

Human rights and *Prisoners*



Australian
Human Rights
Commission

everyone, everywhere, everyday

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This information sheet talks about some of the human rights issues faced by prisoners in Australia. It also highlights how a federal Human Rights Act could help deal with these issues.

Which human rights are we talking about?

Human rights are about everyone, including people who are in prison. Some of the human rights and freedoms particularly relevant to prisoners include the right:

- to be treated with humanity and respect for their dignity
- not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment
- not to be subjected to arbitrary arrest or detention
- for accused persons to be separated from convicted persons
- freedom of association
- to the enjoyment of culture
- to the highest attainable standard of physical and mental health
- to education
- to vote
- to be free from discrimination.

Prisoners should be able to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Juvenile prisoners are entitled to special protection. For example:

- arrest, detention and imprisonment of children should only be used as a last resort and for the shortest appropriate length of time
- juvenile prisoners should be treated in a manner that takes into account their age
- juvenile prisoners should be separated from adults unless it is in the best interests of the child not to do so
- juvenile prisoners have the right to maintain contact with their family through correspondence and visits.

Former prisoners who have served their sentence and are released into the community have the right not to be discriminated against in employment on the basis of their criminal record.

Indigenous prisoners are entitled to be treated in a manner that respects and promotes their cultural identity.

What are some of the human rights problems faced by prisoners in Australia?

Because prisoners have been deprived of their liberty, they are particularly vulnerable to human rights violations.

The conditions within prisons in Australia have at times raised significant human rights concerns. For example:

- Overcrowded and inhuman conditions in some prisons. In 2006, the United Nations Human Rights Committee found that the treatment of an Aboriginal juvenile in a NSW prison amounted to inhuman treatment. The juvenile, Mr Brough, was placed in isolation in an *adult* prison, exposed to artificial light for long periods and had his blanket and some of his clothes removed.
 - Inadequate physical and mental health services. Solitary confinement has exacerbated the symptoms of some prisoners with mental illness.
 - In some cases prisoners have been placed in cells with people they do not feel safe with.
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- Inadequate access to drug and alcohol rehabilitation and harm minimisation programs, leading to a high rate of blood-borne virus transmission.
- Lack of access to educational and rehabilitative services.
- Women in prison face considerable human rights problems. Strip searches can be degrading, humiliating and traumatic, especially for women who have suffered from sexual abuse. Mothers that are prisoners experience difficulties in maintaining their relationship with their children and suffer disruptions to family life, which can lead to their children suffering from emotional and behavioural problems. Indigenous women prisoners, in particular, can suffer from disruptions to their cultural responsibilities and dislocation from their communities.
- Indigenous people continue to be overrepresented in the prisoner population. Although Indigenous Australians make up approximately 3% of the entire Australian population, as at June 2006, Indigenous prisoners represented 24% of the total prisoner population. Indigenous people represented 40% of those aged 10–17 years under juvenile justice supervision. A disproportionate number of Indigenous prisoners have died in custody.
- Indigenous prisoners can face difficulties in accessing prison rules when these rules are not printed in their languages.

Further human rights problems faced by prisoners include:

- Under Australian law, persons serving sentences of imprisonment of three years or more are not eligible to vote in federal elections. This restriction on the right to vote may have a disproportionate impact on groups who are overrepresented in the prison population, such as Indigenous peoples, people with a mental illness and people with an intellectual disability

Prisoners serving sentences of three years or more disqualified from voting

In 2006, the Howard Government changed the law so that anybody serving a custodial sentence of any length was prevented from voting in federal elections if they were in custody during the election. The law had previously been that only inmates serving a sentence of three years or more were disqualified from voting for the time they were in prison.

In 2004, a prisoner serving a six-year custodial sentence challenged the law.

The Court found that the 2006 amendments, disqualifying *all* prisoners, regardless of the length of their sentence, were invalid. It was held that a substantial reason is required to disqualify an otherwise eligible person from voting. Any restriction on a person's right to vote must be proportionate and not arbitrary. The law previously in force, only disqualifying those prisoners serving custodial sentences of three years or more, was upheld.

Former prisoners who have served their sentence and are released into the community **have the right not to be discriminated against in employment on the basis of their criminal record.**

- Difficulties in maintaining contact with their families and communities, including through visits and correspondence
- Disproportionate limitations on the right to privacy, including the interception and censorship of correspondence sent to prisoners
- Restrictions on the freedom of expression, such as the banning of prisoner publications.

Prisoner magazine banned

The NSW Corrective Services Commissioner banned the prisoners' magazine *Framed* from distribution in NSW prisons. Justice Action made a complaint to the Australian Human Rights Commission on behalf of federal prisoners in NSW correctional centres. Justice Action stated that the magazine was 'the only independent publication distributed in prisons' which dealt with 'political and legal information from the point of view of prisoners'. The Commission found that the ban breached the right to freedom of expression of federal prisoners, and that this restriction was not necessary to protect public order or the rights or reputations of others. The Commission made recommendations in a report to federal Parliament, but these recommendations were not enforceable. The NSW Department of Corrective Services stated that it had no intention of taking any action to effect the recommendations.

HREOC Report No. 32, "Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine 'Framed'" (2006)

Prisoners can also face human rights difficulties once they are released from prison, despite the fact that they have served their time. For example, a former prisoner who is attempting to rebuild their life can face discrimination in employment on the basis of an irrelevant criminal record.

Discrimination on the ground of criminal record

Ms Christensen applied for a job as a bartender in the Adelaide Casino. She declared her prior conviction for stealing two bottles of alcohol when she was 15 years old. She was refused employment on the basis that the inherent requirements of the job required her to be trustworthy and of good character. She made a complaint to the Australian Human Rights Commission. While the Commission agreed that these were inherent requirements of the job, it disagreed that there was a sufficiently close connection between Ms Christensen's conviction and the inherent requirements of the position. The Commission found that Ms Christensen had been discriminated against on the basis of her criminal record. The Commission made recommendations for remedies, including an apology from the Adelaide Casino, but these recommendations were not enforceable.

HREOC, *Ms Renai Christensen v Adelaide Casino Pty Ltd*, Report No. 20 (2002)

What are the limitations of existing human rights protections for prisoners?

There are limited human rights protections for prisoners and former prisoners at the moment.

While there are some prison monitoring systems in states and territories, there are currently no national standards for monitoring conditions in prisons and juvenile detention centres. The Australian government has announced its intention to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment* (OPCAT). By ratifying OPCAT, Australia would commit itself to establishing a National Preventative Mechanism (a national system to monitor conditions in all places of detention in Australia) to prevent torture or other cruel, inhuman or degrading treatment in all places of detention.

If you are a prisoner, you have some options if you think your human rights have been breached. For example, you could

- complain about discrimination to state and territory anti-discrimination bodies
- complain about inhuman treatment to state and territory ombudsmen
- if you are federal prisoner, complain to the Australian Human Rights Commission about human rights breaches.

However, if the Commission finds that a federal prisoner has suffered a human rights violation – for example, cruel, inhuman or degrading treatment or punishment – the Commission's recommendations are not enforceable.

For former prisoners, there is only limited protection against discrimination in employment on the basis of criminal record. In the Northern Territory and Tasmania, discrimination on the basis of irrelevant criminal record is unlawful, but not in other states or territories. If you feel like you have been discriminated against in employment because of your criminal record, you can make a complaint to the Australian Human Rights Commission. Even if the Commission finds that you have been discriminated against on the basis of criminal record, there are limited options to resolve the situation. The Commission can only *recommend* a remedy. These recommendations are not enforceable, and you cannot apply to have your complaint heard in court.

How could we improve human rights protections for prisoners?

The Australian Human Rights Commission supports a Human Rights Act for Australia.

A Human Rights Act could make a difference in protecting and promoting the rights of prisoners.

However, it is important to recognise that most prisons are state or territory responsibilities. Depending on the final model adopted by the Australian Government, a federal Human Rights Act may have limited impact upon the states. To make a difference to human rights protection for all prisoners, Australia will need complementary state and territory human rights legislation.

If Australia had a Human Rights Act, it could:

- make the **federal Parliament consider how laws impact on human rights** – for example, Parliament would have to publicly justify any further restrictions on the rights of prisoners to vote in federal elections when it proposes new laws
- make the **federal government respect human rights when developing policy** – for example, the federal government would have to respect the human rights of Indigenous women exiting prison when developing housing policy
- provide **enforceable remedies** for persons discriminated against by a public authority on the basis of criminal record

Over the longer term, a Human Rights Act would also be a powerful tool for fostering a stronger human rights culture in Australia by promoting greater understanding and respect among all people in Australia.

There is a range of other ways in which the human rights of prisoners could be better promoted and protected in Australia. For example:

- enhanced protection of human rights in the Australian Constitution
- establishing a comprehensive, national monitoring mechanism for conditions in prisons
- increased availability of post-release programs for former prisoners
- only suspending the right to vote for prisoners convicted of the most serious crimes or convicted of crimes which are inherently connected with participation in our democracy, for example, treason.

These and other measures could make a positive difference to human rights protection.

Where can I find more information about the human rights of prisoners?

Australian Human Rights Commission
www.humanrights.gov.au/human_rights/prisoners/index.html
GPO Box 5218, Sydney NSW 2001

Justice Action
www.justiceaction.org.au
PO Box 386, Broadway NSW 2007

Sisters Inside
www.sistersinside.com.au
PO Box 3407, South Brisbane QLD 4101

Human Rights Law Resource Centre
www.hrlrc.org.au
Level 17, 461 Bourke Street, Melbourne VIC 3000