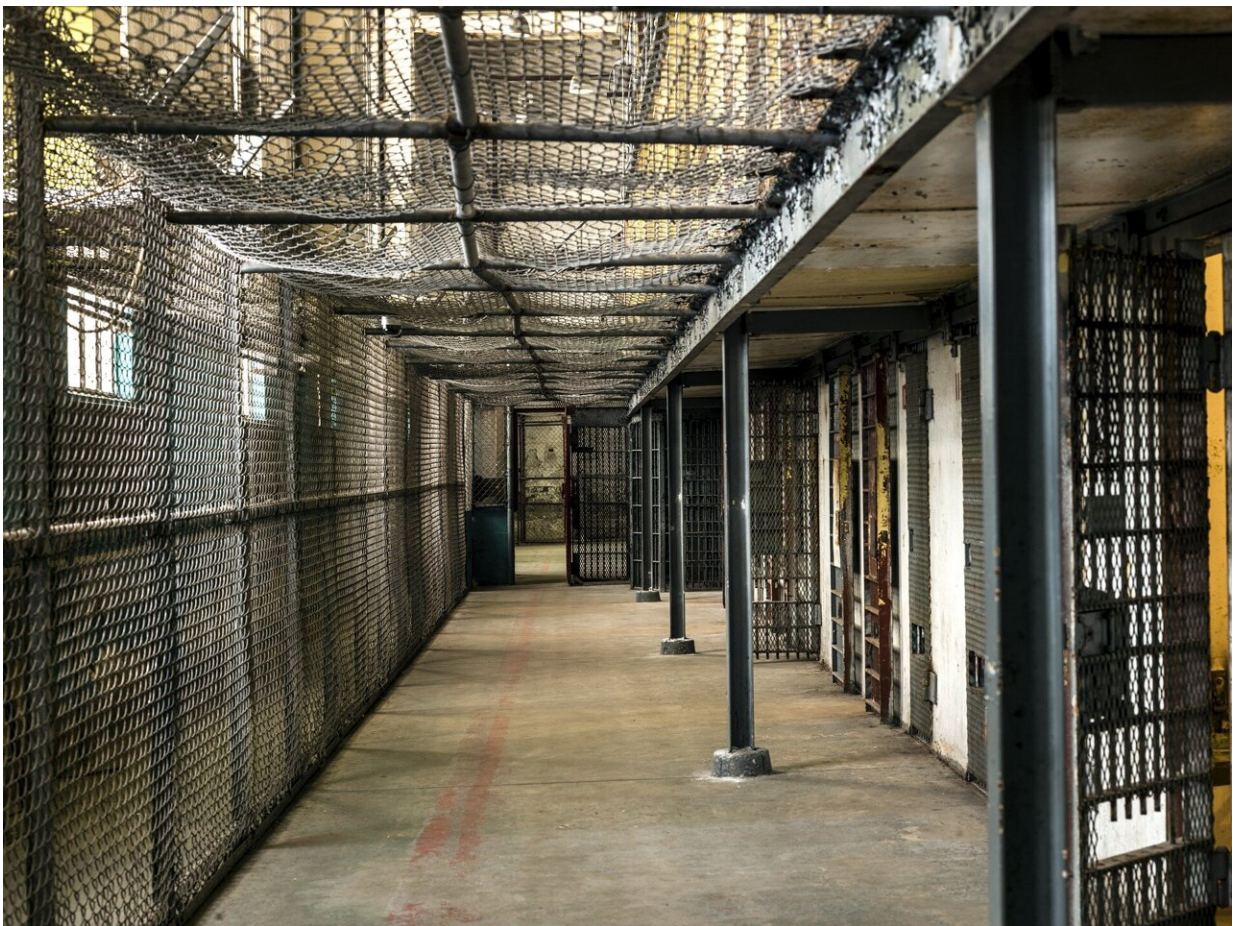


Criminalizing and prosecuting torture could deter practices such as solitary confinement in detention

August 1 2023, by Andreea Lachs



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(Aboriginal and Torres Strait Islander people are warned this article mentions violence towards and death of First Nations people.)

According to the most recent statistics from 2020–21, [640 children](#) and [42,090 adults](#) were detained each day across Australia. Of those, 337 children and 12,599 adults were Aboriginal and/or Torres Strait Islander people.

Some people in Australian prisons and police stations are being subjected to treatment that could amount to torture. This includes prolonged solitary confinement and the [use of spit hoods](#). Last year, the [UN Committee Against Torture](#) recommended Australia end the use of spit hoods and prohibit solitary confinement of children.

Torture has been criminalized in [Commonwealth legislation](#), but not at the state and territory level ([with some exceptions](#)). This is despite a [recommendation](#) from the UN Committee Against Torture.

While progress on criminalizing torture across states and territories has stagnated, [attorneys-general](#) around the country have so far only agreed to look into the "feasability" of a national ban on spit hoods.

[Prohibiting](#) the solitary confinement of children in detention centers is proving to be an even slower process.

The harms of solitary confinement

Torture has a very specific legal meaning [under international law](#). It is defined as "any act by which [severe pain](#) or suffering, whether physical or mental, is intentionally inflicted" for the purposes of obtaining information or a confession, punishment, intimidation or coercion, or based on discrimination. This act is done by someone acting in an official capacity, or with their consent.

Prolonged solitary confinement can fall under this definition. It is specifically defined under the [UN Mandela Rules](#) on the treatment of people in prison as "confinement [...] for 22 hours or more a day without meaningful human contact" for more than 15 consecutive days.

[Solitary confinement](#) of detained children and adults with "mental or [physical disabilities](#) when their conditions would be exacerbated by such measures" is also prohibited under the rules. Solitary confinement has been [proven](#) to cause long-term harm such as anxiety, depression, cognitive disturbances, paranoia and psychosis.

In 2018, Human Rights Watch reported on the use of [prolonged solitary confinement](#) in [Western Australia](#), where a woman with a disability was held in solitary confinement for 28 days. Solitary confinement was also used in Australian prisons and youth detention [during the pandemic](#), ostensibly to prevent the spread of COVID.

Solitary [confinement](#) in detention centers continues to be used across Australia. It has been used on children in Western Australia despite a court [finding the use of lockdowns unlawful](#). It has also been used on [children with disabilities](#) in the Northern Territory.

There have also been reports of an Aboriginal boy with a disability being kept in extended isolation in Queensland's [Cleveland Youth Detention Center](#), likely spending 500 days confined to his room for more than 20 hours a day.

He has reportedly received [no treatment](#) because the detention service lacks the capacity to treat people with trauma-related mental health issues.

Torture is a crime and needs to be properly

investigated and punished

[Criminalizing](#) torture at the state and territory level can increase understanding of what actually constitutes torture among prosecutors, prison authorities and police. This can help [deter torture](#) and other unlawful practices against people in custody.

But as the [UN Special Rapporteur on Torture](#) explains in her [recent report](#), there are challenges in prosecuting, and even reporting torture: "Victims may still be in the custody or under the control of the very authorities against whom they are making allegations. Authorities [...] may lack impartiality or be under pressure to cover up allegations or to destroy evidence. The risk of retaliatory violence [is] real in many contexts. "

[An international study](#) on torture prevention found that, even in countries where torture is criminalized, prosecutions are rare.

The [UN Committee Against Torture](#) has recommended Australia implement protections against retaliation for reporting torture. It recommends people have "access to effective, independent, confidential and accessible complaint mechanisms."

The recently updated [Istanbul Protocol](#) also provides guidance on documenting and investigating torture, which the UN Committee Against Torture recommends Australia follow.

Concrete outcomes for victim-survivors

Crucially, [victim-survivors must be provided redress](#) for wrong-doing against them.

Under the [UN Convention Against Torture](#), the obligation to provide redress should include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

If someone dies as a result of being tortured, [the obligation to provide redress should then be extended](#) to their families or dependents.

While coronial inquests into deaths in custody can identify ill-treatment, they can not order compensation for victims' surviving families. One example is the [inquest](#) into the death of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Nelson.

[The coroner found](#) Veronica's treatment "constituted cruel and inhumane treatment." Compensation in cases like this often need to be pursued in [civil court](#), as Veronica's partner, Percy Lovett, is currently doing.

There are opportunities to pursue allegations of torture and cruel, inhuman or degrading treatment or punishment in other courts under Australia's federal criminal law, or [state and territory human rights acts](#). But whether there will be a prosecution under federal law is at the discretion of the Commonwealth prosecutor. When [the federal law was amended in 2018](#), it was inferred that pre-existing state and territory non-torture criminal laws suffice. So allegations of torture could be prosecuted as other offenses by state and territory prosecutors. This would not be compliant with Australia's international obligations.

A prohibition on torture is not enough

Currently the [federal government](#) is considering whether Australia will take the step of finally having a [national human rights act](#). But this will not guarantee Australia will honor international obligations to criminalize torture, [prosecute torture](#) and provide redress for victim-survivors.

The [Istanbul Protocol](#) describes torture as "one of the most heinous crimes known to humanity."

Prosecuting [torture](#) and providing redress to victim-survivors should be a priority in Australia, especially given the immense power imbalance between governments and incarcerated people.

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