

# Strip-Searching of Women in Prison

## What is the issue?

In October 2020, the NSW Inspector of Custodial Services, Fiona Rafter, undertook an inspection of the Mary Wade Correctional Centre. The results of this inspection exposed a regime of routine execution of strip-searches without central recording. Crucially, these practices pose significant threats to the rights of female prisoners.

These findings consequently called into question the efficacy of routine strip-searches as a measure for deterrence and the identification of contraband.<sup>1</sup> The inspection carried out at the Mary Wade Correctional Centre found that such routine strip-searches were performed after non-contact visits.<sup>2</sup> It is therefore evident that strip-searches are undertaken for the purposes of routine as opposed to a response based procedure to a risk assessment or intelligence information that suggests an inmate may have contraband.

The NSW Inspector of Custodial Services determined from data obtained from Corrective Services NSW that no contraband was identified by way of strip-searching after a visit (contact or non-contact) between 22 October 2018 and 22 October 2019.<sup>3</sup>

On a broader scale, recent controversy on the use of strip-searches at music festivals has also raised concerns about the use of strip-searching by police more generally. This concern is particularly important in light of significant reports of unlawful exercise of search powers by police. Incidents of concern included a lack of privacy provided, degrading and inappropriate comments made by officers, the search of minors without a guardian present and asking a young woman to remove sanitary products.<sup>4</sup>

Justification for strip searches:<sup>5</sup>

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<sup>1</sup> Inspector of Custodial Services NSW Government, *Inspection of Mary Wade Correctional Centre* (Report, October 2020) 20.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Maddy King, 'NSW Police who strip searched teens did not understand the law, inquiry finds' *ABC Triple J Hack* (online, 8 May 2020) <<https://www.abc.net.au/triplej/programs/hack/nsw-strip-search-inquiry-teens-unlawful/12229826>> ; Maddy King, 'NSW Police watchdog uncovers further unlawful strip searches at music festivals' *ABC Triple J Hack* (online 22 July 2020) <<https://www.abc.net.au/triplej/programs/hack/nsw-police-watchdog-uncovers-further-unlawful-strip-searches-at/12482546>> .

<sup>5</sup> Steven Caruana in Gregoire, P 2020, 'Strip Searching Women is Routine in Australia', *Sydney Criminal Lawyers*, 4 November, viewed 9 November 2020, <https://www.sydneycriminallawyers.com.au/blog/strip-searching-women-is-routine-in-australia/>.

- Contraband
  - “Routine strip searching is a practice premised on the idea that contraband is easily concealable within the body and therefore searches are necessary in order to ‘maintain security, good order and discipline.’” (Steven Caruana (OPCAT Network Coordinator))
  - An examination of 6 months of strip searches in Victorian women’s prisons found seven items of contraband out of 6,200 searches. Four were tobacco related products, one was chewing gum, one was an unidentified object, and one was inconclusive.<sup>6</sup>
- Belief that strip searches increase security
  - ‘Contrary to this perception, routine strip searching provides corrections staff with at best a false sense of security and often endangers them.’<sup>7</sup>
  - ‘10 correctional officers surveyed in the WA investigation reported that they’d been assaulted while conducting.’<sup>8</sup>

## Why is it detrimental?

For female prisoners, the effects of strip-searching are significant and varied. The degrading and invasive nature, combined with the harmful psychological effects of the practice, makes it an inappropriate and outdated method of assuring prison safety.

The Women in Prison Advocacy Network contends that strip-searches have the capacity to trigger traumatic memories for prisoners, which is particularly concerning given that many women in prison have been victims of physical and sexual abuse prior to their incarceration. 45% of women in prison have reported that in the year prior to incarceration they experienced abuse by a partner, and 49% of all female prisoners were victims of some form of child abuse.<sup>9</sup>

Strip-searches also exacerbate the disproportionate power of the state over prisoners, which leads to feelings of helplessness and shame for prisoners, in addition to the trauma often involved.<sup>10</sup> Public nakedness is far removed from the accepted norm, thus immediately reducing the dignity of any relationship between prison guard and prisoner.<sup>11</sup> One example of this is the practice of women being asked to remove their sanitary products.<sup>12</sup>

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<sup>6</sup> Human Rights Law Centre, *Total Control: Ending The Routine Strip Searching Of Women In Victoria’s Prisons* (Report, 2017) 20.

<sup>7</sup> Gregoire (n 5).

<sup>8</sup> Ibid.

<sup>9</sup> Women in Prison Advocacy Network (2015), “Ceremonies of Degradation: Strip-Searching in Women’s Prisons”, Issue 9, *Court of Conscience* 8, 9.

<sup>10</sup> Ibid 10.

<sup>11</sup> *Women In Prison* (Anti-Discrimination Commission Queensland) 2006.

<sup>12</sup> Ibid 14.

Further, for women who have been victims of abuse, their involuntary response can be to shut down, become immobile during strip-searches, or refuse to be searched at all. Such behaviour runs the risk of being construed or interpreted as a form of retaliation, consequently resulting in a prison offence. The victim may then be penalized, such as taking away their visiting privileges or being subject to the use of force by correctional officers.<sup>13</sup> In its more drastic consequences, such record of prison disobedience could hinder the prisoner's chances for parole, as to be eligible for early release, they must not commit any prison discipline offences.

Ultimately, the purpose of incarceration is rehabilitation. For routine searches to be enforced is to continue to impose a negative and dangerous perception onto them, hindering the effectiveness of rehabilitation.

## The Current Law and its Limitations

Pursuant to The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police are entitled with the power to strip-search a person. The Act gives officers authority to order a person to completely strip in order to allow for a thorough examination of their body.<sup>14</sup> A police officer is authorised to strip-search upon suspecting on 'reasonable grounds' of its necessity, urgent and circumstances.<sup>15</sup>

However, this section is relatively ambiguous. It relies on the terms 'reasonableness,' 'seriousness' and 'urgency' without further explanation. There are not specific criteria or conditions ascertaining what amounts to 'a reasonable suspicion.' This vague nature inevitably leads to various interpretations that may suppress individual rights.<sup>16</sup>

Police are also permitted to use 'reasonable force' in conducting the actual strip searches. Strip-searches are already deemed to be a relatively degrading and humiliating violation to the right of bodily integrity. When this is coupled with 'reasonable force,' the process becomes subject to further vulnerability.<sup>17</sup> Furthermore, LEPR is notably silent on common practices that require individuals to partake in demeaning conduct during strip-searches, such as 'squat and cough' or bending over.

### Call For Systemic Change.

Numerous proposals have been made in regards to **increasing the threshold** for strip searches. For Instance:

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<sup>13</sup> Simmering and Diamond in Patricia Easteal, "Women In Australian Prisons: The Cycle Of Abuse And Dysfunctional Environments" (2001) 81(1) *The Prison Journal* 87, 106.

<sup>14</sup> *Law Enforcement (Powers and Regulations) Act 2002* (NSW) s 3.

<sup>15</sup> *Ibid* s 31.

<sup>16</sup> Angus Thompson, "Police Had 'No Idea' About Strip Search Laws, Watchdog Finds", *The Sydney Morning Herald* (Webpage, 2020) <<https://www.smh.com.au/national/nsw/police-had-no-idea-about-strip-search-laws-watchdog-finds-20200508-p54r5y.html>>.

<sup>17</sup> Grewcock, M and Sentas, V, *Re Thinking Strip Searches by NSW Police* (Report, August 2019), 16.

- A rule that police cannot search a person's genitals or breasts during search unless the police considers on reasonable grounds that it is necessary.<sup>18</sup>
- Police need to consider whether there are less invasive methods before opting to strip searches<sup>19</sup> - strip searches should be used as an absolute last resort.
- Police should ask all people their preferences regarding the gender of the officer when conducting strip searches on transgender, intersex and gender diverse people.<sup>20</sup>
- Must only be carried out when it is absolutely necessary.

#### Solutions:

- 1. Define 'seriousness and urgency' in police policy.<sup>21</sup>
  - Follow the ACT *Corrections Management (Searching) Policy 2010* because ACT's strip search policy and practice is considered the best in Australia.<sup>22</sup>
- 2. Define when an officer may conduct a strip search in prisons:
  - 'A corrections officer may conduct a strip search:
    - 1. when admitting a prisoner to a correctional centre as part of their initial assessment;
    - 2. when a corrections officer has a reasonable suspicion that the prisoner is concealing a seizeable item;
    - 3. when the following conditions are all satisfied:
      - a) the prisoner has recently not been under the control or immediate supervision of a corrections officer;
      - b) during that period, the prisoner may have had an opportunity to obtain a seizeable item;
      - c) a scanning, frisk, or ordinary search is only likely to detect a limited number of seizeable items; and
      - d) a scanning search is not available or could only be carried out using such force that would make it ineffectual.<sup>23</sup>
- 3. Define reasonableness
  - 'A reasonable suspicion arises where a corrections officer has grounds to believe that a prisoner is concealing a seizeable item. The grounds for this belief must be sufficient to satisfy another corrections officer that the prisoner may be concealing a seizeable item.
  - The circumstance in which reasonable suspicion applies includes, but is not limited to:

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<sup>18</sup> Grewcock (n 7) 45.

<sup>19</sup> See *ibid*

<sup>20</sup> *Ibid* 46.

<sup>21</sup> Angus Thompson, "Police Had 'No Idea' About Strip Search Laws, Watchdog Finds", *The Sydney Morning Herald* (Webpage, 2020) <<https://www.smh.com.au/national/nsw/police-had-no-idea-about-strip-search-laws-watchdog-finds-20200508-p54r5y.html>>.

<sup>22</sup> Human Rights Law Centre, *Total Control: Ending The Routine Strip Searching Of Women In Victoria's Prisons* (Report, 2017) 24.

<sup>23</sup> *Corrections Management (Searching) Policy 2010* (ACT) 4.

- where a corrections officer is informed that a prisoner is in possession of a seizeable item;
  - where a corrections officer is informed that contraband is located in a particular accommodation area (all prisoners in that area may be strip searched if further investigation does not identify a particular individual); and
  - where a prisoner is behaving in a way which is consistent with being under the influence of a drug.
- Note: the fact that a prisoner has previously been found to be in possession of contraband is not, in itself, sufficient.<sup>24</sup>

Policy reforms have been proven to drastically lessen the use of strip searches in Victorian prisons<sup>25</sup>. WA had conducted nearly a million strip searches between 2014-19, and has eliminated or limited strip searches at 3 facilities. There has been no resulting increase in positive drug tests or detection of contraband (through other search methods). This conveys that reducing or eliminating strip searches does work without impacting the police's objectives. Furthermore, there has been a positive impact on the relationship between the staff and the people in custody. This improves the safety of the facility which is a concern for officers during strip searches.<sup>26</sup>

However, challenges regarding this situation still persist. Firstly, policies would be implemented using police discretion, leaving room for police brutality/misconduct. Policies are also not enforceable legislation and therefore cannot be enforced through the common law.

## Strip Searching and Human Rights

- 'Dignity' is enshrined in Article 10 of the International Covenant on Civil and Political Rights (ICCPR) that: 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

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<sup>24</sup> *Corrections Management (Searching) Policy 2010 (ACT) 4.*

<sup>25</sup> Human Rights Law Centre, "Dignity For People In Prison | Human Rights Law Centre", *Human Rights Law Centre* <<https://www.hrlc.org.au/prisoner-rights>>.

<sup>26</sup> Office of the Inspector of Custodial Services, Strip searching practices in Western Australian prisons (March 2019) 9.

- The Inter-American Commission on Human Rights (IACHR) concludes that as a consequence, the act of imprisonment ‘carries a specific and material commitment to protect the prisoner’s human dignity’.<sup>27</sup>
- The Standard Minimum Rules for the Treatment of Prisoners, revised in 2015, maintains that all prisoners should be treated with respect for their inherent dignity and value as human beings.<sup>28</sup>

Encroachments of human rights may be legitimate; however, they must fulfil all three of the following criteria established under international law.

- Legality – the measure must be provided for by laws that are in conformity with international human rights standards.
  - Strip searching is degrading and infringes upon dignity, therefore violating article 10 of the ICCPR
- Necessity – other means must have been proven incapable of maintaining order or security.
  - Body scanners are an alternate method that have been proven capable of detecting contraband.
  - Strip searching itself has been proven incapable of achieving its intended purpose - contraband found only 0.06% of the time.
- Proportionality – the measure taken must be the least intrusive to achieve the objective of maintaining order and security and be imposed for the shortest duration.
  - Strip searching is the most intrusive measure to achieve the objective of finding concealed contraband.

It is clear that strip searching does not fulfil any of the criteria, and is therefore an illegitimate encroachment of human rights.

## Alternative Methods to Strip Searches

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) recommend intrusive searches, such as strip searches are only undertaken when absolutely necessary. The Bangkok Rules also recommend alternative screening methods replace strip searches and invasive body searches.<sup>29</sup>

## Body Scanners

One of the mainstream alternatives to strip searches is the use of portable and full body x-ray scanners. Body scanners and x-ray devices have been implemented in the John Morony

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<sup>27</sup> Inter-American Commission on Human Rights (IACHR), Special report on the human rights situation at the Challapalca prison in Peru, para 113; IACHR, Report No.41/99: Minors in Detention, Honduras, March 10 1999, para.135.

<sup>28</sup> The revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the UN Commission on Crime Prevention and Criminal Justice on 22 May 2015, endorsed by the Economic and Social Council on 9 September 2015, UN-Doc. E/ RES/2015/20 and adopted by UN General Assembly Third Committee on 5 November 2015, UN-Doc. A/C.3/70/L.3 (at the time of printing this Resolution was pending adoption by the plenary of the UN General Assembly.)

<sup>29</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), GA Res 65/229, UN GAOR, 3rd Comm, 65th sess, 71st plen mtg, Agenda Item 105, UN Doc A/RES/65/229 (21 December 2010).

Correctional Centre in NSW as well as the Dame Phyllis Frost Centre in Victoria. Since 2016 there has been support for the use of these scanners, with Corrective Services NSW Commissioner, Peter Severin, stating that he “would not hesitate” to introduce body scanners into all NSW maximum and medium security prisons.<sup>30</sup> However, there is yet to be actualisation of this support.

#### The technology - Transmission X-ray

- Deploys the same X-ray technology used in the medical and dental fields. Transmission X-rays do not produce an image with anatomical features, thus ensuring privacy for the detainees. Transmission X-ray technology is best suited for correctional environments as it detects all forms of contraband that may be concealed under an individual’s clothing (to include shoes) as well as items that may be hidden in body cavities.
- There are multiple companies that market this technology - two of which are Adani, maker of the Compass Body Scanner, and Canon’s RadPro, maker of the SecurePASS Body Scanner. Both of these products are designed to perform quick full body scans of individuals in security settings using low dose radiation (within the federal exposure guidelines). Both products offer additional upgrades, such as software specifically designed to detect the presence of narcotics contained within body cavities.

#### Advantages

- Body Scanners are able to discover contraband hidden under an individual’s clothes and/or concealed in their body cavities without the need for them to undress, thus avoiding humiliation and degradation while preserving an individuals’ dignity.
- Body scanners are a more effective method than strip searching because strip searches generally do not detect contrabands concealed in body cavities.
- Body scanners increase the efficiency of testing by providing the capacity to detect contraband without direct contact by correctional officers performing the strip searches.
  - Body scans are completed in under 8 seconds versus the 5-10 minutes it takes to perform a strip search.
- Body scanners require only one employee to be present in the process versus the two required to conduct strip searches.
- Body scanners would mean employees would not have to view naked individuals on a daily basis.

#### Disadvantages

- Cost issue: total estimated one-time costs to install full body scanners at the women’s correctional facilities is approximately \$1,000,000.

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<sup>30</sup> Body Orifice Security Scanner: The new way Goulburn jail stops inmates smuggle in mobile phones’, Sydney Morning Herald (online, 8 January 2016)<<https://www.smh.com.au/national/nsw/body-orifice-security-scanner-the-new-way-goulburn-jail-stops-inmates-smuggle-in-mobile-phones-20160108-gm1ps9.html>>.

## Victorian Experience

### Victorian Ombudsman's recommendations - second report (4 July 2018)

- This report examines the response from the State and its departments, statutory authorities and local councils to recent recommendations the Ombudsman has made to address issues arising from her investigations.<sup>31</sup>
- With respect to strip-searching in detention, the report looks at recommendations made in *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (2017). In that report, she recommends that the General Manager at DPFC immediately cease the practice of strip searching all women before and after contact visits and following external appointments, as well as replace it with a Charter-compliant practice of strip searching based on intelligence and risk assessment.
- It reports that these recommendations were not accepted. The Ombudsman notes that this was the only recommendation not accepted, out of the 125 public recommendations she made between 1 April 2016 and 31 March 2018.<sup>32</sup>

### Victorian Ombudsman's recommendations - third report (30 June 2020)

- This report details the progress the State Government has made in implementing recent recommendations made by the Ombudsman.
- With respect to strip searching, the relevant recommendations come from the *Investigation into the imprisonment of a woman found unfit to stand trial* (2018). It recommended that VEOHRC review the application of policies and processes of strip-searching at the Phyllis Frost Centre. Further they recommend that the department should develop a plan to apply the review's findings and recommendations to other prisons.<sup>33</sup>
- This report states that these recommendations have been accepted, and that DJCS has commenced discussions with VEOHRC about a review in relation to the Dame Phyllis Frost Centre.
- Further, it reports that DJCS has installed a scanner in the visits centre to remove routine strip searching of women after contact visits and discontinued the practice of routine strip searching of women being transferred from DPFC to the minimum security Tarrengower Prison. Also it adds that a saliva drug testing trial has commenced at DPFC, which they believe will further reduce the number of strip searches required.
- Note however, that it does not clarify if the State government and relevant agencies have developed a plan to apply the review's findings and recommendations to other prisons.

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<sup>31</sup> Victorian Ombudsman, *Implementing OPCAT in Victoria - report and inspection of Dame Phyllis Frost Centre* (2017).

<sup>32</sup> Victorian Ombudsman, *Ombudsman's recommendations - second report* (2018).

<sup>33</sup> Victorian Ombudsman, *Ombudsman's recommendations - third report* (2020).



## Our recommendations

The ultimate goal is to achieve the abolition of strip searches for women in prisons. As the Women In Prison Advocacy network suggests, “requiring correctional officers to protect the dignity of these women when conducting what is an inherently degrading exercise is not only paradoxical but also impossible”. Though, while this is a generally idealistic view, there are steps to which can be taken to reduce its degrading consequences. The primary goal would therefore be the reduction of strip-searches.

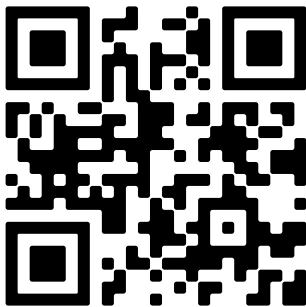
Law reform must be enacted to enforce a clearer definition of what constitutes as ‘reasonable suspicion’. It may be difficult to enforce guidelines on the subjective value that ‘reasonableness’ carries, however, this carries high chances of reducing the frequency of unjustified strip-searches.

The threshold to conduct a legal strip search must be raised. Strip searches should be used as an absolute last resort, aligning with the Mandela Rules that state strip searches should only be conducted only when absolutely necessary.<sup>34</sup>

A sincere focus on implementing alternative methods must be enacted, with the use of non-invasive technology such as body scanners. This significantly reduces the risk of harm to vulnerable women being searched, whilst maintaining the efficacy for protecting the broader community.

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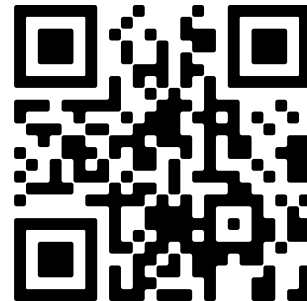
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<sup>34</sup> United Nations General, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)*, GA Res 70/175, UN GAOR, 70th sess, Agenda item 106, UN Doc A/Res/70/174 (17 December 2015) rule 52 (‘The Mandela Rules’).