



Mr Neil McAllister
Inspector
ACT Office of Inspector of Correctional Services
Via ics@act.gov.au

22 March 2022

Dear Inspector

ACT Human Rights Commission submission to Healthy Prison Review of the Alexander Maconochie Centre 2022

Thank you for inviting the ACT Human Rights Commission to provide input to inform your second Healthy Prison Review of the Alexander Maconochie Centre (AMC). We welcome the opportunity to contribute by outlining some of the salient issues and systemic concerns we have observed through our respective oversight functions relating to the AMC. In doing so, we have sought to structure our submission with reference to the four pillars of the Healthy Prison Review framework.

We understand submissions you receive will inform issues of focus for your review and would be pleased to discuss any matters raised in this submission in greater detail should this assist. We are also available to speak with you in respect of any other issues or information that we have not addressed that is of interest in the context of your review.

Please be aware that we intend to make our submission public, whether in full or subject to appropriate redactions, at the time of providing this submission to your office.

Yours sincerely

Dr Helen Watchirs OAM
President and Human
Rights Commissioner

Jodie Griffiths-Cook
Public Advocate and Children
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Karen Toohey
Discrimination, Health Services,
and Disability and Community
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About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. The Commission includes:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services Commissioner (DHSDCSC)
- The Public Advocate and Children and Young People Commissioner (PACYPC); and
- The Victims of Crime Commissioner

Commissioners fulfil various roles in relation to the Alexander Maconochie Centre (AMC) in accordance with their functions under the *Human Rights Commission Act 2005* (HRC Act). The President and Human Rights Commissioner chairs a meeting of oversight agencies every two months, which include representatives from your office, DHSDCSC and PACYPC's teams, Official Visitors and the ACT Ombudsman. This forum provides a useful opportunity for oversight agencies to share information and identify shared concerns and strategic priorities in the oversight of adult correctional facilities. Such meetings also serve to determine how best to apply oversight's limited resources and diverse expertise without unnecessary duplication.

The DHSDCSC receives and handles complaints under the HRC Act, including about alleged unlawful discrimination and provision of health services at the AMC. In accordance with Recommendation 49 of your previous Healthy Prison Review of the AMC, the DHSDCSC has undertaken a review of the experiences of Muslim detainees in accessing their faith in the AMC. In her role as Health Services Commissioner, she has also conducted a review of the dental health services offered at AMC in line with Recommendation 52.

The PACYPC, as Public Advocate, previously attended the AMC on a fortnightly basis (on average), however it has resolved to alter this approach to maximise its limited resources in the context of its oversight role. The PACYPC instead intends to undertake strategic project work with respect to the AMC, with a focus on mental health consumers and detainees with disability (including cognitive disability). In support of this work, the PA will also meet with Forensic Mental Health Services and Programs and Interventions each month by phone, as well as continuing engagement with Official Visitors.

The Human Rights Commissioner also provides human rights education for new correctional officers and is frequently consulted by the ACT Corrective Services (ACTCS) regarding the consistency of proposed corrections policies and procedures with human rights. including conducting human rights audits under the power to review the effect of Territory laws on human rights. Since your previous Healthy Prison Review, the Human Rights Commissioner has also intervened in human rights proceedings in the ACT Supreme Court relating to conditions of detention in the Management Unit of the AMC, for which a judgment is pending. The Commissioner has recently been granted leave to intervene in a human rights matter relating to ACTCS' conduct of a strip search of a female detainee in January 2019.

Along with your office and the ACT Ombudsman, the Commission has also been nominated as part of the ACT's multi-body National Preventive Mechanism for the purposes of implementing the Optional Protocol to the Convention Against Torture (OPCAT) in the ACT. As you know, the implementation of OPCAT will entail regular monitoring of the range of settings across the ACT where people are deprived of liberty with a focus on prevention of torture and cruel, inhuman or degrading treatment or punishment.

Pillar 1: Safety

We note that this pillar measures how detainees, particularly the most vulnerable are held safely and that staff and visitors feel and are safe.

Separation of remanded and sentenced detainees (A.4 Accommodation Assessments, Standard 8)

We note that your 2018 review of the care and management of remandees at the AMC considered at length the requirement, reflected in s 44 of the CMA and s 19(2) of the HR Act, and found that, contrary to ACT Corrections legislation and ACT and international human rights law, remandees are not separated from convicted detainees in the ACT. During your appearance as part of annual and financial report hearings before the Standing Committee on Justice and Community Safety in February 2021, it was acknowledged that the number of remandees accommodated in the AMC does not practically allow for separation of remandees from convicted people and that legislation in other jurisdictions does not require such strict separation. Accordingly, the Standing Committee's report, subsequently published in March 2021, recommends that the ACT Government urgently address the problem of remandees being accommodated with sentenced prisoners at the AMC. Should this not be feasible in the near future, the Committee recommended in the alternative that the ACT Government consider amending the CMA to acknowledge the AMC's inability to comply with s 44 by accommodating convicted detainees separately from non-convicted detainees.¹

As you know, section 19(2) of the HR Act expressly contemplates the segregation (ie in separate quarters) of accused people from those who have been convicted, except in exceptional circumstances. This reflects an essential principle of international human rights law, which ensures the requisite emphasis of an accused's right to be presumed innocent until proven guilty while detained. Given that the ACT Government response has accepted the Standing Committee's recommendation, the Commission maintains significant concerns that any proposed legislative amendment that seeks to acknowledge an enduring state of non-compliance will give rise to a fundamental inconsistency with section 19(2) of the HR Act. Such an approach would also be inconsistent with the findings of the *Independent Inquiry into the Treatment in Custody of Steven Freeman* (henceforth 'the Moss Review'), which concluded that it is inappropriate for the AMC to continue relying on exceptional circumstances to breach a remanded detainee's human right to be segregated from the sentenced population

In practical terms, the mixing of remanded and sentenced detainees, in the Commission's experience, leads to significant disruption in routine for sentenced detainees and unduly exposes remandees to potential criminogenic or traumatic experiences while awaiting trial. Though we appreciate the practical difficulties in separately accommodating remandees and sentenced detainees within the AMC given varied cohorts, overcrowding and now COVID pressures, the Commission is not supportive of any proposed change that purports to qualify the content of established human rights. We consider that doing so would be a seriously retrogressive step to take.

Insofar as the AMC's inability to separately accommodate remanded and sentenced detainees is attributed to its design and allocation of limited resourcing, such considerations cannot provide a legitimate aim or an "exceptional circumstance" for the purpose of limiting rights in accordance with s 28 of the HR Act. Instead, we urge you to examine potential options available to government to achieve compliance in the medium to long-term rather than acknowledging this inability as a practical reality of the AMC to be codified in the CMA.

Consistency of disciplinary process (B.2 Adjudication and consequences for breach of rules, Standard 11)

Your inaugural Healthy Prison Review of the AMC (henceforth 'HPR 2019') observed perceptions of arbitrary and inconsistent application of disciplinary processes at the AMC, including recommendations that ACTCS finalise and implement a revised Disciplinary Policy as a matter of urgency and that ACTCS address significant

¹ ACT Legislative Assembly Standing Committee on Justice and Community Safety, [Annual and Financial Reports 2019-2020; Appropriation Bill 2020-2021 and Appropriation \(Office of the Legislative Assembly\) Bill 2020-2021](#) (Report, March 2021), [3.32].

concerns regarding inconsistency of discipline and limited awareness of a right to review among detainees. These concerns included observations that detainees were often encouraged to plead guilty to a breach in exchange for a negotiated punishment and, consequently, that disciplinary functions were neither robust, transparent nor sufficiently deterrent.

On September 2021, the ACT Supreme Court found that such practices, comprising a series of failures over the course of 2018 to afford a detainee opportunity to address disciplinary charges against him or seek review of sanctions before they were applied reflected a breach of the right to fair trial (HR Act, s 21). In her decision in *Islam v Director-General of the Justice and Community Safety Directorate* [2021] ACTSC 33, McWilliam AJ held that s 159 of the CMA does not enable a CO, presiding officer or the Director-General to proceed to discipline a detainee immediately when a disciplinary breach is charged. Her Honour further found that the then Disciplinary Policy and Procedure as implemented in relation to the detainee had denied him procedural fairness and was inconsistent with the CMA. Relevant to her decision, was a finding that the ACTCS Discipline Form 3, at the time, failed to notify an accused detainee of their right to appeal.

This decision emphasised that, despite contrary arguments, a detainee suffers detriment where they are denied the opportunity to make representations to an independent decision-maker different from the CO involved in issuing a disciplinary charge. Five factors in this decision rose to a standard sufficient to contravene the right to a fair trial under s 21(1) of the HR Act, these being:

- i) *The detainee's vulnerability due to incarceration* (including their inability to readily access legal advice/representation, make an immediate phone call or access a PC to research how the process was applied). His opportunity to receive a procedurally fair hearing very much depended on proper compliance with the statutory scheme.
- ii) *Statutory scheme itself*. The Legislative Assembly had indicated the scheme itself is what affording a right to a fair trial looks like in a custodial setting (per Presentation Speech and CMA objectives). Where the Assembly has held out a process as being the standard for compliance with a human right under the HR Act, the Court should give effect to that standard. This was considered a matter of significant weight.
- iii) *Gravity of the procedural failure*. What was at stake was the potential for further deprivation of liberty by way of separate confinement within the AMC. McWilliam AJ considered that the further deprivation of liberty of a person already lawfully confined is a serious matter and that this was hence not a trivial breach.
- iv) *Stage at which breaches occurred*. The failure to comply with the CMA occurred at an early stage with the consequence that no hearing was afforded, let alone one before an independent external adjudicator or an independent tribunal or court. Accordingly, the entire statutory process miscarried.
- v) *Conduct was not isolated or inadvertent*. It occurred on seven occasions over the course of a year. This repetition was indicative of the conduct being systemic.

The Commission notes that the conduct giving rising to this matter occurred in the period before the HPR 2019 and recall your findings in respect of the disciplinary process at that time. A new Detainee Discipline Policy was recently notified in February 2022 along with several related operating procedures, which substantially address these findings, including by placing emphasis on notifying detainees of opportunities for review and that penalties must not be imposed by a correctional officer before a charge has been admitted by a detainee in accordance with the CMA. We also understand that the relevant forms have been updated to ensure detainees are apprised of their right of review, alongside an obligation on a presiding officer to take reasonable efforts to ensure a detainee understands, among other things, their ability to contest the charge. While the Commission broadly supports these improvements to the disciplinary process, your review may wish to examine the extent to which these changes and important safeguards have been implemented in practice.

Use of chemical agents (B.4 Use of restraints and weapons, Standard 15)

The CMA anticipates the use of chemical agents (such as Oleoresin capsicum spray) in s 140(6)(d) of the CMA, however until December 2021, chemical agents were deployed or approved for deployment in the absence of a specific policy framework. The Commission first raised concerns with ACTCS in June 2021 regarding the approval and deployment of chemical agents against detainees in a correctional setting absent clear instructions about their use and decontamination procedures, as required by international and domestic human rights law. We subsequently raised concerns in December 2021 regarding the policy framework as notified. Despite some improvements prior to notification, the Commission still considers that the policy framework for use of chemical agents in the AMC fails to incorporate sufficient safeguards required to ensure its consistency with human rights recognised in the HR Act.

In our feedback, the Commission has observed ACTCS that human rights law requires that the use of chemical agents is governed by clear directives that contemplate the strictly limited situations in which they may be deployed. In this regard, the use of chemical agents in particular must be distinguished, as exceptional, from other uses of force – which are themselves necessarily a last resort. We are therefore concerned that the policy, as notified, authorises use of chemical agents as one option among an array of potential modes of force that may be deployed at the discretion of the officer-in-charge. Its provisions still afford a relatively open discretion to authorise the use of chemical agents as a means of minimising a risk of injury rather than as a last resort on a spectrum of force. It is also concerning that chemical agents are anticipated for use in cell extractions, contrary to the principle of necessity. As observed by the UN Office of the High Commissioner for Human Rights:

“Chemical irritants should not be used in situations of purely passive resistance. In accordance with the principle of necessity, once a person is already under the control of a law enforcement official, no further use of a chemical irritant will be lawful. Chemical irritants should not be used in closed environments without adequate ventilation or where there is no viable exit, owing to the risk of death or serious injury from asphyxiation.”²

We understand training in the use of chemical agents has been consistently sought by staff representatives as a means to reduce the risk of physical injury associated with, for example, cell extractions and other planned uses of force. Despite these benefits, the rollout of chemical agents carries with it a risk, noted by your counterparts and civil society in several other overseas jurisdictions, of arbitrary or routine over-use.³ In this regard, we are pleased to note that chemical agents have only been deployed to guard posts, rather than to COs as standard equipment, in accordance with international human rights law principles governing their use.

Although anecdotal reports, including from Official Visitors and representatives of your office, have noted a measured approach to use of chemical agents in particular instances, we understand there has been a general increase in their use in recent months. Internal human rights law principles require that there is timely oversight of situations in which chemical agents are deployed. Consistent with our advice to ACTCS, we do not consider that the internal reporting contemplated by the *Corrections Management (Use of Chemical Agents) Policy 2021* provides sufficiently timely and independent assurance against misuse. Accordingly, the Commission would support your office (if amenable), or another statutory office holder, having a role in receiving prompt notification of the deployment of chemical agents as a means of tracking any concerning trends or patterns.

Detainee classification tool and risk of cultural bias (C.1 Safe and Proportionate, Standard 18)

Recommendation 37 of the HPR 2019 proposed that ACTCS engage an independent Indigenous expert to review whether the detainee classifications system is free of any cultural bias that could result in Aboriginal and Torres Strait Islander detainees being over-classified. It is not clear to the Commission whether this

² Office of the United Nations High Commissioner for Human Rights, *Guidance on less-lethal weapons in law enforcement* (2020, United Nations, Geneva), [7.2.7].

³ See, for example, as noted in Office of the Correctional Investigator (Canada), *Annual Report 2015-16* (30 June 2016, Ottawa), [3], Dr Sharon Shalev, [‘First, Do No Harm Segregation, restraint, and pepper spray use in women’s prisons in New Zealand’](#) (Independent report commissioned by New Zealand Human Rights Commission, 2020), [5.2].

review has occurred and, if so, the extent to which it has informed proposed improvements to the management of detainee classifications.

The Commission has recently been consulted with respect to a draft Detainee Classifications Policy and related operating procedures, which we acknowledge are still subject to further independent advice and stakeholder consultation. In our feedback, we have emphasised that the Commission is unable to form a view as to the consistency of any proposed changes to the detainee classifications scheme in the absence of reviewing the 'Classification Tool' that underpins detainee classification decisions. Notwithstanding, we understand – anecdotally – that the severity of a detainee's particular offence and penalty is one of the static factors that go to determining a detainee's classification and whether there is scope for them to eventually progress to a lower security classification.

In our feedback, we have observed that the mandatory considerations in s 80 of the CMA, which must be regarded when deciding a detainee's security classification, includes "the reason for the detention, including the nature of any offence for which the detainee is detained." This wording, in our view, allows scope for the circumstances underpinning a detainee's offending to be taken account of in classification decisions. Given the well-documented overrepresentation of Aboriginal and Torres Strait Islander persons within the criminal justice system and detainee population, it is critical that classification decisions involve an individualised assessment of a detainee's risk of escape and harm to members of the community and that assumptions are not relied on which disproportionately limit detainee's access to rehabilitative opportunities (such as through the Transitional Release Program and Transitional Release Centre).

Accordingly, there may be benefit in your review examining, as suitably informed by the experience and expertise of Aboriginal and Torres Strait Islander peoples, the extent to which any proposed changes to detainee classifications tool and process will allow scope to consider the individual circumstances and needs of detainees, including those who identify as Aboriginal and Torres Strait Islander.

Centralised recording of searches (C.3 Searching, Standard 23)

Recommendation 1 of the HPR 2019, which was agreed by government, recommended implementation of a centralised system for recording of data related to strip searching, uses of force, separate confinement and segregation, time out of cells and incidents that oversight bodies would be able to interrogate and access in a timely manner. Although the government response to your review noted this centralised system was due to be implemented by 30 September 2020, a new platform has not, to our knowledge, yet been adopted by ACTCS.

As you know, in October 2019, oversight agencies wrote to the Minister for Corrections, Acting Director-General of the Justice and Community Safety Directorate (JACSD) and then Executive Director of ACTCS to raise serious concerns about a General Manager Instruction, enacted in September 2019, that appeared to contemplate routine strip searches on entry to and exit from the AMC, contrary to s 113C of the CMA. This GMI was subsequently revoked with ACTCS committing to ensuring an individualised assessment of the level of detainee searches for all non-court escort pending a new Searching Policy being notified. At oversight agencies' request, the Executive Director provided strip search data for the period 13 September 2019 to 25 October 2019, which agencies noted as being deficient in many respects (including frequent absence of recorded reasons for undertaking a strip search).

In light of media reporting of disparity in strip searching of female detainees in July 2021,⁴ oversight agencies wrote to the new Minister for Corrections to reiterate our concerns about the routine strip searching of all detainees when attending and returning from court. This letter voiced concern that ACTCS had not sufficiently progressed options to negate the need for strip searching, such as procurement of scanning technology and, relevantly, about the continued absence of a centralised register of strip searching and inadequate recording of reasons for strip searches, contrary to s 110 of the CMA.

On 11 February 2022, a new Searching Policy was notified on the ACT Legislation Register. The Commission provided input to inform the development of this policy, first in November 2020 and later in January 2021

⁴ See for example 'Aboriginal women targeted in prison strip searches' (City News, 2 July 2021) <<https://citynews.com.au/2021/aboriginal-women-targeted-in-prison-strip-searches/>>

including a draft Searching Strategy. On both occasions, the Commission emphasised the need for a central electronic register for all targeted searches as a means to ensure that all searches, including strip searches, are undertaken in a way that is not arbitrary or unlawful and so consistent with rights under the HR Act.

In this context, the Commission has recently been advised by ACTCS that record keeping is being considered in the development of CORIS, which will replace JOIST as the central electronic register employed by ACTCS. We also understand that ACTCS have also sought to incorporate greater information about what staff should capture in the recording of a search as part of staff training and policy updates. Alongside the new notified policy, the relevant operating procedure for strip searching includes prescriptive requirements (with examples) addressing the standard of reporting to which correctional officers must adhere.⁵

As the new searching policy appropriately emphasises the need for suspicion or reasonable belief as grounds for a strip search, the Commission recommends your review examine whether these grounds are being recorded in adequate detail in a form that assures consistency and access by ACTCS and oversight agencies.

Policies (D.4 Policies and Procedures, Standard 41)

The Commission is regularly consulted by ACTCS in respect of draft policies made as notifiable instruments under the CMA and that pertain to the operation of the AMC. Since providing our submission on 12 June 2019 to your previous HPR review, 35 new policies and 104 operating procedures have been notified. Of these, the Commission has offered comments and suggestions regarding a range of draft policy documents, including with respect to detainee communications, searches, use of chemical agents, classifications, use of force and restraint, detainee discipline, placement and shared cells and interim visits guidelines during the COVID-19 public health emergency.

The Commission values the opportunity to provide feedback to inform the development of draft custodial related policies and operating procedures. Due to limited capacity to do so alongside the exercise of our other functions, we are required to prioritise a discrete set of policies that we consider may involve significant limitations of human rights and are often unable to provide such feedback in less than three weeks. ACTCS has therefore indicated their intention to provide advance notice of upcoming policies to assist us to manage any demands on scrutiny, however this has not yet occurred. In addition, it is important that our consideration of draft policy documents is not understood as a substitute for proper consideration of human rights in their development as required by s 40B of the HR Act. Accordingly, in May 2021, we suggested that ACTCS engage the Legislation, Policy and Programs branch in JACSD or a suitably experienced consultant with legal policy expertise to undertake a preliminary review of proposed draft instruments before circulation to stakeholders.

Having implemented an interim practice of review by an external consultant during the previous eight months, the Commission noted a marked improvement in the quality of several draft instruments that were subject to review, including in terms of their consistency with the CMA and greater coverage of actual and potential human rights concerns. Although we acknowledge ACTCS' previous advice that this practice is a short-term solution, we encourage ACTCS to continue to leverage such expertise whether by contract or arrangement with JACSD. The provision of an external party's report has, as ACTCS has intended, provides useful assurance to stakeholders of the issues that ACTCS have considered and addressed in preparing custodial related policies and operating procedures. We similarly commend the recent practice by ACTCS of providing a table summary of the feedback provided by the Commission and a field indicating how ACTCS has sought to address it.

Beyond the policy development process, the Commission wishes to highlight one previous observation that has not yet been addressed to our satisfaction. In providing feedback concerning the *Corrections Management (Interim Visits Guidelines for the Alexander Maconochie Centre) Policy 2021* (discussed below), we noted that s 143 of the CMA contemplates visiting conditions being declared by way of a disallowable instrument to afford the ACT Legislative Assembly opportunity for scrutiny and disallowance. Social and other visits have, to date, only been expounded in correctional policies under s 14 of the CMA.

⁵ *Corrections Management (Strip Search) Operating Procedure 2022*, s 5.

Pillar 2: Respect

We note that this pillar measures whether all persons are treated with respect for their human dignity.

Needs of older detainees (B.1 Strategic Approach, Standard 23)

Recommendation 45 of your HPR 2019 called for ACTCS to develop a policy approach that articulates and responds to the needs of older detainees, which was endorsed in the government response. The Commission understands that ACTCS is presently seeking to consolidate its policy approach to detainees with additional needs, and that it is not intended that a specific policy addressing the needs of older detainees will be notified. Instead, we note that ACTCS is presently preparing a policy relating to detainees with additional needs and is liaising with the DHSDCS in the context of this work.

We are unaware of substantial progress in addressing the needs of older detainees, as recommended by the HPR 2019. Due to the aging infrastructure and security considerations among other things, we understand that there has been limited ability to accommodate older detainees appropriately or provide access to aids and supports in the AMC. For example, detainees who may access in-home support under My Aged Care while in community cannot receive such support in the AMC. Lack of any provision or arrangement for detainees nearing their earliest release date to access Aged Care Assessments within the AMC can also lead to uncertainty for the Sentence Administration Board in assessing what an appropriate accommodation option is for an older detainee and, thereby, delay release on parole. More information can be discussed with your office on request.

Management of female detainees (B.1 Strategic Approach, Standard 56)

The Commission is pleased that, following sustained advocacy by oversight and civil society organisations, all female detainees were relocated from the high security Special Care Centre in June 2021 after three years and returned to their purpose-built cottage accommodation in the Women's Care Centre (WCC). Although long overdue, we are mindful that the return of female detainees to the WCC appeared to be expedited in the face of public pressure.

It is therefore unclear whether planning for the move involved suitable consideration of particular cohorts and arrangements to ensure the safety of vulnerable women or those under protection. As you would be aware, oversight agencies were advised of a marked increase in violence among female detainees between December 2021 and January 2022 culminating in separated populations. Female detainees have also raised concerns about placement of detainees experiencing significant distress or exacerbated mental health conditions in shared accommodation without due consideration of other detainees. We also note recent correspondence that Winnunga Nimmitjyah Aboriginal Health Service (Winnunga) has shared with oversight agencies, including your office, which voice similar concerns.

Based on recent discussions with ACTCS executive staff, we understand that steps have been taken to address these matters, including by ensuring continuity of CO2s working in the WCC and facilitated mediation sessions. However, in the Commission's view, such measures offer only short-term solutions that may not be sustainable should detainee numbers increase, or accommodation pressures arise due to COVID-19 management or other pressures. Insofar as recent hostility may also be, in part, attributable to disruption caused by new detainees held on remand for short periods, we refer you to our feedback elsewhere in this submission emphasising the need to ensure separation of remanded and sentenced detainees.

Appropriate care for mothers and their newborns (C.2 Strategic Approach, Standard 75)

It is also of concern that the AMC does not presently enable pregnant detainees to take full care of their newborn while detained at the AMC. We commend the positive work of ACTCS with Create in transporting detainees' babies to enable detained mothers to continue breast feeding while at the AMC, which was lacking in April 2014 when the Commission undertook its Human Rights Audit on the Conditions of Detention of Women at the AMC.⁶ Although we appreciate that a new mother may have day access to her child, there is

⁶ ACT Human Rights and Discrimination Commissioner, [Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre](#) (Audit report, April 2014), [5.3.10].

presently no scope or arrangements in place to allow a female detainee to take care of their newborn child overnight. Given increasing scholarship articulating the importance of early bonding on the long-term mental of children in the first two years of life and programmes in other Australian jurisdictions that allow for young children to live with their mothers in prison,⁷ we commend this matter to your HPR 2022 for consideration.

Disability and reasonable adjustments (B.1 Strategic Approach, Standard 58)

Section 8 of the HR Act recognises the right of everyone to equal and effective protection from discrimination on any ground and the right to enjoy their human rights without discrimination of any kind. Information received as a result of our complaints-handling jurisdiction reveals a pattern of reasonable adjustments for disability being either difficult to access or not being provided altogether. In some cases, the absence of such support renders detainees with disability reliant on other detainees for personal care and assistance. We have also identified, as an ongoing theme, limited understanding of disability-related issues among ACTCS staff, including correctional officers. This is particularly so where behavioural elements related to a person's disability are not taken adequate account of in disciplinary processes and, for example, lead to adverse or disproportionate outcomes like placement in management or other sanctions.

The Commission also understands anecdotally, from oversight agency discussions with ACTCS, that the recently appointed Disability Liaison Officer has proved effective in engaging with disability supports and advocating for disability needs assessments for detainees. We also note that a specialist clinical position has also been developed to respond to the clinical needs of detainees living with disability. This Disability and Complex Care Co-ordinator role was filled in late 2021 and has commenced some limited work in undertaking functional assessments and advocating for the specific support and equipment needs for detainees.

Health services for Aboriginal and Torres Strait Islander detainees (C.1 Special Health Needs, Standard 74)

In your HPR 2019, Recommendation 56 called on ACTCS, JHS and Winnunga to work together as a priority to jointly identify any obstacles to effective cooperation and service delivery with a view to addressing them. In agreeing to this recommendation, the Government Response noted that a tripartite working group was in the process of reviewing a Memorandum of Understanding between JHS, Winnunga and ACTCS to identify and resolve any systemic barriers to collaboration and health outcomes for detainees.

The Commission supports the operation of an Aboriginal-controlled health organisation within the AMC, noting this having been an important recommendation of the Moss Report in 2016. We are aware, from health services complaints and contacts, of a recurring pattern of delays in detainees being able to access services through Winnunga instead of JHS. On investigation, it appears that this may be contributed to by delays in acceptance of new patients rather than delay in referrals by JHS. To this end, the formal relationship and any performance measures that apply to the co-delivery of custodial health services in the AMC may benefit from greater transparency and clarity.

We note, in particular, that the existing parameters of the formal relationship between JHS, Winnunga and ACTCS remain unclear with respect to accountability for services provided (as also observed in the recent report of the ACT Auditor-General),⁸ client numbers, staffing and on-site capacity (ie number of doctors) and, in one matter, the claim that the process required verification of a prospective client's Aboriginality. Service delivery by Winnunga is also not presently reflected in notified policies and operating procedures, which gives rise to further ambiguity about their status. For example, it is unclear if service delivery by Winnunga is or should be oversighted by a therapeutic health service as contemplated in s 21 of the CMA (ie by JHS) or a non-therapeutic doctor, as appointed under s 22 of the CMA.

⁷ As discussed for example, in Jane R Walker, Eileen Baldry & Elizabeth A Sullivan, 'Residential programmes for mothers and children in prison: Key themes and concepts' (2021) *Criminology and Criminal Justice* 21(1), 21-39.

⁸ ACT Auditor General, *Report of detainee mental health services in the Alexander Maconochie Centre* (Report No 1, March 2022) <https://www.audit.act.gov.au/_data/assets/pdf_file/0004/1958575/Report-No.1-of-2022-Management-of-Detainee-Mental-Health-Services-in-the-Alexander-Maconochie-Centre.pdf>

Lack of appointed non-therapeutic doctor (C.1 Basic Health Care, Standard 66)

It is a matter of concern that a non-therapeutic doctor has not, to date, been appointed by the Director-General of JACSD or his delegate in accordance with s 22 of the CMA. On several occasions, this absence has created conflicts of interest for JHS staff (including, as we understand it, in respect of patient confidentiality), who provide therapeutic support to detainees under s 21 of the CMA. For example, we are aware of circumstances where JHS staff may be asked to provide advice about underlying health conditions in one of their clients prior to a planned use of force against them (although acknowledge that a strict consultation requirement has now been omitted from the recently notified *Corrections Management (Use of Force and Restraint) Policy 2022*). Such requests are likely, in our view, to exceed a therapeutic doctor's stated functions of providing health services to detainees and protecting the health of detainees (including by preventing spread of diseases within correctional centres).

It is, in this regard and compounded by the opacity of arrangements noted above, additionally unclear the nature of the interface between JHS staff, appointed as a therapeutic doctor under s 21 of the CMA, and health services provided on-site by Winnunga.

Banning smoking in the AMC (C.2 Special Health Needs, Standard 78)

In the HPR 2019, OICS observed that a prohibition on smoking, other than in designated smoking areas within the AMC, is not enforced in practice and that detainees are currently permitted to smoke in cells and do so during cell lock-ins. Detainees and staff continue to raise concerns with the Commission about passive smoking and the impact on health of detainees and staff given the lack of choice of exposure to smoke for non-smokers. The Commission is also anecdotally aware of concerns that the value of tobacco among detainees serves as a common cause of violence and standover behaviours. Further, the misuse of items associated with smoking (such as lighters) could pose a fire and safety hazard to detainees and staff and may also occasion significant damage to AMC facilities, which in turn exacerbates accommodation shortages and related difficulties in managing violence between cohorts.

The Commission supports the important public health objectives in implementing a prohibition on smoking in ACT correctional centres as a means of reducing staff and detainees' exposure to second-hand smoke (SHS) in confined spaces. Tobacco smoking remains the leading cause of preventable disease and death in Australia (AIHW, July 2021) and is a significant contributor to a range of chronic health conditions. Harm from tobacco smoking continues to affect current smokers and ex-smokers, as well as non-smokers through their exposure to second-hand smoke (AIHW 2019). In this regard, protecting staff and detainees from SHS exposure supports their rights to life (s 9, HR Act), freedom from cruel, inhuman or degrading treatment (s 10, HR Act), just and favourable conditions of work (HR Act, s 27B) and humane treatment while deprived of liberty (s 19, HR Act). Although it has previously been suggested that banning smoking may constitute a limitation of a detainee's rights to privacy and home (s 12, HR Act), we are unaware of significant authority to support this position. In implementing a ban on smoking in Victorian correctional facilities in 2014, the then Minister for Corrections contended that the right to privacy and home was not engaged by the proposal, which was implicitly endorsed by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.

Detainees and staff who do not smoke have regularly raised concerns with Commission staff about passive smoking and the impact on their health because of their practical inability to avoid exposure to SHS in the AMC. We note that smoking bans have been implemented in most prisons across Australia. Of the 8 Australian state and territory jurisdictions, we understand that only the ACT still permits smoking within each of its correctional centres with smoking permitted outside of cells in select Western Australian facilities. In this regard, it is pertinent that smoking is expressly prohibited in correctional facilities in other Australian human rights jurisdictions, Victoria and Queensland. It is also, in our view, relevant that other closed facilities in the ACT, such as the Dhulwa Mental Health Unit prohibit smoking.

In our view, the introduction of a smoking ban need not necessarily be graduated, however it will be essential for consistency with various human rights, including the right to humane treatment while deprived of liberty, that detainees are provided with adequate support and/or therapies to assuage the effects of nicotine withdrawal when the prohibition is implemented and, subsequently, for any new admissions. We understand that detainees have already been apprised of ACTCS' intent to prohibit smoking in all areas of the AMC; ACTCS

ought to engage with detainees and other stakeholders in identifying steps and supports that will support the transition to smoke-free correctional centres in the AMC, including considerations unique to the CTU.

Mental health services (C.3 Mental Health, Standard 79)

The HPR 2019, in Recommendation 57, called on ACTCS to take immediate steps to obtain an independent appraisal by an appropriately experienced expert to ascertain the appropriate FTE of general practice psychologists for the AMC and develop a plan to reach the minimum acceptable staffing level within one year. The Commission appreciates that the ACTCS Psychology Support team has experienced turnover in previous years and varied difficulty in attracting and retaining suitably qualified psychologists. Detainees with mild to moderate mental health needs (who do not qualify for assistance from Forensic Mental Health Services) have reported to PACYPC staff that they continue to feel that they do not have access to the services they require (for example one-to-one counselling). For further information, we refer you to the recent report of the ACT Auditor-General into mental health services at the AMC.⁹

The Commission has also observed poor coordination of access to specific services such as the Canberra Rape Crisis Centre or Domestic Violence Crisis Service. While ACTCS may, for example, organise access to a specific service, coordination of these services with JHS, Forensic Mental Health Services and the ACTCS Psychological Support Team can often not occur, which leads to gaps in service provision. ACTCS or JHS may also then not have access to the most current information about a detainee's progress, needs and emerging issues, often due to concerns about the legality of sharing information or otherwise due to poor coordination and governance.

Pillar 3: Purposeful activity

We note that this pillar measures the extent to which detainees engage in activity that is likely to benefit them.

Recording of time out of cells (A. Time out of cells, Standard 87)

Recommendation 62 of your inaugural HPR 2019, which was agreed by government, recommended that ACTCS record cohort lock-ins for the purpose of reporting out-of-cell hours to the Productivity Commission for inclusion in its annual Report on Government Services (ROGS).

The *Corrections Management (Regime Planning) Policy 2020*, as amended in response to Recommendation 62, presently anticipates the establishment of a core day operating procedure which provides for, *at minimum*, 9.5 hours of time out of cell (in closed conditions) or 11 hours of time out of cell (in open conditions). In this regard, the recent Report of Government Services 2022, published by the Productivity Commission, indicates that detainees in secure custody at the AMC received an average of 8.9 hours out-of-cell per day in 2020-21. While this is lower than the minimum hours contemplated in the Policy, it is unclear to what extent this average is attributable to impacts of the COVID-19 emergency pandemic.

As "time out-of-cells", for the purposes of ROGS, is defined as the average number of hours in a 24-hour period that detainees are not confined to their cells *or* units, it is unclear to the Commission whether this measure does capture periods during which select detainees are locked in their cells for the purposes of cohort management. Only New South Wales presently adopts a stricter interpretation for determining out-of-cell hours whereby prisoners who are free to leave their cells but restricted to a locked accommodation unit are not counted as enjoying time out-of-cells. Anecdotally, the Commission has heard uncorroborated reports, including during litigation, of more significant periods of lockdown in which detainee time out of cells has been limited. As noted in our previous submission, the Commission would support your office having an ongoing monitoring role in identifying trends in time out of cells, recognising the significant limitations on rights to humane treatment and association that arise from prolonged time in cells.

⁹ ACT Auditor-General, [Management of detainee mental health services in the AMC](#) (Audit Report No 1/2022, March 2022).

Time out of cells in the Management Unit (A. Time out of cells, Standard 87)

The Commission is particularly interested in the extent to which detainees accommodated in the Management Unit of the AMC – whether on disciplinary segregation, health segregation or safety and security segregation or in protective custody – are being afforded time out of cells and open air and exercise. As your office is aware, in November 2020, the Human Rights Commissioner was granted leave to intervene in an ACT Supreme Court matter concerning the Management Unit of the AMC. The plaintiff, who was at the time detained at the AMC, spent 63 days in segregation in the Management Unit over separate periods between October 2018 and September 2019. He alleged that, during these periods of confinement, ACTCS had failed to respect his minimum entitlement to one hour of open air and exercise, required under the CMA, and his right to humane treatment while deprived of liberty (HR Act, s 19). At issue was whether granting the detainee access to an enclosed rear courtyard (approximately the same dimensions as their cell, with four solid walls, a thin horizontal window onto a small grassy area with metal mesh overhead) met these standards. In this context, it was relevant that the two purpose-built larger exercise yards were not currently being used by ACTCS largely due to security considerations (eg the lack of a door hatch for use of handcuffs) and potential risks of harm to staff.

The court heard the matter in May 2021, which included the court and parties' representatives conducting an inspection of the Management Unit. On 17 June 2021, Loukas-Karlsson J declared that affording 'access to the rear courtyard of the Management Unit at the AMC does not comply with section 45 of the Corrections Management Act 2007'. Her Honour also declared invalid a June 2019 operating procedure to the extent that it deemed opening the rear cell door to count as a detainee's minimum one hour of fresh air and exercise. Her Honour reserved her decision in respect of orders sought under the HR Act, with these orders and reasons for decision still pending.

The Commission understands that ACTCS have sought to ensure that detainees in the Management Unit are offered access to the outdoor exercise yards for at least one hour a day consistent with their minimum entitlement under s 45(1) of the CMA. In querying use of the Management Unit for COVID isolation, however, it was recently suggested to oversight agencies in discussion with ACTCS management that the rear courtyard provides adequate open air and space for exercise. To the extent that any detainees – whether newly admitted or who have otherwise been placed on COVID isolation – are accommodated in the Management Unit, the ACT Supreme Court has confirmed that all detainees have, *as far as practicable*, a minimum entitlement to one hour of open air and exercise which is not satisfied by access to the rear courtyard. The qualification 'as far as practicable', in our submission, contemplates only those unexpected or non-routine events, that make providing the entitlement on any particular day impossible. As the risk of transmission of COVID-19 within the AMC is neither unexpected or now unusual, we consider that ACTCS should take steps to ensure that all detainees who are isolated due to risk of COVID transmission are able to enjoy their minimum entitlements to open air and exercise as inherent in the right to humane treatment while deprived of liberty (HR Act, s 19).

In this regard, the Commission is also troubled that senior staff do not appear to have appreciated the implications of the Court's decision with respect to implementation of COVID safety measures and have returned to a default understanding that the rear cells of the Management Unit are satisfactory to discharge a detainee's minimum entitlement under s 45(1) of the CMA. We acknowledge that this matter reflects one among a number of concerns related to current arrangements in respect of ACTCS management of COVID-19 risks, which both OICS and the Commission are currently querying with the Commissioner.

Educational programs (B. Education, skills and work activities, Standard 91)

We understand that ACTCS is presently in the process of procuring a new education provider for the AMC and that, as a consequence, substantial changes to the delivery of education and programs within the centre are anticipated. Although the most recent ROGS report indicates that ACT has consistently, since 2011-12, led Australia in terms of the proportion of detainees in education and training programs, we are aware of a number of practical barriers to detainees' participation that we consider merit attention.

Limitations on detainees accessing the internet and limited dedicated access to computers for all detainees together present a challenge to meaningful engagement with educational courses. Delays in approving requests by detainees to access programs or to bring their own equipment into the AMC where equipment

of suitable capability is not already available have also, in our view, impacted the educational opportunities available to detainees. As a broader observation, the PACPYC team has also received feedback from detainees about the impact of cohorts that are unable to mix or associate due to risks to individual safety and good order of the AMC. In some cases, such dynamics have, according to detainees, greatly reduced the ability to deliver group programs and education.

Pillar 4: Rehabilitation and preparation for release

We note that this pillar measures how detainees are supported to connect with their family and the community, supported to rehabilitate and prepared for release back into the community.

Impacts of COVID-19 on family connection (B.1 Contact with the outside world, Standard 97)

The Commission recognises the efforts of ACTCS and staff in responding to the COVID-19 public health emergency and the significant impacts that the recent omicron wave has had in management and staffing of the AMC in recent months. Notwithstanding, such preventative measures have often had significant impacts that detainees have brought to our attention, including as a result of associated pressures on staffing and facilities. Such impacts have been especially acute in terms of the limits placed on detainees' ability to have contact with their families, children and kin during the course of the pandemic.

All social visits to the AMC were suspended on 22 March 2020 to limit the risk of infection to detainees, visitors and staff and have since been subject to varying levels of restriction over the course of the public health emergency. As you know, the Commission wrote to your office, in the context of a critical incident review, in September 2020 to draw your attention to concerns with restrictions on visits as they were being implemented at that time. For example, limits on the number of children permitted to visit a detainee which risked, in our view, an unduly high barrier for visitation by spouses, partners and other relatives having responsibility for the care of multiple children. As a further example, restricting visits to immediate family and kinship relations, in our view, constituted an arbitrary prioritisation of rights that failed to recognise the freedom of association of detainees without immediate family or kin or those in close relationships that were not familial in nature. While many of these restrictions, which varied throughout the pandemic, have since been addressed, we remain concerned that such decisions were implemented with limited transparency about the health and other advice that underpinned them.

Strict restrictions on any contact with visitors, including young children, which remain in place appear, in the Commission's view, to constitute an overly cautious approach in the current environment, noting the ongoing Rapid Antigen Testing pilot. We also note concerns raised with us that younger children are unable to develop meaningful relationships by means of audio-visual visits and acknowledge the importance of family connection for detainees, which has been significantly constrained over extended periods of suspended visitation. Should restrictions on visitation be deemed necessary again in future, the Commission considers that greater consultation with families and the ACTCS psychological services should be prioritised in conjunction with reliance on public health, security and other advice.

Transitional release program for women (B.2 Links with the community, Standard 115)

The Commission has received multiple complaints about the different treatment afforded to women seeking to access Transitional Release Program (TRP). As you know, access to the Transitional Release Centre (TRC) is limited to male detainees on the basis that its design and infrastructure would not enable male and female detainees to be accommodated separately and that there is greater demand among male detainees for access to the transitional release centre, although we have limited data as evidence of this claim. As noted above in relation to time out of cells in the Management Unit and the separation of sentenced and remanded detainees, considerations of infrastructure and resourcing cannot alone provide sufficient justification for limitation of human rights, including equality and non-discrimination.

We have also received a series of complaints from women regarding delays in approval to access the transitional release program, which is only accessible in the year preceding a detainee's earliest release date. It is therefore important, from the Commission's perspective, that the administration of requests to access

transitional release are processed in an equitable and timely manner. Concerns have also been raised that in not being able to access the TRC, women who are participating in the TRP are more likely to be subject to coercion or stand over with respect to bringing items or other materials into the AMC.

Other new and emerging issues

Transfers to New South Wales

The Commission notes that, in response to separate critical incidents in 2020 and 2021 which affected the AMC's capacity, eight or more detainees were transferred into the custody of NSW Correctional Services. Your report of a review of a critical incident concerning a riot and serious fires at the AMC on 10 November 2020 specifically addressed this issue, noting the human rights implications of transferring a detainee to another jurisdiction and correctional centre that is not subject to equivalent human rights standards.¹⁰ Your report also highlighted the lack of any published policy or procedure to inform ACTCS' decision-making with respect to the transfer of detainees to other correctional centres, including those outside the ACT.

The Commission appreciates the difficulties that may arise in managing violent or extremely disruptive detainees within existing AMC facilities and understand that ACTCS may consider such detainees for transfer to New South Wales correctional centres, including when experiencing accommodation pressures, without their consent. As of November 2021, we have provided comments to ACTCS with respect to a draft policy concerning the transfer of detainees to a NSW correctional centre. In broad terms, our advice highlighted a need to develop arrangements with the Governor of New South Wales that contemplate at least equivalent treatment of an ACT detainee who has been transferred to a NSW facility and for each decision to transfer a detainee to afford procedural fairness and meaningfully and prospectively take into account their individual circumstances. This feedback follows from a number of contacts or complaints to the Commission about transfers of detainees, or threats to do so, that have not taken into account a detainee's race or, for Aboriginal and Torres Strait Islander detainees, their connection to country, disabilities and need for reasonable adjustments, as well as proximity to family and children.

Consistency with ACTCS' public authority duties under s 40B of the HR Act will require that each transfer decision be reasonable, necessary and proportionate in the context of the individual detainee's circumstances. As transfers of detainees to other correctional centres may be relevant to your review in terms of managing cohorts within existing facilities, we reiterate that any limitation of rights arising from transfer decisions must be based on a legitimate aim (eg safety) and cannot alone be justified with reference to resourcing considerations and the functional capacity of existing facilities. We accordingly encourage your review to identify any opportunities for ACTCS to develop procedures that prioritise transfers by consent and that trigger advanced planning for any anticipated demand for accommodation.

¹⁰ Office of the ACT Inspector of Correctional Services, *Report of a review of a critical incident by the ACT Inspector of Correctional Services – Riot and serious fires at the Alexander Maconochie Centre on 10 November 2020* (Report, 21 March 2021) <https://www.ics.act.gov.au/_data/assets/pdf_file/0005/1733999/Final-report_tagged.pdf>