22 'I Thought I Was Going to Die'[1]

Bodily Autonomy and the Misuse of Restrictive Practices in Aged Care and Youth Detention Settings

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Introduction

Eminent jurist Lady Hale describes bodily autonomy as 'the most important of civil rights' (Herring & Wall, 2017, p. 556). The breach of this fundamental human right through the use of restrictive practices in 'care' settings, such as in aged care and juvenile detention, is attracting intense scrutiny in Australia and elsewhere (Baker et al., 2022; RCACQS, 2021; White & Gooda, 2017). Attempts to restrict a person's liberty without consent could amount to assault or unlawful detention (Erlings & Grenfell, 2022, p. 22). This chapter examines the use of restrictive practices (RP) in aged care and youth detention settings in Australia and how these practices impact on people's right to bodily autonomy and bodily integrity.

Using a human rights-based approach we examine the misuse of RP in aged care and youth detention settings and explore the frequent failure of these institutions to uphold people's agency, dignity, and choice. Our examination suggests these failures are not uncommon and that the misuse of RP is endemic throughout both the aged care and juvenile justice systems resulting in human rights violations. We document some of the ways this is occurring and propose that this is due in part to underlying social and political disinterest in people at the beginning and end of the life cycle. We draw on reported lived experience of individuals who have experienced the misuse of RP in aged care and youth detention centres documented by two Royal Commissions undertaken in Australia: the *Royal Commission into Aged Care Quality and Safety* and the *Royal Commission into the Protection and Detention of Children in the Northern Territory* ('NT Royal Commission') (White & Gooda, 2017). We consider the effects of institutional failures to uphold older and younger people's right to bodily autonomy from a human rights perspective and identify the implications of this in relation to Australia's duties under international human rights law. Our analysis centres around three human rights treaties, the *Convention on the Rights of Persons with Disabilities* ('CRPD') (United Nations, 2006); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') (United Nations, 1987) and its and its Optional Protocol ('OPCAT') (United Nations, 2002); and the *Convention on the Rights of the Child* ('CRC') (United Nations, 1989). First, we situate our analysis in the context of the themes of this book by linking the experiences of people at either ends of the life cycle in relation to breaches of their rights to bodily autonomy through the misuse of RP. We then outline our conceptualisations of bodily autonomy followed by an analysis of the use, and misuse, of RP in aged care and juvenile detention settings. The paper concludes with recommendations about the need for greater regulation of the use of RP in relation to young people and older people in institutional settings.

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Scope and connections to themes of the book

While older and younger people are at opposite ends of the life spectrum, we draw comparisons and commonalities in how the law engages with these age groups and the impact of this with respect to the fulfilment of their rights to bodily autonomy and bodily integrity. We correlate human rights breaches in aged care and juvenile detention contexts and in doing so seek to highlight gaps in legal and policy frameworks that contributes to people in these environments being at greater risk of experiencing a range of abuses. It may appear incongruous to analyse human rights obligations and compliance relating to bodily autonomy and integrity from the perspectives of two institutions that have almost diametrically opposed purposes – one to provide support and care for older people who can no longer live independently and require a degree of care, and the other to detain and rehabilitate young people for criminal offences. However, there are several key similarities between the lived experience of certain people living in aged care settings and all people living in juvenile detention in that these groups can both be defined as people 'deprived of their liberty' in accordance with article 4(2) of OPCAT (United Nations, 2002) that defines the deprivation of liberty as:

> … any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.
>
> (United Nations, 2002)

Australia ratified OPCAT in December 2017 but is yet to fulfil the obligation to establish a domestic National Preventative Mechanism (NPM) to oversee the implementation of the Protocol (Spivakovsky et al., 2023, p. 247). The Victorian Ombudsman has noted that the definition of *places of detention* is expansive, and may extend to areas beyond the traditional detention context such as locked wards in aged care facilities (Victorian Ombudsman, 2017 p. 25).

People living in both aged care and juvenile detention contexts have the right to care and protection from harm and ill-treatment including the protections conferred by international human rights law to freedom from torture and any other forms of cruel, inhuman or degrading treatment or punishment (United Nations, 1987). The overarching and central mandate of aged care and juvenile detention facilities is to 'care' for people within their facilities and we contrast this mandate with findings of serious and egregious human rights abuses within these settings via the misuse of RP. Young people in youth detention are, by virtue of their age, in need of care and protection and international law mandates standards of care in these settings.[2] Young people in detention are regularly subjected to a range of RP, some of which are lawful and others that are not. The purpose of an aged care facility is to provide an environment where people are assisted to live self-determined and meaningful lives regardless of the level of care needed. However, residents are subject to restrictions imposed by the institution concerning, at the very least, routine (for instance meals, activities, confinement to rooms at certain times) (Steele et al., 2020, pp. 8–9) or in other instances forms of unlawful RP including mechanical, physical, and chemical restraint (McSherry & Maker, 2020, p. 4; Nay & Koch, 2006, p. 34). The executive summary of the Aged Care Royal Commission Report confirmed this when it stated, 'the inappropriate use of unsafe and inhumane restrictive practices in residential aged care has continued, despite multiple reviews and reports highlighting the problem' (RCACQS, Executive Summary, 2021, p. 68).

There are many reasons why children and older people in institutions are at greater risk of having their rights to bodily autonomy breached. Crawford (2007) says a person's age is one of the primary factors associated with discrimination, she says: "[c]hronological age is one of those key markers – like race and gender – that greatly influence how a person is treated" (Crawford, 2007, p. 27). Further, Hockey and James (1993) reflect that those who experience dependency as a feature of childhood and deep old age are assigned less autonomy, and "are often made to share a space on society's fringe" (Hockey & James, 1993, p. 5).

We agree that people in institutional settings at either end of the age spectrum are more vulnerable to having their rights to bodily integrity breached due to their age, race and gender, in circumstances where those charged with their 'care' behave toward older and younger people in ways that are contrary to their human rights. Moreover, we view these abuses in the wider social-political context in which they occur and frame instances where RP have breached children's, young people's and older people's bodily autonomy and integrity as part of a broader system of oppression against people who are not perceived as being economically valuable. Therefore, abuses against them are often unchallenged and those responsible are not held to account.

We argue that abusive behaviour toward young people and older adults by caregivers in institutional settings is enabled by, and symptomatic of, ongoing prevalence of paternalistic social attitudes that are reflected in laws and policies that define older people and the young as deficient, needy, economically and socially dependant and consequently not as full citizens with the full body of citizenship rights. The Human Rights Commission in a study on ageism in Australia, found that Australians considered older people to have declining skills, agency and vitality, and to lack competence in many areas, such as with technology or professionally. The study found that older people's 'lack of association with meaningful life roles means they are regarded as onlookers, rather than active participants in society, including in the workplace' (Australian Human Rights Commission, 2021, p. 15). Kesby explores these social narratives, observing that the topic of ageing is often framed in the language of disaster or crisis (Kesby, 2017, p. 374). She states that 'global ageing is taken to be a 'crisis' when viewed from a neoliberal perspective, and one which presumes older persons are an 'economic burden which will cripple already overstretched economies' (Kesby, 2017, p. 374). Further, the systemic stereotyping of older persons by seeing ageing through the lens of pathology means aging is characterised by 'decline, dependency and loss of production', which reduces them to 'passive recipients of welfare and care, dependant on the State' (Kesby, 2017, p. 376).

The new sociology of childhood sheds light on the denial of children's and young people's citizenship rights and we suggest this school of thought offers insight into the emerging theorisation of older people's human rights. Adult control of children and young people has been the norm for centuries, 'often justified as necessary for their welfare'(Desai, 2010, p. 10). Philosophers from the 14th to the 18th centuries such as Hobbes (1968), Locke (1700), and Rousseau (1979) espoused Platonic/Aristotelian thinking about childhood, which viewed children as incomplete, as 'becoming', their potential for reason yet to be learned (Milne, 2013, p. 245). When the new sociology of childhood emerged in the 1980s 'social constructions of childhood as innocent, passive, or romantic' was challenged (Wilson & Wilks, 2013, p. 142). Yet, despite this the ongoing legacy of the Enlightenment period persists and paternalism in law, policy and practice remains, and in this context we argue it remains evident in the way RP are used to violate the rights of younger and older people in institutions.

Nevertheless, we argue that learnings from the child rights domain and the new sociology of childhood that challenged paternalistic and 'welfarist' rather than 'rights-based'

approaches to matters concerning children are relevant also to older people and the same reasoning is applicable.

Human rights of children, young people and older people in Australia

Elder law is an emerging area of thought and practice in Australia and internationally and we suggest that applying learning from the children's rights movement is directly relevant to tackling shared legal problems associated with human rights breaches across both age groups. We acknowledge however, that there are a vast array of differences and a diversity of legal concerns facing both groups of people that impact these groups differently. However, we draw on commonalities in this chapter to highlight common ground and possible ways to share learning for the advancement of young and older people's human rights.

The 'CRC' (United Nations, 1989) provides a legal basis for the global movement that recognises children as individuals and holders of human rights, rather than 'mini-persons with mini-human rights' (Connors et al., 2007, 15). While the United Nations Human Rights Council has, in 2020, appointed an Independent Expert on the enjoyment of all human rights by older persons, to date there is no comparable convention or global instrument that articulates and assures older people's rights. We argue that unfortunately Connors et al.'s assessment may be the reality as experienced by many older people in aged care settings, that is, that they may experience infantilisation and be perceived and treated in ways that do not afford them their full human rights. We argue this is additionally pertinent when considering the right to bodily integrity and autonomy in care settings.

The children's rights movement prior to and during the drafting of the CRC (from 1979 to 1989) emphasised the importance of a specific treaty to address and advance children's rights given the inadequacies of existing human rights law protections that failed to incorporate the rights of children. This movement challenged prevailing paternalism toward children and emphasised that children are experts in their own lives, with agency and the right to participate in decision-making processes about matters affecting them. This advocacy culminated in a central provision, article 12, being embedded into the CRC, which gave all children, everywhere, the right to express their views about matters affecting them and for these views to given due weight in decision-making processes. Prior to the CRC states were not duty bound to seek and take into account children's and young people's views and this is one of the reasons why a specific treaty for children was necessary. We argue the same is necessary for older people as there is no clear articulation of older people's rights in international human rights law, other than the *UN Principles for Older Persons* (1991) which are not legally binding and the CRPD (United Nations, 2006) that is legally binding and requires states to address discrimination against older people, yet it is not a comprehensive statement of older people's rights in the same way that the CRC is in relation to children's rights. We correlate the inadequate legal context for children prior to 1989 when the CRC came into force with the current inadequate legal context for older people today under international human rights law.

While UN human rights treaties exist for children (CRC) (United Nations, 1989), women (*Convention on the Elimination of All Forms of Discrimination Against Women*, 2016 ('CEDAW')) (United Nations, 1979) and people with disabilities (CRPD) (United Nations, 2006), specifically focussed international human rights law protections for older people do not exist. Consequently, treaty committees must engage in interpretive strategies that recognise the rights of older persons as being within a treaty's scope. A campaign for a new convention on the rights of older persons was explored on 20 December 2012 when the

United Nations General Assembly adopted Resolution 67/139 'Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons' where the Open-Ended Working Group on Ageing (OEWGA) were to start considering 'proposals for an international legal instrument to promote and protect the rights and dignity of older people' (Poffé, 2015, p. 591). However, more than a decade later, this promised convention has not materialised.

The OEWGA, established by the UN in 2010 have identified the need for more robust protections for the human rights of older people, and the strongest message to come out of the UN discussion on the human rights of older people is the prevalence and significant impacts on older people of ageism, and the failure of existing international human rights instruments to respond to ageism. Multiple reports have recommended enhanced legal protections against ageism at the international *and* domestic level. The 2021 OHCHR working paper identified ageism and age discrimination as 'fundamental underpinning concepts':

> Understanding the nature of the ageing process and the extent and impact of ageism is critical to any attempt to address violations against individuals on the ground of their older age. Ageism and actions based on ageist attitudes are a critical component and frequently a principal cause of human rights violations based on older age. Other factors may also combine with ageist attitudes and practices that constitute the disadvantage suffered by particular groups of older persons – such as race, ethnicity, gender and so on (the concept of intersectionality).
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> (OHCHR, 2021, p. 13)

Additionally, Chapter 1 of *Care, Dignity and Respect*, the Aged Care Royal Commission's Final Report, recognised the need for a more human rights-based approach to the regulation of aged care services in line with Australia's international human rights law duties (Aged Care Royal Commission, *Final Report* 2021, 79.) Australia has agreed to be bound by a number of international human rights instruments, including the CRPD (United Nations, 2006). The World Health Organisation (WHO) has recognised dementia as a source of disability bringing many older people in care within the scope of the CRPD. While not all people living in aged care are living with dementia, a significant number of aged care residents experience some form of cognitive impairment, and misuse of RP violates their human rights under international instruments such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *('CAT')* (United Nations, 1987).

Human rights ideals and values are expressed in the *User Rights Principles 2014* (Cth), the *Quality of Care Principles 2014*, and Charter of Aged Care Rights (Aged Care Quality and Safety Commission, 2019). For example, Schedule 1 under Part 4 of the *User Rights Principles* 2014 (Cth), states (amongst other things) that those in residential care are to be "treated with dignity and respect, and to live without exploitation, abuse or neglect" (s1(d)), and "to live without discrimination or victimisation, and without being obliged to feel grateful to those providing his or her care and accommodation" (s1(e)).

Just as important as the existence of human rights obligations, is whether they are in fact understood and observed by institutions, and if they are not, what consequences flow from that. Aged care and juvenile detention facilities have a poor record of understanding and implementing human rights standards. Additionally, individuals living in these facilities may lack the resources or capacity to report compliance breaches.

As indicated earlier we posit that a key driver of socio-political neglect of these groups of peoples' citizenship rights is due to economic and political reasons, the fact that children and

young people as well as older people do not participate in the workforce (in the main), and the disenfranchisement of young people in political processes such as the exclusion of young people from voting. Another key reason why the abuse of RP in these institutional settings is occurring is because of inadequate domestic human rights protections. Australia is the 'only democratic nation in the world without a national charter of rights' and we argue that the ongoing 'absence of rights' (Doel-Mackaway, 2022, pp. 46, 238) for Indigenous children and young people, (the population of young people who are the most highly incarcerated demographic) is one of the key drivers of rights abrogations in juvenile detention settings. The lack of a national charter of rights to comprehensively embed Australia's international human rights law duties is also problematic for older people in care settings. At present, the Australian Government is inviting public submissions on the foundations of the new Aged Care Act, which is due to commence in July 2024. Human rights principles are to be at the centre of the legal framework, and the Act will include new system oversight and accountability arrangements. Nonetheless, there are concerns over the challenges associated with embedding human rights in the legislative framework, including questions concerning identification, regulation, enforcement and consequences for breach or non-compliance with the relevant human rights.

The ability to exert autonomy over decision-making and to exercise bodily autonomy are fundamental to individuals' rights to self-determination and control over their own bodies. We explore some of the complexities associated with these rights below before relating these to human rights violations in aged care and juvenile detention facilities via the misuse of RP.

The right to bodily autonomy and the use of restrictive practices

Generally speaking, any exercise of power over a person's autonomy – the authority to control one's own actions or mental state – is illegitimate unless it is authorised by the individual (Berofsky, 2005, p. 59). Cohen describes autonomy as 'that quality which describes the degree of mastery an individual exercises over his or her life' (Cohen, 1985, p. 146). While this chapter focuses on bodily autonomy and bodily integrity, there remains scope to explore the role of autonomy with respect to other areas impacting people in aged care and youth detention and, and in many respects they overlap. These include questions concerning guardianship and decision-making processes, privacy, access to information and communication, and sexual, cultural, religious, and spiritual autonomy.

Under the umbrella of personal autonomy, we can further distinguish bodily autonomy and bodily integrity – bodily autonomy means a person can make decisions about what happens in and to their body. Mackenzie describes this as 'bodily self-determination' (Mackenzie, 2001, p. 420). This is subject to any restrictions imposed by the law, for instance the law does not permit consent to be murdered or mutilated (*R v Brown (1993)* UKHL 19, [1994] 1 AC 212). Bodily integrity is expressed in the negative – it refers to someone's right not to have their body touched or interfered without their consent (Herring & Wall, 2017, p. 568). Circumstances raising questions of bodily autonomy and bodily integrity cover a vast spectrum of behaviours including restraint and RP, the receiving of medical treatments that are either unwanted, unnecessary or carry risks, and freedom from sexual assault. In these instances, both a person's autonomy and bodily integrity is interfered with (Herring & Wall, 2017, p. 568). The fulfilment of psychological needs for autonomy and agency is essential to a person's well-being. Retaining a sense of dignity, choice, and control over one's environment and care is a fundamental right, even if that choice is to assign decision making to someone else (Custers et al., 2012, p. 324). Hence, informed or supported decision making is the hallmark of consent.

Broad concepts of autonomy and individual agency encompass a wide range of concerns within the youth detention and aged care settings. This includes children's and young people's rights not to experience torture and inhumane treatment in detention settings in accordance with the *('CAT')* (United Nations, 1987). This also includes the common law right to bodily integrity and to be protected from battery. The Australian High Court found this includes the right not to have tear gas administered by a prohibited weapon (such as a CS fogger) (Binsaris v Northern Territory [2020] HCA 22, 2020).[3] The use of tear gas has long been deemed a form of chemical restraint and a form of restrictive practice (Trigwell, 1997). *Binsaris* highlights that detainees in juvenile detention are not prisoners, that youth detention centres are not prisons and that the administration of tear gas in this case amounted to the tort of battery.

Our discussion centres on the wrongful interference with bodily autonomy through the use of excessive or unlawful restraint and RP. These practices are highly controversial in both aged care and youth detention settings and have been used in these institutions a means of controlling people's behaviour (Baker et al., 2022; Clark, 2017; Grenfell, 2019). It is common for these practices to be rationalised and justified as necessary for the well-being of older or younger people (Lamont et al., 2020). Evidence given to a legislative committee inquiry into elder abuse in New South Wales observed that such justifications can act as a ruse for the infliction of abuse and the deprivation of bodily autonomy (General Purpose Standing Committee No 2, Report No 44, 2016, 71). The use of RP can lead to trauma, both physical and psychological, and sometimes death (Starr, 2022). The very nature of 'detention' is a purposeful deprivation of autonomy, however, the curtailment of liberty for the specific purpose of incarceration does not eliminate the right to bodily autonomy. Similarly, many aged care residents who live with dementia may lack capacity that can impair autonomous choice and consent may need to be given by an authorised person. Nonetheless, a diagnosis of dementia does not *presume* a lack of capacity (Barry, 2018), and even so, a lack of decision making capacity does not negate or eliminate the right to respect and dignity informing any consent when provided by a third party.

Similarly, when hearing about excessive use of RP in relation to children in juvenile detention, including as a means to manage detainee's behaviours, the NT Royal Commission "emphasised that the use of restraint for non-emergency reasons was contrary to human rights standards" (Spivakovsky et al., 2023, p. 222). The NT Royal commission recommended that the use of RP against children in detention should only occur under the following conditions:

- Use of force be permitted only in circumstances where all other measures have failed
- The use of force be permitted only to protect a detainee, another detainee, or another person from physical injury
- The use of force be applied only by persons trained and holding a current qualification in physical intervention techniques on children and young people
- The use of force be proportionate in the circumstances, and take into account the detainee's background, age, physical, and mental circumstances
- Mandate that a verbal warning be given before force is used, and the detainee given a reasonable period of time to comply, except in emergency circumstances
- The superintendent ensure any detainee injured by use of force is examined by a treating doctor or nurse and clinical notes be recorded (White & Gooda, 2017, p. 265).

When restrictive practices infringe bodily autonomy

The term 'restrictive practice' (RP) covers many different forms of interference with a person's bodily autonomy and integrity. In the context of aged care, the definition of a RP has been set out in the *Aged Care Act 1997* (Cth) under ss54-9 and 54-10. Section 54-9 (1) states:

> (1) A *restrictive practice* in relation to a care recipient is any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.

A restrictive practice therefore can include seclusion (forced confinement), chemical restraint (medication used for sedation rather than for prescribed medical condition), mechanical restraint (the use of jackets, straps, bedrails, ropes), physical restraint (where staff members use their bodies to restrain an individual). Some include within this definition environmental restraint, meaning a restriction of movement to all parts of a person's environment. Other forms of RP can be observed particularly in the case of people living with dementia in care facilities. Steele et al document instances where people are subjected to indirect restrictions, for instance being immobilised through deprivation of aids to mobility such as walkers, seating a person in a deep chair that they cannot get out of, placing a table in front of their chair, leaning a wheelchair back, or ensuring that the person is 'parked', for instance in front of television with little or no opportunity to move (Steele et al., 2020).

Restrictive practices are also used widely in youth detention settings and include, amongst others, physical restraint (the use of physical force); chemical restraint (such as forced medication or the use of tear gas) and mechanical restraint (such as the use of spit-hoods and restraint chairs) (Anthony, 2017; Fitz-Gibbon, 2018); segregation (Grant, 2017); solitary confinement (Naleemudeen & Mackay, 2021); and restriction of privileges and body searches.

Restrictive practices are a threat to bodily autonomy and integrity and this threat can constitute a breach of human rights, yet even when justified as 'necessary' are still problematic. In a detention setting movement is restricted and regulated. In aged care, the restriction of free movement is often justified on the basis of 'problematic' or 'challenging' behaviour' of those living with dementia. As Chelberg observes, this language of problematising individuals living with dementia also underpins the findings of the RCACQS in justifying 'lawful restrictive practices' (Chelberg, 2023). The improper use of RP is widespread in both aged care and youth detention settings and these abuses have attracted broad public condemnation in Australia. Our exploration below demonstrates many similarities between the misuse of RP against people in aged care and juvenile detention settings and the need for law reform in this area.

The use of restrictive practices in aged care and juvenile detention

Juvenile detention

In 2016, the Australian Broadcasting Corporation televised an episode of the current affairs program *Four Corners,* called 'Australia's Shame', showing graphic footage (filmed secretly) of heinous acts of state-based violence against, and torture of, Aboriginal children at the Northern Territory Don Dale Youth Detention Centre (Anthony, 2018b). This included the

misuse of many forms of RP against Aboriginal children including the use of spit hoods, tear gas, mechanical restraint chairs, sustained solitary confinement and refusing children access to toileting facilities (ABC, Australia's Shame, 2016; Doel-Mackaway, 2022, p. 184). The day after the Four Corners program aired the Australian Federal government announced the NT Royal Commission.

The program showed cruel and degrading uses of RP being used against Aboriginal children at the facility, including holding a 14-year-old child, Jake Roper, in solitary confinement in a dark cell for 17 continuous days. When he escaped in a highly agitated state through a door that had accidently been left open, he and several other children were tear-gassed after the riot squad with an Alsatian dog arrived at the scene (Doel-Mackaway, 2022, p. 4). When the riot squad arrived, and before Jake and the other children were tear gassed, Jake asked the officers in charge if they could talk 'things out' and said, 'I give up' to which he was told by the officers in charge that 'it was too late'(Anthony, 2017, p. 24). Then forgetting that closed-circuit television was in operation at the time in the detention centre, an officer, referring to Jake, said, '…the fucker should come through because when he comes through he'll be off balance [because he had been in solitary confinement in the dark] and I'll pulverise – I'll pulverise the little fucker. Oh shit, we're recording' (Anthony, 2018a, p. 65).

The Four Corners program showed many scenes where state officers at Don Dale assaulted, stripped naked and tear gassed children (ABC, Australia's Shame, 2016) – prohibited acts under article 1 of the CAT (United Nations, 1987). The effect of tear gassing 'constrained the children's breathing, blinded some of them, and made them feel as though they were going to die' (Anthony, 2018b, p. 259). One of the young people shown in the program was Dylan Voller, who was 13-years old at the time, and described to the NT Royal Commission his experience of being tear gassed, he said "I thought I was going to die" (Anthony, 2017, p. 24).

The NT Royal Commission report details the prevalence of the torture of children at Don Dale and shows evidence of the misuse of solitary confinement of children 'beyond the statutory limits in section 153(5) of the *Youth Justice Act* (NT)' (White & Gooda, 2017, vol 2a, p. 330), yet there have been no convictions for these offences against children (Doel-Mackaway, 2022, p. 6). Very few of the recommendations outlined in the final report from the NT Royal Commission have been implemented and Don Dale remains open despite calls for its closure.

The Australian Child Rights Taskforce identified more than 14 state and territory inquiries into violations of children's rights in detention that demonstrate 'widespread and systematic failings' on a national scale (Australian Child Rights Taskforce, 2018, p. 73). Since the NT Royal Commission, knowledge about endemic abuse and torture of children in juvenile detention have surfaced across youth detention centres throughout Australia including in Tasmania, Queensland, New South Wales, and Western Australia (Cunneen, 2022).

Unlawful use of a range of RP, particularly solitary confinement and the use of force, against children in Australian detention centres is not restricted to the NT – it is widespread across other jurisdictions and the UN Committee Against Torture has noted this as a 'serious concern' (United Nations Committee Against Torture, 2022, para. 37). In 2022 evidence emerged about the mistreatment of children living in detention centres in Western Australia (WA) and Tasmania (Mackay, 2023, p. 91). The National '*Disability Royal Commission*' heard evidence of the abuse of children in Banksia Hill Detention Centre and the unlawful use of solitary confinement and restraint (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2022, 6 October 2022; VYZ By Next Friend XYZ v Chief Executive Officer of the Department of Justice *[2022]* WASC 274). Further,

the misuse of solitary confinement and the use of force against children detained at the Ashley Youth Detention Centre in Tasmania were uncovered by the *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* (Transcript of Proceedings, 2022).

There is no shortage of inquiries into the treatment of child detainees, the problems are known, however, little action is taken to address these problems and perpetrators of such crimes against children are not brought to account. For example, despite the findings of the NT Royal Commission detailing grave abuses of children in detention no officers responsible for these offences have been prosecuted (White & Gooda, 2017). The conclusion we draw from political inaction (other than calling for investment via costly investigations and Royal Commissions) is that systemic abuses of children in detention persists and those responsible for such acts continue to do so with impunity.

Justifications for the use of RP against young people in detention settings centre on the notion that this is in their *best interests*, to for example, prevent a young person from harming themselves or others (Baker et al., 2022). The best interests principle is highly contentious and steeped in colonialism as well as adultist interpretations and definitions of what is in children's best interests(Blanchet-Cohen et al., 2023). Australia has one of the lowest ages of criminal responsibility in the world and this is one of the key drivers of children's engagement with the criminal justice system as children as young as 10 can be incarcerated. In concert with racist policing this has facilitated the hyper-incarceration of Indigenous children and their removal from Country and family through juvenile justice systems which has led to Indigenous children experiencing egregious harms and abuse by the state in detention (Cunneen, 2020). The United Nations Committee on the Rights of the Child have implored Australia to set a higher minimum age of criminal responsibility to a minimum of 14 years (United Nations Committee on the Rights of the, 2019, paras. 47–48).

Restrictive practices in aged care

Lamont et al argue that 'care' provided within institutional settings based on paternalism rather than a rights-based approach causes tension between the respect for autonomy and beneficence which justifies or legitimises duty of care (Lamont et al., 2020). They argue the duty is commonly used, in the health care environment at least, as a (misguided) legal justification for imposing non-consensual patient care and treatment where a belief that failing to uphold that duty makes them susceptible to legal action (Lamont et al., 2020).

Lack of government oversight particularly in relation to for-profit residential care providers has led to instances of cost-cutting and the overuse of unacceptable RP. Criticisms include poor coordination with the broader medical care sector (in particular during the COVID-19 pandemic), and workplace issues including poor staffing ratios, inadequate staff training (RCACQS, 2019, p. 207), particularly concerning rights-based rather than paternalistic approaches to care (RCACQS, 2019, p. 205). A common theme is use of RP for cost and labour efficiency, as explained by some people's experiences that were recounted by the Royal Commission into Aged Care Quality and Safety:

> Mrs Barbara Spriggs gave evidence about the experience of her husband, Mr Robert Spriggs, at the Oakden Older Persons Mental Health Service. Mrs Spriggs said Mr Spriggs received medicine to sedate him and that other patients 'appeared sedated'. In Mrs Spriggs's view, 'this was done by staff to ease the management of residents.
>
> (RCACQS, 2021, p. 98)

The *Royal Commission into Aged Care Quality and Safety* (RCACQS, 2019) was established by the Australian government in October 2018 in response to reports of appalling practices and egregious human rights abuses in care institutions across Australia. Its terms of reference were to inquire into the quality of aged care services provided to Australians, the extent to which those services meet the needs of the people accessing them, the extent of sub-standard care being provided, including mistreatment and all forms of abuse, the causes of any systemic failures, and any actions that should be taken in response. In its Interim Report, the Royal Commission found that the prevalence of physical restraint was 'very poorly documented' (RCACQS, 2019, p. 198) and that prescription rates of antipsychotics for people in residential aged care 'are significant and well above what might be expected' (RCACQS, 2019, p. 200). Professor Joseph Ibrahim, the Head of Health Law and Ageing Research at Monash University, gave evidence that 'the use of restraints generally is sadly still widely accepted, though people will all react abhorrently when they hear it, but it's still used' (RCACS, 2019, p. 198). The Royal Commission concluded that the ongoing and common use of RP in aged care was unacceptable, and reform was needed to address the level of severely substandard and unsafe care (RCACQS, 2019, p. 216). There are also issues associated with use of RP beyond what has been legally authorised by guardians. For example, evidence given during the RCACQS brought to light the following case study:

> I signed permission for [name removed] to have a seatbelt on his wheelchair, expecting it to be used only when he is in transit. I am assured that it will not be left on him all day, but every time I go to see him, at different times every day, he is strapped down. It looks like the staff, at each new shift, just leave him as they find him. He is trussed tightly around his legs and body, the strap in the middle biting deeply into him. This makes it extremely difficult for me to take him to the bathroom, or for him to eat at table. He has no exercise, and his mobility is affected. He is constantly agitated, asking me and others to set him free.
>
> (RCACQS, 2021, p. 99)

Insofar as RP are justified on the basis of responding to behaviours of concern, they can be used to enforce discriminatory assumptions about what is deemed 'normal' and 'ideal' behaviour (RCACQS, 2021, p. 99). For example, people who have been previously subject to physical or sexual abuse, or "forgotten Australians", those who have experienced institutionalised care as children may be retraumatised by some aspects of aged care, and their responses, for instance anger or aggression, interpreted as disproportionate (Brown-Young et al., 2020). Such behaviour can be used as a justification for restraint, and under s15F-F(c) of the *Quality of Care Principles (2014)*, may be considered an 'emergency' and override the circumstances set out in the Act for when RP can be used.

Regulating the use of restrictive practices in aged care

As mentioned above, RP are recognised in aged care as 'necessary' in certain circumstances where a person may be at risk or in danger, but their use without consent is unlawful. Amendments to the *Aged Care Act 1997* and the *Quality of Care Principles 2014* that regulate restrictive practice arrangements for approved residential aged care providers took effect on 1 July 2021. These amendments aimed to define RP, detail the requirements that providers must meet for the use of RP, introduce compliance notices and the potential for civil penalties if providers do not meet the requirements, and emphasise 'person centred' care. Under the *Aged Care Act 1997* and the *National Disability Insurance*

Scheme Act 2013, care providers must ensure the use of RP is in accordance with an individual behaviour support plan. These plans detail the circumstances when RP may be used and provide a mechanism of gaining informed consent based on a hierarchy of authority. Under section 15NB (2A) *Quality of Care Principles (2014)*, the use of a restrictive practice not in accordance with a care plan is a 'reportable incident'. Linda Steele describes this form of authorised restrictive practice as 'lawful violence' (Steele, 2017, p. 5), where violence to an individual is sanctioned by the state. There is further procedural uncertainty as the detail of authorisation has been left to the respective state and territory governments to legislate. This leaves aged care residents in a precarious position, as the types of people who are permitted to be 'substitute decision makers' remains undefined in some jurisdictions. At present there are questions concerning the extent to which the provider responsible for ensuring residents without capacity are informed, and whether an appropriate decision maker has been appointed. This makes those people in aged care who have been assessed as lacking capacity, wholly reliant on substitute decision makers appointed under guardianship laws. Additionally, Schedule 9 also grants an aged care provider 'immunity from civil or criminal liability in relation to the use of a restrictive practice in certain circumstances.' The explanation given for this measure is that it represents an interim solution until all state and territory governments enact legislation defining who can consent to a restrictive practice on behalf of an aged care resident deemed incapable of doing so. Erlings and Grenfell argue that the interlocking federal and state laws lack clarity regarding the consent procedure, which in turn impacts both the recipients and providers of care (Erlings & Grenfell, 2022, p. 22).

Additionally, the Serious Incident Response Scheme was introduced in mid-2021 and requires federal government subsidised residential aged care services to systematically report incidents including neglect, psychological or emotional abuse, financial coercion by staff, RP, and inappropriate sexual conduct. Unfortunately, more than 37,800 "serious incident notifications" were received by the Aged Care Quality and Safety Commission during last financial year, and while the statistics do not offer a breakdown detailing the use of RP, most of the notifications were related to the unreasonable use of force.

Conclusion

Grave violations of older people's and young people's rights are occurring in institutional settings in Australia. In this chapter we document some of the ways this is occurring and propose that part of the reason for this is due to underlying social and political disinterest in people at the beginning and end of the life cycle. We posit that a key driver of sociopolitical neglect of these groups of peoples' citizenship rights is due to economic and political reasons, children's and young people's as well as older people's non-participation in the workforce (in the main). We also argue that the ongoing 'absence of rights' for Indigenous children and young people, is one of the key drivers of rights abrogation, especially in a national context where there is no national human rights charter.

We situate institutional abuse in aged care and in youth detention settings as being grave human rights violations constituting, in many cases, acts of torture in contravention of Australia's duties under the CAT (United Nations, 1987) and are inconsistent with Australia's obligations under international human rights law including the 'CRPD' (United Nations, 2006) and the 'CRC' (United Nations, 1989). We note however, the lacuna in international human rights law regarding protections for older people the consequences of which have serious implications as there is no overarching international instrument that require states to adhere to with respect to the promotion, protection and fulfilment of older

people's rights. We argue that the continued tolerance of these practices only reinforces the dehumanisation of both the detained child and aged care resident, and the perpetuation of the social disinterest in people at the beginning and end of the life cycle.

This chapter sought to highlight many serious legal problems in Australia concerning the use of RP in both aged care and youth detention settings. The correlations we draw between these two settings highlight the urgency of addressing the abuses of people at the early and later stages of their lives living in institutional settings, at times in the life cycle when the most care is necessary and should be expected and delivered. Instead, this chapter cites instances of grave human rights abuses across various institutions. These abuses are neither isolated nor accidental but rather symptoms of ongoing structural discrimination against young people and older people in institutional settings. Often such abuse is carried out behind closed doors, and even when revealed, accountability for these offences is continuously evaded.

Notes

1 Thalia Anthony. (2017). NTER took the children away. *Arena Magazine*, 21, 24 quoting testimony Dylan Voller gave at the NT Royal Commission into Juvenile Justice and Child Protection about when he was placed in a mechanical restraint chair at Don Dale Youth Detention Centre at 13 years old.
2 The human rights standards applicable to juvenile justice are: *Convention on the Rights of the Child* (1989) (CRC), Arts 37 and 40; *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (the 'Beijing Rules'); *Standard Minimum Rules for Non-Custodial Measures* (1990) (the 'Tokyo Rules'); *Guidelines for the Prevention of Juvenile Delinquency* (1990) (the 'Riyadh Guidelines'); and *Rules for the Protection of Juveniles Deprived of their Liberty* (1990) (the 'Havana Rules').
3 In this case the majority of the High Court of Australia (made up of Justices Gordon and Edelman) found that the use of the CS gas (a form of tear gas) had been unlawful because it was administered using a CS fogger, a prohibited weapon under the *Weapons Control Act* (NT) 2001.

References

Anthony, T. (2017). NTER took the children away. *Arena Magazine*, *148*, 21–25.
Anthony, T. (2018a). Growing up surplus to humanity: Aboriginal children in the Northern territory. *Arena Journal*, *51/52*, 40.
Anthony, T. (2018b). 'They were treating me like a Dog': The colonial continuum of state harms against indigenous children in detention in the Northern territory, Australia. *State Crime Journal*, *7*(2), 251–277.
Australian Child Rights Taskforce. (2011). Listen to Children: Child Rights NGO Report Australia". https://childrightstaskforce.org.au/wp-content/uploads/2014/06/Listening-to-children-Report-2011-colour.pdf.
Australian Child Rights Taskforce. (2018). The Children's Report: Australia's NGO Coalition Report to the United Nations Committee on the Rights of the Child.
Australian Human Rights Commission. (2021). 'What's age got to do with it?' https://humanrights.gov.au/our-work/publications
Baker, J., Berzins, K., Canvin, K., Kendal, S., Branthonne-Foster, S., Wright, J., McDougall, T., Goldson, B., Kellar, I., & Duxbury, J. (2022). Components of interventions to reduce restrictive practices with children and young people in institutional settings: The contrast systematic mapping review. *Health Services and Delivery Research*, *10*(8). https://doi.org/10.3310/YVKT5692
Barry, L. (2018). He was wearing street clothes not pyjamas': Common mistakes in Layers' assessment of legal capacity for vulnerable older clients. *Legal Ethics 21*, 3–22.
Berofsky, B. (2005). Autonomy without free will. In J. Taylor (Ed.), *Personal autonomy: new essays on personal autonomy and its role in contemporary modern philosophy* (pp. 58–86). Cambridge University Press, 2009.

Binsaris v Northern Territory [2020] HCA 22.
Blanchet-Cohen, N., Cooper, A., & Doel-Mackaway, H. (2023). (Re)imagining Children's participatory rights with decolonial learning. *O Social Em Questão*, *2*(56), 61–88.
Browne-Yung, K., O'Neil D., Walker R., Smyth A., Putsey P., Corlis M., Laver K., & Fernandez E., & Cations M. (2020). 'I'd rather die in the middle of a street': Perceptions and expectations of aged care among Forgotten Australians. *Australasian Journal on Ageing*, *40*(2), 101–227.
Chelberg, K. (2023). 'Vulnerable monsters': Constructions of dementia in the Australian Royal Commission into aged care. *International Journal for the Semiotics of Law* online publication *36*, 1557–1580. https://doi.org/10.1007/s11196-023-09979-w
Clark, A. B. (2017). Juvenile solitary confinement as a form of child abuse. *The Journal of the American Academy of Psychiatry and the Law*, *45*(3), 350–357.
Cohen, E. S. (1985). Autonomy and paternalism: Two goals in conflict. *Law, Medicine and Health Care*, *13*(4), 145.
Connors, J., Zermatten, J., & Panayotidis, A. (2007). *18 Candles: The convention on the rights of the child reaches majority*. Institut International des Droits de L'enfant (IDE).
Crawford, K. (2007). *Adult themes: Rewriting the rules of adulthood*. Macmillan Publishers Aus.
Cunneen, C. (2020). *Arguments for raising the minimum age of criminal responsibility: Comparative youth penalty project research report*. Jumbunna Institute for Indigenous Education and Research, UTS.
Cunneen, C. (2022). Youth justice and children's rights. In *Critical perspectives on human rights law in Australia*. Thomson Reuters.
Desai, M. (2010). *A rights-based preventative approach for psychological well-being in childhood*. Springer.
Doel-Mackaway, H. (2022). *Indigenous Children's right to participate in law and policy development*. Routledge.
Erlings, E., & Grenfell, L. (2022). Restrictive practices: Disentangling the laws of consent, guardianship and restrictive practices. *The Bulletin (Law Society of South Australia)*, *44*(2), 22–25.
Fitz-Gibbon, K. (2018). The treatment of Australian children in detention: A human rights law analysis of media coverage in the wake of abuses at the Don Dale detention centre. *UNSW Law Journal*, *41*(1), 100–129.
Grant, E. (2017). The use of segregation for children in the Northern Territory youth detention system: Submission to the Royal Commission into the protection and detention of children in the Northern Territory.
Grenfell, L. (2019). Aged care, detention and OPCAT. *Australian Journal of Human Rights*, *25*(2), 248–62.
Herring, J., & Wall, J. (2017). The nature and significance of the right to bodily integrity. *Cambridge Law Journal*, *76*(3), 566–88.
Hockey, J. L., & James, A. (1993). *Growing up and growing old: Ageing and dependency in the life course*. *Theory Culture & Society*. Sage in association with Theory, Culture & Society, School of Health, Social and Policy Studies, University of Teesside.
Kesby, A. (2017). "Narratives of aging and the human rights of older persons." *Human Rights Review 18*, 371–393.
Lamont, S., Stewart, C., & Chiarella, M. (2020). The misuse of 'duty of care' as justification for non-consensual coercive treatment. *International Journal of Law and Psychiatry*, *71*. https://doi-org.ezproxy.lib.uts.edu.au/10.1016/j.ijlp.2020.101598
Locke, J. (1700). *An essay concerning human understanding*. Eliz. Holt.
Mackay, A. (2023). Preventing torture and other cruel, inhuman or degrading treatment of children in detention in Australia. *Alternative Law Journal*, *48*(2), 90–96. https://doi.org/10.1177/1037969X231157811
Mackenzie, C. (2001). On bodily autonomy. In S. Kay Toombs (Ed.), *Handbook of phenomenology and medicine. Philosophy and Medicine* (pp. 417–39). Springer Netherlands. https://doi.org/10.1007/978-94-010-0536-4_22
McSherry, B., & Maker, Y. (2020). *Restrictive practices in health care and disability settings: Legal, policy and practical responses*. Routledge.
Meldrum-Hanna, C., & Ferguson, S., dirs. (2016). *'Australia's Shame', Four Corners (Australian Broadcasting Corporation, 25 July 2016)*. http://www.abc.net.au/4corners/australias-shame-promo/7649462

Milne, B. (2013). *The history and theory of children's citizenship in contemporary societies*. Springer.
Morgan, M.L. (1968). *Classics of moral and political theory*. Hackett Publishing.
Naleemudeen, M. A., & Mackay, A. (2021). Locking up the locked up: Solitary confinement of children and young people in Victoria. *Australian Journal of Human Rights*, *27*(1), 78–96.
Nay, R., & Koch, S. (2006). Overcoming restraint use: Examining barriers in Australian aged care facilities. *Journal of Gerontological Nursing 32*(1), 33–38.
Office of the High Commissioner for Human Rights (OHCHR) (2021). Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older Persons (2021)
Poffé, L. (2015). Towards a new United nations human rights convention for older persons? *Human Rights Law Review*, *15*(3), 591–601. https://doi.org/10.1093/hrlr/ngv022
Rousseau, J.-J. (1979). *Emil (1762), trans. by Allen bloom*. Basic Books, Inc.
Royal Commission into Aged Care Quality and Safety. (2019). Interim Report.
Royal Commission into Aged Care Quality and Safety. (2021). Final Report.
Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. (2022). Seventh progress report.
Spivakovsky, C., Steele, L., & Wadiwel, D. (2023). *Research report – Restrictive practices: A pathway to elimination*. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. https://disability.royalcommission.gov.au/system/files/2023-07/Research%20Report%20-%20Restrictive%20practices%20-%20A%20pathway%20to%20elimination.pdf
Starr, L. (2022). Restrictive practice – A change in name only. *Australian Nursing and Midwife Journal*, *27*(9), 31.
Steele, L. (2017). Lawful institutional violence against disabled people. *Precedent: Journal of the Australian Lawyers' Alliance*, *143*, 4–8.
Steele, L., Carr, R., Swaffer, K., Phillipson, L., & Fleming, R. (2020). Human rights and the confinement of people living with dementia in care homes. *Health and Human Rights Journal*, *22*(1), 7.
Transcript of Proceedings. (2022). Commission of inquiry into the Tasmanian Government's Responses to child sexual abuse in institutional settings.
Trigwell, P. (1997). CS gas has been used as chemical restraint in mentally ill person. *BMJ*, *314*(7078), 444.
United Nations. (1979). Convention on the elimination of all forms of discrimination against women (CEDAW) opened for signature, 18 December 1979, A/RES/34/180 (Entered into Force, 3 September 1981).
United Nations. (1987). Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted and opened for signature, ratification and accession by general assembly resolution 39/46 of 10 December 1984 (Entered into Force, 26 June 1987). https://www.ohchr.org/sites/default/files/cat.pdf
United Nations. (1989). Convention on the rights of the child, opened for signature, 20 November 1989, 44 UNTS 25 (Entered into Force, 2 September 1990).
United Nations. (2002). Optional protocol to the convention against torture and other cruel, inhuman or degrading treatment or punishment, 18 December 2002, A/RES/57/199. Accessed 28 July 2023 from https://www.ohchr.org/sites/default/files/cat-one.pdf
United Nations. (2006). Convention on the rights of persons with disabilities. Adopted 13 December 2006, A/RES/61/106, Entered into Force, 3 May 2006.
United Nations Committee Against Torture. (2022). Concluding observations on the sixth periodic report of Australia, UN Doc CAT/C/AUS/CO/6 (5 December 2022).
United Nations Committee on the Rights of the. (2019). United Nations Committee on the rights of the child, concluding observations on the combined fifth and sixth periodic reports of Australia, CRC/C/AUS/CO/5-6, 1 November 2019.
Victorian Ombudsman. (2017). 'Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre' https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Implementing-OPCAT-in-Victoria-report-and-inspection-of-Dame-Phyllis-Frost-Centre.pdf
VYZ By Next Friend XYZ v Chief Executive Officer of the Department of Justice [2022] WASC 274. (2022).
White, M., & Gooda, M. (2017). *Royal commission into the detention and protection of children in the Northern territory, final report*. Commonwealth of Australia.
Wilson, K., & Wilks, J. (2013). Research with indigenous children and young people in schools: Ethical and methodological considerations. *Global Studies of Childhood*, *3*(2), 142–152.