

Crimes Amendment (Prohibiting Shackling During Childbirth) Bill 2026 (Cth)

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About the Justice and Equity Centre

The Justice and Equity Centre stands for a society that is fair and free from discrimination and disadvantage. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we use the law and policy advocacy to challenge injustice and inequality. We do this through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We collaborate and partner in our work with people and communities who are experiencing marginalisation and disadvantage and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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Recommendations

Recommendation 1

The Committee support the passage of the Bill. The Commonwealth Parliament should legislate to prohibit the use of restraints on persons while giving birth, in labour, immediately before entering labour, or immediately after giving birth ('during the birthing process').

Recommendation 2

If use of restraints on persons during the birthing process is not prohibited by passage of the Bill, the Commonwealth Government should introduce measures to make use of restraints on persons during the birthing process an event which requires compulsory contemporaneous reporting.

1. Introduction

The Justice and Equity Centre ('JEC') welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Legislation Committee's ('Committee') inquiry into the Crimes Amendment (Prohibiting Shackling During Childbirth) Bill 2026 ('Bill').

We welcome and support the objectives of the Bill, which seeks to amend the *Crimes Act 1914* (Cth) ('Crimes Act') by inserting a new section 87A, which would prohibit the restraint of persons in custody while they are giving birth, while in labour, immediately before entering labour, or immediately after birth ('during the birthing process'). The section would apply to a person who is detained in prison, detained in hospital, or otherwise in custody.

Prohibiting the use of restraints during the birthing process is an appropriate step to safeguard the rights to life and the liberty, security and dignity of persons in detention in Australia and ensure Australia's compliance with international human rights law. The Bill also contributes to ending a practice which disproportionately harms First Nations people, given the overrepresentation of Aboriginal and Torres Strait Islander people in prison and youth detention populations in Australia.

The JEC acknowledges that it may be appropriate to incorporate certain strictly limited exceptions into the prohibition in the proposed s 87A. For example, where it is considered necessary on reasonable grounds to prevent serious injury or death to the person being restrained or another person.

We suggest the Bill would benefit from clarification of its key terms, including 'immediately' and 'otherwise in custody'. The terms 'immediately before entering labour' and 'immediately after giving birth' are ambiguous, and may not capture the use of restraints on patients who do not enter spontaneous labour, for example those for whom labour is induced and those who may receive planned caesarean section procedures.

We also note that the Bill does not currently prohibit the use of restraints on persons during transport to medical facilities prior to the onset of labour. The objectives of the Bill would benefit

from clarifications of these terms, particularly considering the risk of harm that use of restraints during transport may pose.

We also highlight the lack of reporting on the use of restraints on pregnant persons in Australia, which makes it challenging to accurately evaluate the occurrence of the issue. Whether or not the Bill is progressed, the Commonwealth Government should introduce a framework for the compulsory contemporaneous reporting and independent review of any use of restraints on persons during the birthing process.

Our support for the Bill is informed by expert legal advice received by the JEC and the National Aboriginal and Torres Strait Islander Legal Services ('NATSILS') in 2025 which advised that the Australian Government has the power to legislate minimum standards for the treatment of children in state and territory criminal legal systems, in reliance on the external affairs power and Australia's obligations under international treaties. A copy of that advice (the 'National Child Rights Advice'), prepared by Kate Eastman AM SC and Emma Dunlop of counsel, is at **Annexure A**. We consider that a similar constitutional position applies with respect to this Bill.

2. The need for the Bill

2.1 Use of restraints may cause harm to parent and child

Use of restraints can cause significant harm to a pregnant person and/or their child during pregnancy, labour, childbirth, and the post-natal period.

In the prenatal period, use of restraints increases the risk and severity of falls, as restraints create challenges for balance and may interfere with the ability of the restrained person to break their fall and protect their abdomen if a fall does occur, increasing the risk of hemorrhage, placental abruption and stillbirth.¹ This risk is particularly acute during transport to medical facilities, which is a circumstance where use of restraints may be considered 'routine'.

In the periods immediately prior to entering labour and during labour, restraints can prevent necessary movement, which may interfere with the progression of labour and lead to birth complications.² Use of restraints during this period may also unnecessarily and dangerously delay assessment, diagnoses and intervention from health care practitioners, including delaying medical practitioner ability to commence lifesaving interventions for obstetric emergencies like emergency cesarean sections.³

¹ Ginette G Ferszt, Michelle Palmer, Christine McGrane, 'Where Does Your State Stand on Shackling of Pregnant incarcerated Women?' (2018) 22(1) *Nursing for Women's Health* 17–23, cited in Veronic Brawley and Emma Kurnat-Thoma, 'Use of Shackles on Incarcerated Pregnant Women' (2023) 53 *Journal of Obstetric, Gynaecologic & Neonatal Nursing* 79, 82; Office of the Inspector of Custodial Services, *Routine Restraint of People in Custody in Western Australia* (May 2020) v ('*Routine Restraint in Custody in WA*').

² Brawley and Kurnat-Thoma (n 1) 82.

³ Ibid.

In the post-natal period, use of restraints increases the already elevated risk of thromboembolic events (blood clots).⁴

Use of restraints at any time during the birthing process also may create new trauma for the individual being restrained, especially if that person has previously experienced abuse or torture.

2.2 Use of restraints has potential to disproportionately harm First Nations people

The use of restraints during the birthing process exacerbates the existing health risks of people in custody, causing disproportionate harm to Aboriginal and Torres Strait Islander persons in particular.

Women who are incarcerated while pregnant are more likely to experience poorer birth outcomes than those who become pregnant after prison, including an increased risk of birthing babies of low birthweight.⁵ The use of restraints during the birthing process exacerbates these risks, as persons with pre-existing risks of poor birth outcomes are exposed to the additional risks associated with use of restraints during transport, labour, childbirth and the post-natal period.⁶

These risks may be particularly acute for Aboriginal and Torres Strait Islander women, who are overrepresented in prison populations in Australia, more likely to be incarcerated during pregnancy,⁷ and two times more likely to experience low birthweight than non-Indigenous Australians.⁸ As Aboriginal and Torres Strait Islander women and girls are the fastest growing prison population in Australia,⁹ the prohibition contemplated by the Bill is necessary to prevent a harm that will disproportionately impact First Nations people.

2.3 Existing guidelines are insufficient to prevent use of restraints during childbirth

Despite the harms caused by restraints during the birthing process, there is currently no specific legislative prohibition against the practice in any jurisdiction in Australia.

The *Guiding Principles for Corrections in Australia*,¹⁰ provide that instruments of restraint are not used on prisoners during and immediately following childbirth unless an assessment identifies a safety risk that cannot be otherwise managed.¹¹

⁴ Brawley and Kurnat-Thoma (n 1) 82.

⁵ Caitlin McMillen Dowell et al, 'Maternal Incarceration, Child Protection, and Infant Mortality: A Descriptive Study of Infant Children of Women Prisoners in Western Australia' (2018) 6(1) *Health Justice* 2, cited in The Australian Institute of Health and Welfare, *The Health of people in Australia's Prisons 2025* (Web Report) 27 September 2026.

⁶ Brawley and Kurnat-Thoma (n 1) 82.

⁷ McMillen Dowell et al (n 5) 6.

⁸ Ibid 2.

⁹ Australian Law Reform Commission, *Pathways to Justice- An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) 27 March 2018 [12.18].

¹⁰ Government of Australia, *Guiding Principles for Corrections in Australia* (Report) (2025) ('*Guiding Principles*').

¹¹ *Guiding Principles* (n 10) Principle 2.1.16.

The Guiding Principles are applied by Australian states and territories.¹² Despite this, records demonstrate that use of restraints during labour has occurred outside of the circumstances described by the guidelines. In 2023, a woman in custody in Victoria was handcuffed during active labour, due to perceived ambiguity amongst custodial staff as to her security rating.¹³ This reflects observations that where there is ambiguity as to whether restraints should or can be used, the default is often to apply restraints.¹⁴

Without legislative prohibition, the current guidelines-based framework for restricting the use of restraints during childbirth is insufficient to prevent the practice from occurring. The lack of compulsory reporting of the practice also means it is likely there have been more occurrences that have not been publicly reported on. To prevent unnecessary use of restraints during childbirth and associated harm, we support passage of Bill. We further recommend the Government introduce measures to require compulsory contemporaneous reporting of any use of restraints on persons during the birthing process.

3. Australia's obligations under international law

3.1 Relevant international standards and treaties to which Australia is a signatory

Australia has signed and ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'),¹⁵ and the International Covenant on Civil and Political Rights ('ICCPR').¹⁶ Both of these treaties impose relevant obligations upon Australia with respect to the use of restraints during the birthing process. The full text of each of the treaty articles referred to in this submission is at **Annexure B**.

The CAT imposes on Australia an obligation to prevent acts of torture by any person (Article 2) and cruel, inhuman or degrading treatment when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 16(1)). It also obliges Australia to ensure all acts of torture or ill treatment are offences under its criminal law (Article 4), and keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture or ill treatment (Article 11).

The United Nations Committee Against Torture has recognised that medical treatment involving reproductive decisions is one of particular contexts in which women are at risk of torture or ill

¹² Australia, Seventh Periodic Report Under Article 40 of the Covenant (CCPR/C/AUS/7), UN Doc CCPR/C/AUS/7 (26 August 2026) [196].

¹³ Victorian Government, *Victorian Government response to the Cultural Review of the Adult Corrections System* (Report) (22 March 2023), 716.

¹⁴ *Routine Restraint in Custody in WA* (n 1) 1.

¹⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratified 8 August 1989).

¹⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified 13 August 1980).

treatment.¹⁷ The Committee has also expressed concern about the use of restraints during childbirth in the United States, and urged the US to introduce measures to end the practice in order to achieve compliance with international law and standards.¹⁸ In such circumstances, it is likely that use of restraints during the birthing process is also contrary to Australia's obligations under CAT Articles 2, 11 and 16(1).

The ICCPR obliges Australia to take necessary steps including to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ICCPR (Article 2(2)), including that every person has the right to liberty and security of the person (Article 9) and all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Article 10). In light of the well documented risks associated with the use of restraints during the birthing process, the disproportionate impact these risks carry for persons in custody and the insufficiency of Australia's guidelines based approach to prohibiting the practice, legislative prohibition may be required to ensure Australia's compliance with the ICCPR Articles 2(2), 9 and 10.

Non-binding international standards are also relevant to the Bill, particularly the United Nations Standard Minimum Rules for the Treatment of Prisoners ('the Nelson Mandela Rules') and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules'). Both the Nelson Mandela Rules and the Bangkok Rules expressly provide that instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth.¹⁹

3.2 National Child Rights Advice

As the National Child Rights Advice at **Annexure A** explains, section 51(xxix) of the Australian Constitution (the 'external affairs power') provides the Commonwealth Government with the power to enact national legislation to implement a treaty obligation binding on Australia.

To be characterised as a law with respect to external affairs, a law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.²⁰ The test for determining whether the law is reasonably capable of being considered as giving effect to the relevant treaty involves a consideration of the object for the advancement or attainment of which the law was enacted.²¹

¹⁷ Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of the Person)* 112th sess, UN Doc CCPR/C/GC/35) (16 December 2014) ('*General Comment No 35*') [5]; UN Committee against Torture General Comment No. 2, 23

¹⁸ Committee against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 36th sess, UN Doc CAT/C/USA/CO/2 (25 July 2006) [33].

¹⁹ *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (adopted 17 December 2015) ('*the Nelson Mandela Rules*') Rule 48(2); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Rule 24.

²⁰ *Victoria v Commonwealth* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

²¹ *Ibid.*

Given that use of restraints during labour, childbirth and immediately after childbirth is expressly prohibited by international standards, and understood to be contrary to a number of international law obligations binding on Australia, legislative prohibition of that practice gives effect to those obligations.