

## Cruel punishments in Australia

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### Abstract

The Eighth Amendment of the United States Constitution prohibits the government from subjecting individuals to ‘cruel and unusual punishments.’ This article briefly discusses the law and practice in Australia with regard to cruel and unusual punishments.

## Cruel punishments in Australia

### Introduction

People around the world are generally aware that ‘cruel and unusual punishments’ are forbidden by law in the United States. This prohibition imposed on the federal government falls under the Eighth Amendment of the US Constitution, which was ratified in 1791 as part of the Bill of Rights. The Amendment states: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ The Fourteenth Amendment of the Constitution extends the operation of the prohibition to state governments, their political sub-divisions and their laws. Australia does not have a federal Bill of Rights and there is no explicit prohibition on cruel and/or unusual punishment in the Australian Constitution. This article briefly discusses the law and practice in Australia with regard to cruel and unusual punishments.

### How ‘cruel and unusual punishments’ has been interpreted in the US

The Constitutional amendments have been interpreted to bar certain punishments for particular offences (for example, the death penalty for non-murder offenses is prohibited,

although the death penalty for treason is yet to be settled<sup>1</sup>) and to bar certain punishments for particular classes of offenders (for example, the death penalty for people with an intellectual disability or children/young people who have committed an offence). Because the Amendment reflects what the general US population considers egregious punishment, what constitutes cruel and unusual punishments has been interpreted as being changeable as American society changes. For example, in Amdt8.4.9.4 *Gregg v. Georgia* and *Limits on Death Penalty*, the justices opined that ‘reenactment of capital punishment statutes by thirty-five states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction.’

Following two Supreme Court decisions in the 1960s<sup>2</sup>, there was some confusion about whether the prohibition on cruel and unusual punishments had a substantive element that could limit criminal laws, but a 2024 Supreme Court decision<sup>3</sup> clarified that the Eighth Amendment had historically been concerned with the methods, modes and proportionality of punishment, and that the prohibition did not extend to what criminal laws the government had authority to enact.

Because of protections in the Magna Carta and the English Bill of Rights of 1689 that were adopted in the colonies, the Eighth Amendment was also, from the beginning, interpreted to require a level of proportionality between crime and penalty.

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<sup>1</sup> The death penalty for treason or aiding enemies is authorized under 18 U.S.C. § 2381 and the Espionage Act of 1917. The death penalty is, however, rarely applied, with the last execution for treason occurring in 1862 (William Bruce Mumford) and the last execution for conspiracy to commit espionage in 1953 (Julius and Ethel Rosenberg).

<sup>2</sup> *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968)

<sup>3</sup> *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024)

### **‘Cruel and unusual punishments’ in Australia**

A federal Bill of Rights or a direct prohibition of cruel and unusual punishments in the Constitution may be absent in Australia, but the nation does have such a prohibition expressed in a variety of statutes and treaties.

Three state/territory jurisdictions have a human rights Act/Charter that provides for protection from torture and cruel, inhuman or degrading treatment. ACT has section 10 of the *Human Rights Act 2004*; Queensland has section 17 of the *Human Rights Bill 2018*; and Victoria has section 10 of the *Charter of Human Rights and Responsibilities Act 2006*. Other sections in these Acts are related, such as requirements for humane treatment when deprived of liberty (sections 19, 30 and 22 in ACT, Queensland and Victoria respectively).

Capital punishment has been abolished in all jurisdictions. Apart from the state legislation, the death penalty is prohibited in Australia by the *Death Penalty Abolition Act 1973* (Cth) and the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) bars any state or territory from reintroducing it. Australia is also bound by the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, committing it to global abolition of the death penalty.

Torture is criminalised, including under Division 274 of the *Commonwealth Criminal Code Act 1995*. The law applies to acts committed by a public official or someone acting in an official capacity, or at the instigation of such a person, and applies to acts in Australia, as well as, with the consent of the Commonwealth Attorney-General, to acts committed outside Australia. The perpetrator may be of any nationality. Sections 268.13, 268.25 and 268.73 of the *Criminal Code* also criminalise torture and severe infliction of pain or suffering when perpetrated as a crime against humanity or a war crime. Protection from torture or cruel, inhuman or degrading treatment are also provided under section 23Q of the *Crimes Act 1914*, section 105.33 of the *Criminal Code 1995* and section 34T of the *Australian Security Intelligence Organisation Act 1979* for people under arrest; in custody or detained

under a preventative detention order; or being questioned in relation to terrorism offences respectively.

Australia is also a signatory to international treaties that prohibit torture and cruel, inhuman or degrading treatment or punishment. The most important provisions are Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and Articles 1-3, 13-16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

### **Potential examples of cruel, inhuman or degrading treatment or punishment in Australia**

Torture is generally defined as involving the intentional infliction of severe mental/physical pain or suffering on a person for certain defined purposes (Article 1 of CAT). Conduct not meeting this threshold of torture may be regarded as cruel, inhuman or degrading treatment or punishment (or 'ill treatment') (Article 16 of CAT). The following examples of seemingly cruel, inhuman or degrading treatment or punishment in Australia are now provided.

#### **Example 1: Deportation**

Removing a person from Australia to a country where death, torture, or cruel/ inhuman/ degrading treatment/punishment is a possibility for that person upon return may meet the threshold. One example is of a family that fled from Colombia to Australia, but were appealing a notice of intention to deport in 1999. The father was a union leader before leaving and all family members provided considerable evidence of multiple threats being made on their lives by the government and drug cartels. The appeal was dismissed so there was the real prospect that the family would return to real threats of torture or death.

#### **Example 2: Extradition**

Extradition is a similar example to the first one. Australia's *Extradition Act 1988* expressly prohibits extradition to a country where there is a "real risk" of the death penalty. An Australian can be extradited to a country with the death penalty, but only if the requesting

country provides a binding undertaking that the death penalty will not be applied, or if a sentence of death is imposed, that it will not be carried out. Likewise, Australia operates under the principle of non-refoulement, which prevents the government from extraditing an Australian citizen to a country where there is a real risk of 'irreparable harm', including torture or inhuman treatment, as this is prohibited under both domestic law and international obligations. One example, though, is that of Dan Duggan, a former US Marine Corps pilot and instructor who became an Australian citizen in 2012 and renounced his US citizenship. From 2014, Dan worked in Beijing for a South African flight school. Dan was arrested in Australia in 2022 pursuant to an American warrant. The flight school denied the American accusations, saying that all of Duggan's instructions were legal and followed international norms, adding that it followed a "code of conduct" to make sure that no material would be classified or considered sensitive from a legal or operational standpoint. Dan also denied the accusations, saying he took the word of the flight school that he had trained only civilians – student test pilots - and never military pilots. Dan has now been held in maximum security in Australia without Australian charges for 3.5 years and his appeal against extradition has just been dismissed. He believes that his prosecution was political and due to rising tensions between the US and China. "It's solely because this is a political thing — anything to do with China is considered bad now," he said. Dan's legal team is arguing that he is unlikely to receive a fair trial in the US; that the likely "cruelly long sentence" would represent "gross injustice"; and that ASIO unlawfully lured Dan to Australia by offering clearance for an Australian aviation security identification card. When Dan returned to Australia, he was arrested and the ASIO clearance revoked. The use of such a lure is illegal under Australian law. They also argue that Dan was indicted in the US under the first Trump administration, "before Australia had comparable laws to the United States" regarding training foreign militaries. It therefore did not become explicitly illegal for Australians to train foreign militaries until 2018. Dan faces up to 65 years in prison on the charges, so there appears to be the risk of severe disproportionality between what he has done wrong (if anything) and the sentence that could be imposed in the United States. (refer to Dan's [full story](#) in *Australian Prison Reform Journal* 5(3)-3).

### **Example 3: Unnecessarily cruel and degrading arrests**

An inmate has been counting down the days until his release for the past two years. He has arranged to have his sweaty street clothes that he was arrested in cleaned in the prison laundry, and all his family is driving four hours to greet him when he exits. The guards say 'See you soon' and the last gates swing open. There's his beloved smiling family, then two police officers step in between and arrest the releasee for additional offenses. The releasee and his family burst into tears. The sheer cruelty of saving up the re-arrest for this moment of family elation is clear. The re-arrested person can only interpret this humiliating treatment as police vindictiveness and it will affect his mental health and prospects for rehabilitation.

The arrest of former Australian Special Air Service (SAS) corporal and Victoria Cross recipient, Ben Roberts-Smith appears to be another example of cruel and degrading treatment, whether the charges are later found to be justified or not. Ben had repeatedly offered to surrender himself privately prior to his humiliating public arrest at Sydney Airport on April 7, 2026. He was arrested by the Australian Federal Police at Sydney Airport in front of his twin teenage daughters, a scene described by supporters as 'deliberate and designed for maximum theatre' and a 'national disgrace.' Ben made a plea to the media for privacy for his children, 'who have already unfortunately suffered through a deliberate sensational arrest... an unnecessary spectacle.' A further issue is how the media came to be present when Ben was arrested. At this stage, it is unknown whether the Australian Federal Police (AFP) tipped off the reporters. It may be noted that it is no longer possible for the Australian media to be tipped off by listening to police radio. Federal, state and territory police forces now use highly secure, encrypted digital radio networks. Decrypting these signals is extremely difficult, and attempting to do so or possessing specialized equipment to bypass these systems is highly illegal. If an AFP officer did tip off the media, especially without formal authorisation, there is the possibility that the nationally broadcast arrest would prejudice a future jury pool or otherwise compromise the right to a fair trial, which could lead to a stay of court proceedings and legal challenges. An unauthorised tip off could also

be considered a breach of the AFP Code of Conduct and result in disciplinary action or dismissal. Unauthorised disclosure could also be dealt with as corruption and investigated by the National Anti-Corruption Commission (NACC), or be a criminal offence under ss 122.1-122.4A of the *Criminal Code Act 1995 (Cth)*.

A further example can be seen when people are arrested in the middle of the night and dragged in their underwear before the TV news cameras to the police van (the media again tipped off in some way by police). This contravenes the detainee's human rights, including those relating to human dignity, privacy, and procedural fairness. While there may be reason for applying handcuffs without allowing the arrestee to get dressed—for example, if the arrestee is resisting arrest or there is some other danger—the arrestee should subsequently be dressed or at least covered for the sake of avoiding degrading treatment.

#### **Example 4: Cross-jurisdictional 'double jeopardy'**

The legal principle of 'double jeopardy' applies in both the United States and Australia. In the US, double jeopardy is a constitutional right protected under the Fifth Amendment. In Australia, double jeopardy laws generally stem from the ancient common law doctrines of *autrefois acquit* (previously acquitted) and *autrefois convict* (previously convicted). They are also found in legislation.<sup>4</sup>

Double jeopardy prohibits a person from being prosecuted or punished twice for the same offence after a valid acquittal or conviction. This right not to be tried or punished more than once for the same offence does not, however, apply across state borders, nor between state and federal governments. The United States is particularly strong on this under the 'dual sovereignty' doctrine, where each state and the federal government are treated as separate

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<sup>4</sup> E.g. Commonwealth: *Australian Crime Commission Act 2002*, Section 35A; Australian Capital Territory (ACT): *Human Rights Act 2004*, Section 24; New South Wales: *Crimes (Appeal and Review) Act 2001*, specifically sections 100-102 (permitting retrials for life sentence offenses); Queensland: *Human Rights Act 2019*, and *Criminal Code Act 1899*, Section 17, with amendments in 2007 permitting retrials for serious crimes: *Criminal Code (Double Jeopardy) Amendment Act 2007* (and subsequent 2024 amendments); Tasmania: *Australian Crime Commission Act 2004* - sect 39 and the *Criminal Code Act 1924*; Victoria: *Criminal Procedure Act 2009* allows for exceptions based on 'fresh and compelling' DNA or evidence, or if the initial acquittal was 'tainted.'

sovereigns. A person can be prosecuted by both State A and State B (or by a state and the federal government) for the same criminal act without violating the Constitution.

Australia is different in that it follows the principle of the unity of the Crown, where the Commonwealth and the States are viewed as acting on behalf of one indivisible Crown. There is considered to be a single national sovereign power shared between the Commonwealth and states. A person in Australia generally cannot be tried twice for the same offense after an acquittal or conviction, and cannot be prosecuted by both state and federal jurisdictions for the exact same act in the way allowed in the US.

Most Australian jurisdiction (e.g., NSW, QLD, TAS, VIC and WA) have, however, reformed their double jeopardy laws to allow retrials in limited, exceptional circumstances—such as when ‘fresh and compelling’ evidence emerges for serious offenses like murder or rape, but this is not based on dual sovereignty.

Whilst the law reforms are intended to bring justice for murderers or rapists where, for example, subsequent DNA evidence is obtained, there is the danger that people on non-violent charges may be caught up in additional proceedings based on the fact that some of the offences were cross-border. The purpose of the ‘double jeopardy’ rule is to ensure finality in criminal proceedings. It protects against government overreach, preventing repeated attempts to convict an individual. A person with cross-border offences could conceivably be tried in multiple states and federally for the same offence, even a decade apart for each jurisdiction, so that there is a cruel lack of an ending and getting on with their life. If a person is being tried in a particular state, there should be an expectation that they will not be tried later in other states or federally. There is also economic sense in considering all the evidence just once and after any acquittal or sentence, allowing the person to reintegrate in society.

#### **Example 5: Abusive acts**

The use of excessive force, for example during arrests or welfare checks, can constitute cruel, inhuman or degrading treatment. Repeatedly using capsicum spray, repeatedly striking a person, or imposing excessive or chemical restraint can amount to cruel police brutality and even threaten a person's life. In particular, putting weight on a person who is lying face down, risks death by asphyxiation (refer to article on the controversial diagnosis of '[Excited Delirium Syndrome](#)' in *Australian Prison Reform Journal* 2(3)-3).

Everyday prison life gives rise to many other abusive acts, including humiliation during degrading strip searches (state-sponsored sexual abuse); withholding critical medication such as insulin (sometimes over a period of days in watchhouses); withholding suitable medical treatment (including for mental health issues); providing chemical restraint or forced medication without consent; verbal humiliation; and slow responses to medical emergencies; withholding visits or mail from prisoners; unnecessary or extended solitary confinement; denying the right to vote; denial of access to complaints mechanisms (for example, a prisoner not being allowed to complain to an ombudsman or complaint forms being destroyed); unfair treatment in criminal proceedings (e.g. police lying or stretching the truth); sexual abuse (especially in youth detention given the additional vulnerability – refer below); exceeding powers of search and seizure; and preventive detention or arbitrary detention (refer Case No 1090/2002; *Rameka v New Zealand*; and Case No 1069/2002; *Bakhtiyari v Australia*, both decided by the Committee Against Torture in Geneva in 2003).

### **Example 6: Childhoods spent behind bars**

The minimum age of criminal responsibility across eight of the nine criminal jurisdictions in Australia is currently 10 years, well below the most common minimum age internationally — 14 years as recommended by the UN Committee on the Rights of the Child, and the Australian Human Rights Commission (CRIN 2025; AHRC 2021; UNCRC 2019: General Comment No.24). This low age of responsibility in Australia (together with other “tough-on-crime” policies such as strict bail and mandatory sentencing laws; socioeconomic factors and systemic racism – Boffa and Mackay 2025) has contributed to 845 young Australians being held in youth detention on an average night (AIHW 2024) and another 7,447 young people being subject to community-based supervision or required to attend a

conference or diversion program (ABS 2025). Studies and reviews have found that most young people under youth justice supervision have a background of severe disadvantage and adverse childhood experiences, including fragmented education, intergenerational incarceration and unresolved trauma (AHRC 2024:16; ANZCCGA 2024:1; Malvaso et al. 2022). Rather than addressing this disadvantage or providing rehabilitation, youth detention provides a harsh and violent setting that further hardens and marginalizes young people (NT Royal Commission 2017; Qld Commission of Inquiry 2017:121-125). Well-publicized systemic failures in youth detention have garnered national and international condemnation (Edwards and Barume 2025; Human Rights Watch 2025). Youth detention centres in all Australian jurisdictions have contravened the human rights of children and a number have recently been closed following investigations (including Royal Commissions) and scathing reports. These youth detention centres include:

- Bimberi (ACT)
- Don Dale (now repurposed for adult prisoners following a *Four Corners* report and Royal Commission – Meldrum-Hanna 2016) (Northern Territory)
- Cleveland, as well as Brisbane Watch House (children held in this adult watch house were moved following a second *Four Corners* report – Willacy 2019– although the practice has since continued – Messenger 2025) (Queensland)
- Kurlana Tapa (South Australia)
- Ashley (the ‘gladiator pit’ purportedly to be closed in 2024, then 2026 and now 2028) (Tasmania)
- Grevillea Unit at Barwon Prison (now closed), Malmsbury (now closed) and Parkville (Victoria)
- Unit 18 at Casuarina Prison, where 16-year-old Aboriginal boy, Cleveland Dodd died in 2023 from self-harm after spending over 22 hours a day in his cell in 77 of his final 93 days in detention (to be closed), Rangeview Juvenile Remand Centre (now closed) and Banksia Hill, where a 17-year-old Aboriginal boy died by suicide in 2024 (Western Australia)

All of the above youth detention centres were investigated for serious mistreatment of

children and found to have systemic failures, but only Bimberi (ACT) and Kurlana Tapa (South Australia) were found at the time to have failures that did not amount to an entrenched culture of violence and disregard for the human rights of young people. Issues identified within Australian youth detention centres included deaths in custody; attempted suicides; self-harm; severe mistreatment of children (in some centres including beatings and the use of spit hoods and excessive force/restraint); extended lockdowns and punitive isolation in cells; poor living conditions; systemic discrimination; the extremely high prevalence of mental health conditions and/or neurological disability; deprivation of food, water and hygiene facilities; humiliation; overcrowding; and alleged/actual unlawful detention in units within adult prisons—with resultant tensions leading to attacks on demoralised staff, understaffing, violence, major riots and escapes (ACT HRC 2019; Boffa and Mackay 2025; Bourke 2024; Disability Royal Commission 2023; Meldrum-Hanna et al. 2016; National Senate inquiry 2025; NT Royal Commission 2017; Qld Commission of Inquiry 2017; Ryan 2023; SA GCYP 2023, 2024; Tas Commission of Inquiry 2023; Vic CCYP 2017; Vic Legal and Social Issues Committee 2018; WA CCYP 2024; Willacy 2019). Such continuing systemic failures in all Australian states and territories reflect the futility of locking up children in harsh conditions rather than providing the training, education, medical treatment, mentors and support they need for successful desistance or reintegration into society.

## **Conclusion**

The above are some of the major areas in which cruel and unusual treatments and punishments persist in Australia. Some are related to 'old school' ways of doing things amongst some of the older police and correctional officers (cruel and humiliating arrests being an example), although younger recruits are starting to bring in new ways of doing things. Other aberrations have resulted from legal 'reforms' as part of 'tough-on-crime' policies. The 'reforms' to double jeopardy laws are an example. Tougher bail conditions and mandatory sentencing are further examples that may veer towards cruel and unusual punishment, particularly because of the disproportionate and discriminatory impact of these laws on First Nations peoples, children and vulnerable groups. Australian law reform

should be urgently dismantling such unacceptable treatment and punishments rather than contributing to them.

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