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## Submission to the Independent Expert on the human rights of older persons report on ageism and age discrimination

Penal Reform International (PRI) welcomes the opportunity to contribute to Independent Expert's forthcoming report to the 48th session of the Human Rights Council and provides the following information in response to the questionnaire shared. This submission is based on research conducted by PRI for the development of an upcoming resource to support monitoring bodies to address the particular needs and risks faced by older persons in prison, including input from National Preventive Mechanisms (NPMs).

### Forms and manifestations of ageism and age-discrimination

Old age cannot be universally defined as it is considered differently in different societies and contexts, particularly as life expectancy increases. In demographic analysis, age 60 and above is often considered the "older" cohort of the population, but in places of detention, those over 50 can be considered older or elderly – although this varies between countries and studies. This is due in part to the concept of "accelerated ageing" in prison. Prison populations typically have poorer health status compared to general populations, due to behavioural health risk factors like unhealthy lifestyles or alcohol and substance abuse, poorer prior access to healthcare, and the harmful effect of imprisonment on health and wellbeing. This means that older people in prison are more likely<sup>1</sup> – compared to both younger people in prison and people of the same age living in the community – to have disabilities, multiple, chronic health conditions or age-related cognitive impairment such as dementia, and so, the average physiological age of a person in detention is higher than his or her actual age.

Data and comprehensive research on older people in criminal justice systems globally is lacking, but it is clear that the number of older people in prison has been growing at a faster rate than the general prison population – at least in high income countries where data is available. Across Europe, the average proportion of the prison population who are over the age of 50 increased

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<sup>1</sup> See, for example, Greene, M. et al (2018), *Older adults in jail: high rates and early onset of geriatric conditions*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733/>.

from 11.7 per cent in 2013 to 15.3 per cent in 2019 (ranging from 7 per cent in Russia and Moldova, to over 30 per cent in Liechtenstein and Bulgaria).<sup>2</sup> In Switzerland, the number of people in prison over the age of 50 has doubled between 2007 and 2017, totalling over 800 people. Elsewhere, in Japan, the number of people detained aged 60 or older rose from seven to 19 per cent of the total prison population from 2008 to 2016, and in Singapore, the number of detainees over 60 doubled between 2012 and 2016. In Canada, those aged 50 or over in federal custody now make up a quarter of the federal prison population.<sup>3</sup>

Factors driving the increase in the number of older people in prison vary: life expectancy has increased in many countries, and more older people are being convicted of historical offences committed when they were younger, but fundamentally, sentences have become longer and harsher. The hardening of sentencing practices and increased use of imprisonment has coincided with reduced mechanisms for early release in some countries. Life imprisonment in particular has increased considerably in recent years and is being used more often for less serious and non-violent offences. Mandatory sentencing laws have also contributed to longer prison terms and resulted in the increased use of life imprisonment without the possibility of parole. In some societies, it is reported that some older people have turned to crime due to poverty and isolation, for example in Japan where more older people have been imprisoned for non-violent offences, such as shoplifting and petty theft.<sup>4</sup>

Without significant reforms to sentencing practices for older people – and indeed everyone – we can expect the growth of the older prison population to continue in many countries worldwide. It is therefore becoming increasingly important that law enforcement and other officials interacting with older adults entering the criminal justice system are trained to identify and respond to their health-related needs. Failure to identify and account for these needs can have a detrimental effect on how the criminal justice system responds to an older person. It could lead to arrest for behaviour that is caused by early onset dementia, or harsher treatment for failure to comply with police officers during an arrest, caused by hearing loss. Some older people with impairments that are not easily identifiable may not be assessed by a geriatric specialist, even where this is available, and as a result may experience repeat cycles of arrest.

The “greying” of the prison population also has unique and important implications for health-related policy and practice across criminal justice systems, including throughout detention. Prisons are designed for younger people who make up the majority of the prison population worldwide, and any programmes available are also generally aimed at meeting their needs. The increased use of imprisonment and resulting overcrowding of prisons means that most prison systems struggle to provide even for the needs of younger people, let alone cater to the different physical capabilities and programming needs of older people in their care. As the number of older people in prison is expected to continue to grow in the coming years, it is vital that prison services develop policies and strategies to address the needs of this vulnerable group, and that bodies monitoring places of detention are equipped to identify and highlight violations of their rights, in particular to prevent ill-treatment and torture.

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<sup>2</sup> Council of Europe Annual Penal Statistics SPACE I reports, available at <https://wp.unil.ch/space/space-i/annual-reports/>

<sup>3</sup> Figures from Penal Reform International, *Global Prison Trends 2020*, available at <https://www.penalreform.org/resource/global-prison-trends-2020/>

<sup>4</sup> See for example, *Why some Japanese pensioners want to go to jail*, BBC News, 31 January 2019, <https://www.bbc.co.uk/news/stories-47033704>

A 2018 report from Her Majesty's Inspectorate of Prisons and the Care Quality Commission in the UK stated that 'many older jails are ill-equipped for prisoners in wheelchairs, or with mobility problems. Some prisoners struggle to wash and look after themselves and others who have fallen cannot get help during the night'.<sup>5</sup> This account of conditions of detention for older people sheds light on the importance of awareness raising and delivering appropriate training and tools to prison staff and monitoring bodies on the particular needs and risk factors associated with older people in detention.

Over the past year, older people in prison have also faced a higher risk of contracting and suffering serious complications from COVID-19 given their poorer health status and often limited access to quality medical services in detention. The transmission risks are compounded by poor prison conditions, overcrowding and wider difficulties in adhering to social distancing and sanitary hygiene protocols. Basic necessities such as hand sanitizer, soap and toilet paper are often hard to acquire in prison and some items are viewed as contraband. In November 2020, the US Supreme Court denied a request from people detained in a geriatric prison in Texas for more protective measures against the spread of Covid-19, including access to hand sanitiser. Two dissenting justices argued that people in prison face "severe risks of serious illness and death from Covid-19, but are unable to take even the most basic precautions against the virus."<sup>6</sup>

Older women in prison may be seen as a 'minority within a minority' of the prison population. They are likely to have a range of unique needs particularly around healthcare and rehabilitation<sup>7</sup> which are seldom taken into account in policy formulation and programme development. The unique health care and medical needs of older women prisoners is 'under-researched and under-recognised'<sup>8</sup> but the limited research that does exist is very revealing in terms of this prison population. According to studies in Texas, the prevalence of hepatitis B and C, HIV/AIDS, MRSA and syphilis are higher in older women prisoners than their male counterparts.<sup>9</sup> Further, a study of imprisoned women aged 55 or older in California, indicated that 16 per cent reported needing help with at least one ADL ("activities of daily living") and some 55 per cent reported a fall in the last year.<sup>10</sup> They may also have specific care needs in relation to gynaecological issues and osteoporosis.<sup>11</sup>

## Legal, policy and institutional frameworks related to ageism and age-discrimination

At the international level, the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) set out the minimum universal standard for the treatment of people in

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<sup>5</sup> For more, see <https://www.justiceinspectors.gov.uk/hmiprisoners/media/press-releases/2018/10/care-for-elderly-prisoners-is-inconsistent-and-the-lack-of-planning-for-an-ageing-population-is-a-serious-defect-say-inspectors/>.

<sup>6</sup> 'Supreme Court denies request from geriatric prisoners seeking Covid relief', *CNN*, 16 November 2020, <https://www.cnn.com/2020/11/16/politics/supreme-court-texas-covid-19/index.html>.

<sup>7</sup> For more, see [Integrating the Issue of Sexual and Gender-Based Violence in Detention Monitoring: A Guidance Note for Oversight Mechanisms](#), OSCE, January 2021; APT/PRI, [Women in detention: a guide to gender sensitive monitoring](#), 2013.

<sup>8</sup> Codd, H. 'Ageing in prison', in Sue Westwood (ed.), *Ageing, Diversity and Equality, Social Justice Perspectives* (London, 2018), p 345-346.

<sup>9</sup> ICRC, Bedard, Metzger and Williams, 'Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities', (2016), 98 (3) 917-939.

<sup>10</sup> Ibid.

<sup>11</sup> Carlie Newman 'Last chance: older women through the criminal justice system', [Research Paper 2005/2](#)

prison and contain rules that pertain to all aspects of prison life.<sup>12</sup> The Rules are grounded in principles of compassion and dignity and call for people in prison to be “treated with the respect due their inherent dignity and value as human beings.”<sup>13</sup> The principle of non-discrimination underpins the application of the rules and entreats prison administrations to take account of the individual needs of prisoners, in particular the ‘most vulnerable categories in prison settings’.<sup>14</sup> While the rules do not explicitly mention older people, they are implicitly included as a vulnerable category given their advanced age, complex health needs and attendant challenges in places of detention. Older people in prison should be afforded all the rights as set out in the Nelson Mandela Rules.

The situation of older people in prison has come to the attention of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment who has noted that certain groups of detainees suffer “double or triple discrimination” given their position in prison hierarchy; the elderly and persons with disabilities and diseases fall within this group.<sup>15</sup>

In its jurisprudence, the European Court of Human Rights (ECtHR) has considered the potential human rights impacts of the prolonged detention of older people in prison. In principle, the ECtHR has noted that advanced age is not, of itself, a bar to pre-trial detention or a prison sentence, and has indicated that its assessment will be determined by the particular circumstances of each specific case<sup>16</sup> based on i) the situation of the person detained ii) quality of medical care and iii) continued appropriateness of detention given the person’s health status.<sup>17</sup> The ECtHR has, on occasion, found that sub-standard healthcare and poor prison conditions outweigh age considerations. The continued detention of a 52-year-old suffering from leukaemia breached Article 3 of the ECHR; in that particular case, the French authorities had failed to take any special measures such as admitting the individual to hospital or transferring him to another institution where he could be monitored.<sup>18</sup>

### Penal Reform International briefing note

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<sup>12</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the General Assembly on 17 December 2015; A/RES/70/175.

<sup>13</sup> Ibid, Rule 1.

<sup>14</sup> Ibid, Rule 2.1

<sup>15</sup> Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ‘[Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention](#)’, 5 February 2010 – A/HRC/13/39/Add.5

<sup>16</sup> Papon v France, (no 1) Application no 64666/01, 7 June 2001, ‘Detention of an elderly person over a lengthy period of time may violate human dignity, but regard is to be had to the particular circumstances of the case’.

<sup>17</sup> International Committee of the Red Cross (ICRC), ‘[Ageing and Imprisonment – Workshop on ageing and imprisonment: identifying and meeting the needs of older prisoners. Summary Report](#)’ – June 2018, page 8

<sup>18</sup> Mouisel v France – Application no 67263/01, 2002