THE UNIVERSITY OF NEWCASTLE AUSTRALIA

Medicare in Prisons: The Case for Reform

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Executive Summary

- Prisoners, including juveniles, have never had access to Medicare.
- Without Medicare, prisons are unable to provide a range of services and medications, resulting in poor healthcare outcomes, unnecessary illness, and preventable deaths.
- One of the main consequences of a lack of Medicare is that prisoners have little to no mental health treatment while in custody, worsening treatable conditions and preventing effective rehabilitation.
- Introducing Medicare will likely be cost-effective due to decreases in crime and long-term strain on the public health system, despite the high superficial cost it may initially incur.
- Australia is violating its international human rights obligations by denying those in custody access to Medicare.
- Introducing Medicare would reduce Indigenous deaths in custody.
- We recommend legislative amendment of the *Health Insurance Act* to give imprisoned people equality of access to essential healthcare.

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Introduction

Most people are surprised to hear that people in prison lack access to Medicare, Australia's 'universal' health care system.

The lack of Medicare access for people in prison in Australia causes many issues not only for prisoners themselves, but also for the general community. The consequences of the Medicare exclusion include unnecessary deaths, the exacerbation of mental health conditions, increased recidivism, and increased strain on public health services once those in custody are released.

While the costs of providing Medicare access in prisons may appear substantial, it would likely be highly cost effective as improved mental health support will reduce reoffending, avoiding high costs of reincarceration. The improved health of prisoners will also reduce strain on the public health system once they are released.

Introducing Medicare into prisons will also ensure Australia meets its human rights obligations under international law and will support Australia's commitment to the 2030 Sustainable Development Goals. It will be an effective way of preventing Indigenous suicides and deaths in custody and reducing reincarceration rates.

Providing greater access to healthcare for Indigenous people in custody is also necessary to achieve the targets listed in the *National Agreement on Closing the Gap*.

This policy brief also outlines the history of the Medicare exclusion for prisoners and provides multiple recommendations for the introduction of Medicare in prisons.

Health and Incarceration – A Snapshot

> "People in prison usually come from disadvantaged backgrounds, with poorer physical and mental health than the general population. They are less likely to have accessed health care services, and more likely to have a history of risk behaviours. Most people in prison are there for short periods, and many cycle through prison and the community multiple times. So, the health of people in prison is public health."[1]

People in prison have, on average, much poorer mental and physical health than those in the general community, and more complex, long-term health needs.[2] Mental health issues are particularly overrepresented in prison, with 40% of people entering prison reporting being formally diagnosed with a mental health condition.[3] This is far higher than the community average, and it is believed the actual number is considerably higher due to undiagnosed illnesses.[4]

Approximately 29% of people in prison report having a disability,[5] again, a prevalence higher than the general Australian community (18%).[6] While there is little information available about the true prevalence of disability in Australian prisons, existing research indicates that people with intellectual disabilities and acquired brain injuries are particularly overrepresented in the criminal justice system. A report by the Mental Health Commission of NSW has also found that half of all adult inmates have been diagnosed or treated for a mental health problem.[7]

The Australian Institute of Health and Welfare releases a 'Prisoners Report' to monitor the health of prisoners. The Report includes data from 84% of prisons across the country. Data for the National Prisoner Health Data Collection is collected by the AIHW

[1] Australian Institute of Health and Welfare (2019). The Health of Australia's prisoners 2018
[2] Ibid
[3] Ibid.
[4] Mental Health Commision (2011). Mental Health 2020: Making it personal and everybody's business; Butler, T. and S. Allnutt (2003). Mental illness among New South Wales prisoners, Corrections Health Service Sydney, NSW.
[5] Australian Institute of Health and Welfare (2019) (n 1)
[6] Australian Institute of Health and Welfare (2022). "People with disability in Australia 2022".
[7] Mental Health Commission of NSW (2017). Towards a just system: Mental illness and cognitive impairment in the criminal justice system, Mental Health Commission of NSW Sydney.

every 3 years.[8] The AIHW noted that while there is currently limited information on prisoners with physical disabilities, almost one-third (30%) of participants reported a long-term health condition or disability that limited their daily activities and affected their participation in education and employment.

The Australian Centre for Disability Law also estimates that 95% of Indigenous people charged with criminal offences who appear before court have an intellectual disability, a cognitive impairment, or a mental illness.[9] Indigenous people with a disability are 14 times more likely to be imprisoned than the rest of the population.[10]

There is a particularly high prevalence of multiple and complex health issues among women in prisons. For example, female prisoners are more likely to have a history of physical and sexual abuse, more likely to experience mental health concerns and have higher rates of drug and alcohol dependencies than male prisoners.[11] The health and wellbeing of female prisoners is often impacted by a range of socioeconomic factors and a lack of adequate health care before entering the prison itself, and many will require extensive ongoing care while in custody.[12]

Mental health or cognitive disability is a factor in 41% of Indigenous deaths in custody.[13] Major causes of death in custody among people with disabilities are a lack of support provided by the prison, and suicide.[14] These risks are especially high for Indigenous Australians. Prisoners also have elevated rates of mortality and morbidity shortly after release.[15] The risk of suicide is more than six times higher for people recently released from prison,[16] and rates of hospitalisation among recently

[8] Australian Institute of Health and Welfare (2022). "Health of prisoners." from https://www.aihw.gov.au/reports/australias-health/health-of-prisoners

[9] Australian Centre for Disability Law "Submission in Response to the Criminal Justice Systen Issues Paper of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People With Disability ('The Royal Commission')."

[10] Australian Institute of Health and Welfare (2019) (n 1)

[11] World Health Organization (2014). Prisons and health. Copenhagen: World Health Organization Regional Office for Europe.

[12] Australian Institute of Health and Welfare (2020) The health and welfare of women in Australia's prisons. Cat. No. PHE 281.

[13] Allam, L. W., Calla; Evershed, Nick (2018). The 147 dead: terrible toll of Indigenous deaths in custody spurs calls for reform. The Guardian.

[14] Human Rights Watch (2020). "He's Never Coming Back" People with Disabilities Dying in Western Australia's Prisons Human Rights Watch.

[15] Cumming, C., et al. (2018). "In sickness and in prison: the case for removing the Medicare exclusion for Australian prisoners." J Law Med 26(1): 140-158

[16] Australian Institute of Health and Welfare (n 1)

released Indigenous Australians have been reported as three times higher than that of the general population.[17] Addressing medical issues before people are released is therefore predicted to reduce deaths and also strain on the public health system.

Communicable diseases are more prevalent in prisons than in the general community,[18] and people in prison receive inadequate disease prevention when compared to the general population.[19] As they are considerably more likely to come from disadvantaged or marginalised communities, people in prison are already at a higher risk of contracting various diseases before being confined, and once in custody, disease is more likely to spread.[20] The average prison sentence is 1.9 years, and more than 65,000 people cycle through the prison system annually. Accordingly, the health concerns of people in prison are also those of the general population.[21]

The Australian Institute of Health and Welfare also provides statistics on the number of prisoners who saw a psychologist or a mental health worker during their sentence, showing rates comparable to the general population.[22] However, such statistics do not take into account that psychologists and mental health workers in prison typically only assess the mental health of patients, while providing no actual treatment due to a lack of Medicare.[23] In the absence of behavioural therapy with qualified mental health professionals, short programs are run in-house by prisons to address mental health and offending behaviour. Completing these programs requires little to no input from participants. It is argued these programs are ineffective and exist only to generate favourable data on the amount of 'rehabilitation' offered to prisoners.[24]

It is also reported that most prisoners rate the level of healthcare in prison as better to what they received prior to entering custody. While this appears on first glance to suggest that healthcare in prison is effective, the raw statistics do not reflect that most prisoners come from extremely disadvantaged backgrounds, and often had little to no healthcare before entering prison.[25] The reality is that prisoners under-utilise health

[17] Cumming, C., et al. (n 15).
[18] Australian Institute of Health and Welfare (2019) (n 1).
[19] Dias, S., et al. (2013). "Physical health outcomes in prisoners with intellectual disability: a cross-sectional study." Journal of Intellectual Disability Research 57(12): 1191-1196.
[20] Australian Institute of Health and Welfare (n 1); Gregoire, P. (2021). Inmates Continue to Be Denied Medicare: An Interview With NSPTRP's Connie Georgatos, Sydney Criminal Lawyers.
[21] Australian Institute of Health and Welfare (2019) (n 1).
[22] Ibid.
[23] Linnane, D. (2022). Secretly suicidal: Why prisoners need access to Medicare. Eureka Street. 32.
[24] Linnane, D. (2021). Escaping into the Prison Library. Exploring the Roles and Practices of Libraries in Prisons: International Perspectives, Emerald Publishing Limited.
[25] Meyerowitz-Katz, G. (2018). Whatever you do, don't get sick. Inside Story.

services both before and after release,[26] often because health is seen as a lower priority than issues like housing, employment and dependents.[27] 36% of prisoners either do not have or do not know if they have a Medicare card available to them upon their release.[28]

As they receive a constant influx of marginalised people, correctional centres have the potential to become institutions that detect and treat previously undiagnosed physical and mental health problems, better preparing them for release and reintegration into society. According to the *Medical Journal of Australia*, it is "paradoxical" that prisoners are instead excluded from Medicare, the very service that could provide this necessary reintegration support.[29]

[26] Public Health Association Australia (2013). Public Health Association of Australia: Prisoner Health Policy.

[27] Australian Institute of Health and Welfare (2019) (n 1).

[28] Ibid.

[29] Plueckhahn, T. M., et al. (2015). "Are some more equal than others? Challenging the basis for prisoners' exclusion from Medicare." Medical Journal of Australia 203(9): 359-361.

Why is Medicare unavailable in prison?

In 1975, Medicare was introduced by the Whitlam government in response to systemic problems in the public health system. It is administered under the Health Insurance Act 1973. In 1976, the economic expense of Medicare became clear, and a review committee was established to try and cut costs.[30]

Accordingly, section 19(2) of the *Health Insurance Act* was amended, which states that when health services are provided by a government entity, whether federal or state, Medicare will not be available unless the Minister for Health or their delegate grants an exemption. State prisons were therefore excluded from Medicare on the assumption they would have alternative funding.

However, chronic underfunding to healthcare means services have long been too expensive for prisons to provide without Medicare rebates.[31] The Pharmaceutical Benefits Scheme, which provides free or affordable medications, is only available to those who have access to Medicare, meaning prisoners also have no access to this service, and accordingly, cannot access certain medications at all.

There is no reason other than section 19(2) as to why prisoners do not receive Medicare. On the contrary, legal precedent has established that prisoners retain all civil rights not expressly taken away as a necessary requirement of imprisonment.[32]

The Health Minister's ability to grant exemptions to the Medicare exclusion was created explicitly for the purpose of avoiding any disadvantage to individuals caused by not having Medicare access.[33] Several exemptions have already been

[30] Ibid.
[31] Ibid.
[32] Cumming, C., et al. (n 15)
[33] Ibid.

granted. In 2006, the Commonwealth and Western Australian Governments agreed to exempt remote health services in that state, citing the difficult of providing primary care in remote areas.[34] That same year, an exemption was granted for the Inala Indigenous Health Service in Queensland, after gaps in services were recognised.[35] These examples illustrate the willingness of the Commonwealth governments to allow Medicare access to communities that are disadvantaged without it, a situation that is readily apparent in prisons.[36]

The Current Issue

The level of healthcare available in prison is far below that of the general community and puts prisoners at a much higher risk of experiencing long-term physical and mental illnesses as a result. Patients with a wide range of conditions have substantially longer long wait times to see medical professionals and are not able to receive certain treatments at all, as services are too expensive to be provided without access to Medicare rebates.[37] In NSW, 40% of the highest priority patients were unable to receive treatment within the recommended time-frame of three days.[38] In some jurisdictions, the lack of PBS access may mean that drug treatment therapies available in the community cannot be accessed in prisons.[39]

Indigenous Australians are disproportionately affected by the lack of Medicare in prisons,[40] and are dying in custody from treatable medical conditions.[41] In July 2022, a coroner found the death of an Indigenous man in a NSW prison from an ear infection could have easily been detected with adequate access to medical treatment, renewing calls for the introduction of Medicare for those in custody.[42]

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[34] Ibid.
[35] Hayman, N. E., et al. (2009). "Improving Indigenous patients' access to mainstream health services: the Inala experience." Medical Journal of Australia 190(10): 604-606.
[36] Plueckhahn, T. M., et al. (n 29).
[37] Ibid.
[38] Auditor-General, N. S. W. (2021). Access to health services in custody, Audit Office of New South Wales.
[39] Australian Medical Association (2012). Position Statement on Health and the Criminal Justice System.
[40] Cumming, C., et al. (n 15).
[41] Allam, L. W., Calla; Evershed, Nick (2018). The 147 dead: terrible toll of Indigenous deaths in custody spurs calls for reform. The Guardian.
[42] Australian Associated Press (2022). Indigenous death in NSW jail from ear infection 'the result of systemic failures': coroner. The Guardian.

Prisoners have one of the highest rates of mental illness of any population group in Australia. While those outside prison can access rebates for psychological services under a Mental Health Care Plan, this service is not available for those in custody. Most prisoners have little to no access to ongoing counselling.[43] In the absence of mental health treatment, mental health problems are often exacerbated in prison,[44] and some prisoners develop their first mental illness in custody as a result of incarceration itself.[45] The fact that prisoners cannot access PBS medications has also been found to exacerbate mental illness during incarceration.[46]

Suicidal prisoners who request counselling have been told that due to a lack of funding, the only thing the prison can do for their mental health is provide the phone number of a service to call once they are released.[47] Phone calls in prison are heavily restricted; in NSW, they are limited to six minutes per call. Accordingly, most prisoners cannot effectively access free phone counselling services such as Lifeline. As there is no therapy available, typically the only response to severe depression is to place the individual under 24-hour surveillance.[48] In 1999, the Victorian auditor general condemned this process as unacceptable, stating:

> "It is difficult to imagine why any prisoner would voluntarily alert staff to their intention to attempt suicide of inflict self-harm, if the final outcome was for the prisoner to be placed in an observation cell".[49]

Over two-decades later, however, the process remains unchanged.[50]

[43] Plueckhahn, T. M., et al. (n 29)
[44] Laing, J. M. (1999). Care Or Custody?: Mentally Disordered Offenders in the Criminal Justice System, Oxford University Press New York. 209.
[45] Doyle, J. (1998). "Prisoners as Patients The Experience of Delivering Mental Health Nursing Care in an Australian Prison." 36(12): 25-29;
[46] Victorian Ombudsman (2018). Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial.
[47] Linnane, D. (n 23)
[48] Brown, D. and M. Wilkie (2002). Prisoners as citizens: Human rights in Australian prisons, Federation Press. 233.
[49] Ibid.
[50] Linnane, D. (n 23)

Legal action against the state governments responsible for prisons will not improve conditions, as the issue lies instead with federal legislation.[51] There are also typically no options to pay for better healthcare in prison, meaning the minority of prisoners who are financially viable enough to pay for their own healthcare still cannot access treatment.[52]

There is a lack of Commonwealth and State and Territory cooperation to establish national standards to promote and maintain the health of incarcerated people.[53] Healthcare in prison is subsequently provided by a "mish-mash of services which responds in a variable manner",[54] that "rarely manages to deliver what's needed."[55]

Cost Effectiveness and Benefits

It costs over $109,000 a year to keep an adult incarcerated in Australia, and over $525,000 a year for each child.[56] While superficially, the cost of health services may be considered expensive, it is far cheaper than the cost of reincarceration.[57] Research proves that poor mental health is a strong predictor of recidivism in former prisoners,[58] and so there is a strong impetus for improving the health and wellbeing of prisoners before they are released to support their reintegration into society and decrease their risk of reoffending.

Improving mental health is therefore beneficial from health, criminal justice, and economic perspectives.[59] Mentally ill prisoners who do not receive therapy in prison are more likely to commit crimes upon release, resulting in further

[51] Plueckhahn, T. M., et al. (n 29).
[52] Gregoire, P. (n 20).
[53] Public Health Association Australia. (n 26).
[54] Brown, D. and M. Wilkie. (n 48) 246.
[55] Meyerowitz-Katz, G. (n 25).
[56] Knowles, L. (2017). Australia spending more on prisons, policing than other comparable countries: report. ABC News; Morrison, H. (2021). "Incarceration Nation." on Special Broadcasting Service. https://www.sbs.com.au/ondemand/watch/1930938947662.
[57] Laing, J. M. (n 44); Fleming, J., et al. (2012). "Creating HoPE: mental health in Western Australian maximum security prisons." Psychiatry, Psychology and Law 19(1): 60-74.
[58] Dias, S., et al. (2013). "Co-occurring mental disorder and intellectual disability in a large sample of Australian prisoners." Australian & New Zealand Journal of Psychiatry 47(10): 938-944.
[59] Ibid.

imprisonment and expense to the public.[60] There is also strong evidence that improving the physical health of inmates reduces their rates of recidivism.[61] The Productivity Commission recognises improved healthcare and mental health treatment in prison as an important factor in reducing recidivism and saving on the costs of reincarceration.[62] Introducing Medicare in prisons would also support the 2030 Sustainable Development Goals, in particular goals 3.4, 10.3 and 16.3. Australia officially endorsed this worldwide commitment in 2015.

In 2015, it was estimated that giving every Indigenous prisoner in Australia a health assessment would cost less that 0.01% of the Medicare budget. The focus of such assessments is disease prevention, meaning they will likely have strong cost-effectiveness.[63] Screening for prisoners with mental health issues would also give "extraordinary cost benefits to the community".[64] Justice Health, which is responsible for health services in NSW prisons, does not currently mandate chronic health screening for Indigenous Australians.[65] It must be noted that improved primary access to healthcare is considered vital in order to close the gap in Indigenous deaths.[66] Introducing Medicare in prisons would work toward Targets 1, 10, 11, and 14 of the National Agreement on Closing the Gap.

[60] Laing, J. M. (n 44).
[61] Meyerowitz-Katz, G. (n 25).
[62] Commission, P. (2021). Australia's prison dilemma, Productivity Commission.
[63] Plueckhahn, T. M., et al. (n 29).
[64] Fleming, J., et al. (n 57).
[65] Australian Associated Press. (n 42).
[66] Hayman, N. E., et al. (n 35).

Expert Medical and Legal Opinions

Most organisations and the general public are completely unaware that people who are imprisoned lack access to Medicare.[67] However, relevant organisations have raised concerns. The Australian Medical Association has called for the introduction of Medicare into prisons since at least 2012, stating:

> "The loss of Medicare and PBS entitlements while in prison is inconsistent with best practice in throughcare, and serves to exacerbate the cycle of ill-health experienced by prisoners and detainees as they move between prison and the community".[68]

The Public Health Association of Australia, the Royal Australian College of General Practitioners, and the Aboriginal Legal Service also support the introduction of Medicare into prisons.[69]

The Public Health Association of Australia, in its *Prisoner Health Policy* encourages the Commonwealth Government to set minimum national standards for the health and wellbeing of everyone within the criminal justice system. As part of this policy, it also strongly advocates for access to both Medicare and the Pharmaceutical Benefits System.[70]

Focussing on the particular needs of Indigenous people in the corrective services system, the *Royal Australian College of General Practitioners* points out that culturally-appropriate health care services is essential for effective health care, and that therefore Community Controlled Health are both best-placed and necessary for effective healthcare for Aboriginal and Torres Strait Islander people in the system. They point out that this can be achieved through the introduction of a specific set of Medicare item numbers that can be used for the health needs of prisoners.

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[67] Meyerowitz-Katz, G. (n 25).
[68] Australian Medical Association. (n 39).
[69] Australian Associated Press (n 42); Meyerowitz-Katz, G. (n 25).
[70] Public Health Association Australia. (n 26).

International Human Rights Law

International human rights law is clear that certain basic rights should be extended to all people, regardless of their incarceration status. Where Australia does not meet these standards, it is in breach of international law.

Australia has general obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which declares all people have the "highest attainable standard of physical and mental health".[71]

Australia also has specific treaty obligations in relation to the health of people who are imprisoned, including:

- The *United Nations Standard Minimum Rules for the Treatment of Prisoners*: Rule 24(1) requires states to ensure that "Prisoners should enjoy the same standards of health care that are available in the community and should have access to necessary health-care services free of charge".[72] These are also known as the Nelson Mandela Rules.

- The *International Covenant on Civil and Political Rights (ICCPR),* prohibits "cruel, inhuman or degrading treatment or punishment". Cases interpreting this treaty provision have clearly stated that withholding treatment from mentally ill prisoners is cruel and degrading and impinged on the person's inherent dignity.[73] A further case held that states are obligated to provide health care to prisoners where it is deemed required, even in the absence of a complaint or request by the prisoner.[74]

- The *Convention on the Rights of Persons with Disabilities* (CRPD) is also relevant due to the disproportionate amount of people with disabilities and mental illness in Australian prisons.[75]

[71] Cumming, C., et al. (n 15).
[72] United Nations (2015). United Nations Standard Minimum Rules for the Treatment of Prisoners, Centre for Human Rights and Rehabilitation.
[73] Cumming, C., et al. (n 15).
[74] Ibid.
[75] Sharma, K. (2018). "I needed help, instead I was punished": abuse and neglect of prisoners with disabilities in Australia, Human Rights Watch.

The absence of adequate health care has flow on effects for the treatment of prisoners generally. For example, people with mental health conditions are more likely to be put into solitary confinement, which is euphemistically called "separate confinement" or "segregation" in Australia although the conditions meet the international definition of solitary confinement.[76] These arrangements are routinely used in response to mental health issues in prison in the absence of other available treatment.[77] In 2018, the Victorian Ombudsman investigated the case of a woman with a mental disability who was held in solitary confinement in prison for more than 18 months, partly due to a lack of funding for treatment. Their report noted the woman's case was not isolated, and that her imprisonment had failed to comply with both the CRPD, and the Nelson Mandela rules.[78] It is therefore clear that the use of solitary confinement is a violation of the deprivation of liberty safeguards outlined in international human rights law and is an inappropriate response for dealing with the needs of vulnerable prisoners who require mental healthcare.

It Is clear from even this brief snapshot of international law that Australia is falling short of its human rights obligations.

[76] Ibid.
[77] Ibid.
[78] Victorian Ombudsman. (n 46).

Recommendations

Reform could take one of several paths. Our research suggests the following options, from most to least desirable:

1. Amending section 19(2) of the *Health Insurance Act 1973*, to allow incarcerated people to access Medicare while in detention. While this requires legislative amendment, it brings the legislation formally into compliance with Australia's human rights obligations and would ensure all prisoners the right of access to healthcare while in custody.

2. An exemption declaration by the Health Minister pursuant to the *Health Insurance Act* to provide Medicare in prisons. This would require an exemption for each state and territory. The advantage of this mechanism is that amending legislation would not be required, allowing the change to be made more quickly.

3. A final alternative is for the Minister to grant an exemption in New South Wales as a pilot scheme, with monitoring of impact on recidivism, deaths in custody, savings to public health and other key indicators, with a view to later rolling out the initiative nationally.

Conclusion

Australia has international obligations to ensure people have high standards of physical and mental health. There is currently a strong case to find Australia is in violation of international human rights at the United Nations Human Rights Committee by not providing Medicare access to prisoners. Introducing Medicare into prisons will also work towards the Australian government's existing commitment to closing the gap for Indigenous Australians and supporting the 2030 Sustainable Development Goals, while also reducing strain on our public health system. It is also likely be cost effective in the long-term. We therefore have much to gain at local, national and international levels by introducing Medicare into prisons.

About the Authors

Damien Linnane was arrested in 2015 for crimes that were found to be linked to his disability, and which the sentencing magistrate described as an act of vigilantism. He was sent to prison after he was found ineligible for a community sentence on the grounds there was no funding to support his disability during such a sentence. After being told there was no mental health treatment or education available in prison, he turned to art and writing as a way of rehabilitating himself. His first book, *Scarred* (Tenth Street Press, 2019), was written by hand while he was in custody, and his artistic credits include illustrating the book *This Is Ear Hustle* (Crown Publishing, 2021). He currently has a CIFAL (a UN Institute for Training and Research) scholarship to complete a PhD that focuses on improving the rights of people with disabilities when impacted by the criminal justice system, and works as the editor of *Paper Chained*, an art and writing magazine for prisoners worldwide.

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