

5

The Second Prerequisite: Align Domestic Legislation with Australia's International Human Rights Law Obligations

Introduction

The second prerequisite for human rights compliance in Australian prisons is legislation that aligns with Australia's international human rights law obligations. The need for such a legislative framework arises from the international law requirements contained in the Treaties that Australia has chosen to sign, which oblige state parties to implement the rights domestically.¹ For example, both the *International Covenant on Civil and Political Rights* (ICCPR) and *Convention on the Rights of Persons with Disabilities* (CRPD) require states 'to adopt such laws or other measures

1 This is not an enforceable requirement, as outlined in Chapter 2. The international committees responsible for overseeing the Treaties regularly comment on Australia's failure to do so, but there is no other 'sanction'. For example, in December 2017, the Human Rights Committee made the following recommendation in their periodic review of Australia's compliance with the *International Covenant on Civil and Political Rights*: 'The Committee reiterates its recommendation (see CCPR/C/AUS/CO/5, para. 8) that the State party should adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions': Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 2.

as may be necessary to give effect to the rights recognized in the present Covenant/Convention', and the ICCPR further requires that there be 'effective' remedies provided.²

The particular rights that are to be recognised at the domestic level were outlined in Chapter 2. A central focus for three of the Treaties Australia has signed—the aforementioned ICCPR and CRPD, as well as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)³ in particular—is the prohibition of torture or cruel, inhuman or degrading treatment or punishment (TCID).⁴ This has to be given particular attention now that Australia has ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT)⁵ and the consequent National Preventive Mechanisms (NPMs) that state parties are required to establish with the purpose of *preventing* TCID in prisons (as discussed in detail in Chapter 3).

There are existing human rights protections in Australia under the Constitution, in common law and in legislation. This includes explicit human rights legislation in the Australian Capital Territory (ACT), Victoria and Queensland and corrections legislation. How well Australia's current domestic legislation aligns with Australia's international human rights law obligations, however, is debatable and needs to be analysed in each state and territory separately. The reforms necessary to achieve compliance with this prerequisite then become more readily apparent.

2 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2 ('ICCPR'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 4 ('CRPD').

3 *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) ('CAT').
4 ICCPR art 7; CRPD art 15.

5 *Optional Protocol to the Convention against Torture*, adopted 18 December 1992, UN Doc A/RES/57/199 (entered into force 22 June 2006) ('OPCAT').

Human Rights Protections in Australia

Australia does not have a culture of human rights protection and some authors have suggested there is a ‘deep seated’ ‘reluctance about rights in Australia’⁶ that is longstanding.⁷ Nowhere is this more evident than in relation to imprisoned people, where historically people suffered a ‘civil death’ upon incarceration. There are attitudes held by some in the community that committing a crime means a person forfeits their rights.⁸ These attitudes are not confined to members of the public and are sometimes expressed by experts, such as the former High Court judge who was reviewing the parole system in Victoria.⁹ There is also a gap between the obligations imposed on Australia by international law and the current legal protections, such as they are, for imprisoned people.

Domestic Implications of International Law

International conventions do not give rise to domestic obligations in Australia unless they are incorporated into domestic law.¹⁰ The High Court has confirmed this point many times.¹¹ Australia has not enacted national human rights legislation incorporating the rights contained in the international treaties to which we are a signatory (a matter that will be returned to later in this chapter, under ‘Assessment of Alignment of Domestic Legislation with International Human Rights Law Obligations’).

6 Adam Fletcher, *Australia’s Human Rights Scrutiny Regime. Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) 9.

7 Hilary Charlesworth, ‘The Australian Reluctance About Rights’ (1993) 31(1) *Osgoode Hall Law Journal* 195. In 2003, Charlesworth et al described a ‘negative view of international law’ as ‘part of mainstream politics’: Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 464. The general lack of a culture of human rights protection was also documented by the National Human Rights Consultation, *National Human Rights Consultation Report* (September 2009).

8 Tony Ward and Astrid Birgden, ‘Human Rights and Clinical Correctional Practice’ (2007) 12(6) *Aggression and Violent Behaviour* 628, 635.

9 Callinan wrote that ‘convicted criminals are intentionally denied rights. It is an important object of the justice system that they are so denied’: Ian Callinan, *Review of the Parole System in Victoria* (2013) 196.

10 *Kooiwa v Bjelke-Petersen* (1982) 153 CLR 168. The most well-known example of incorporation into domestic law is Commonwealth anti-discrimination legislation. For other examples see Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) 42. This position was modified by the High Court’s decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, a decision that Charlesworth et al describe as creating ‘considerable political anxiety’: Charlesworth et al, above n 7, 437 (see also the discussion at 449–50).

11 See, eg, *Kioa v West* (1985) 159 CLR 550, 570–1; *Dietrich v The Queen* (1992) 177 CLR 292, [17].

The practical effect of this is that imprisoned people cannot directly enforce rights under the treaties in the domestic setting, except to the extent that they are reflected in domestic human rights legislation in the ACT, Victoria and Queensland (discussed below). For example, as noted in Chapter 3, in *Minogue v Williams*¹² and *Collins v State of South Australia*¹³ ('*Collins*'), people in prison sought to rely on the ICCPR. In each case, the courts confirmed the position that the rights contained in the ICCPR cannot be enforced by individuals via litigation in domestic courts.¹⁴ This was despite the fact that in *Collins* the Court considered that arts 10(1) and 10(2) of the ICCPR had indeed been violated.¹⁵

The Constitution

The *Commonwealth of Australia Constitution Act 1900* ('*Constitution*') does not contain a Bill of Rights and 'does *not* provide comprehensive protection of human rights'.¹⁶ There are only three express rights that Debeljak considers 'can be categorised as human rights proper':¹⁷

- s 80 that provides the right to a jury trial for trial on indictment
- s 116 that protects the free exercise of any religion
- s 117 that provides for the right to be free of discrimination for choosing a particular state of residence.¹⁸

The *Constitution* has been found to contain some *implied* rights, such as the implied freedom of political communication.¹⁹ Most relevantly, the *Constitution* has been found to provide limited protection of electoral

12 *Minogue v Williams* (2000) 60 ALD 366.

13 *Collins v State of South Australia* [1999] SASC 257.

14 For a more detailed discussion of these cases see Bronwyn Naylor, 'Protecting the Human Rights of Prisoners in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) 401–2.

15 *Collins v State of South Australia* [1999] SASC 257, [30]. Article 10(1) requires treatment with humanity and with respect for the inherent dignity and art 10(2) requires unconvicted people to be separated from convicted people.

16 Debeljak, above n 10, 41 (emphasis in original).

17 *Ibid* 39.

18 For a discussion of the interpretation of these provisions see Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80, 87–90.

19 In relation to the implied right to freedom of political communication see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Dixon argues there are three or four implied rights: *ibid* 86. After a hiatus in discovering additional implied rights, however, the High Court recognised some protections for voting rights of imprisoned people in *Roach v Electoral Commissioner* (2007) 233 CLR 162.

participation for some imprisoned people. The franchise for imprisoned people was the subject of High Court litigation when the Federal Government introduced legislation in 2006 to amend the *Commonwealth Electoral Act 1918* to ban all people serving prison sentences from voting.²⁰ Previously, only those sentenced to three years or more were prohibited from voting. The majority of the High Court in *Roach v Electoral Commissioner* held that the ban was a disproportionate limit on the constitutional provisions pertaining to Parliament being ‘directly chosen by the people’.²¹ However, the previous position of a ban applying only to people sentenced to more than three years in prison was held to be valid.²²

Orr and Williams argue that the decision in *Roach* ‘amounts only to a very modest protection’ and ‘represents a partial shield against any federal legislative attempts to roll back well-established aspects of the federal franchise’.²³ By way of comparison, in jurisdictions that have an express constitutional protection of the right to vote—such as Canada and New Zealand—both blanket bans on imprisoned people voting and restrictions applying to those serving sentences of two years or more have been held to be unconstitutional.²⁴

20 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). The ‘doctrine of legal equality’ suggested in *Leeth v Commonwealth* (1992) 174 CLR 455 had some potential for protecting the interests of people in Australian prisons. That case concerned differential treatment of people convicted under Commonwealth legislation who are kept in state and territory prisons. Deane and Toohey JJ opined: ‘[t]he conditions of imprisonment may vary from State to State and, to that extent, a person imprisoned in one State for an offence against a law of the Commonwealth may be more harshly treated than a person imprisoned for the same offence in another State. If the Constitution’s doctrine of equality would otherwise preclude such different treatment, it must be modified to permit it at least to the extent that it is a necessary concomitant of the use of State prisons to punish Commonwealth offenders’: at [490]. However, the doctrine has been rejected in later cases (including in *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1): George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory. Commentary & Materials* (The Federation Press, 6th ed, 2014) 627. Therefore, this does not currently provide an avenue of protection for the rights of imprisoned people.

21 Sections 7 and 24. See *Roach v Electoral Commissioner* (2007) 233 CLR 162, 182 [24]–[25], 202 [95] per Gleeson CJ, Gummow, Kirby and Crennan JJ (Hayne and Heydon JJ dissenting).

22 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 179–80 [19], 204 [102].

23 Graeme Orr and George Williams, ‘The People’s Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia’ (2009) 8(2) *Election Law Journal* 123, 138.

24 *Ibid* 129. The relevant Canadian cases are *Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438 and *Sauvé v Canada (Chief Electoral Officer)* [2002] SCR 519. In relation to New Zealand see *Attorney-General v Taylor* [2018] NZSC 104.

International human rights law has influenced statutory interpretation by the High Court in other ways, although none of these have been applied in cases relating to prisons.²⁵ It is clear that when there is a legislative intention to override ‘common law rights or liberties, or human rights’, the High Court cannot protect these.²⁶

Common Law Position

Historically, imprisonment led to what was known as ‘civil death’. That is, a person who was sentenced to imprisonment ‘lost all civil rights such as the right to inherit, to own or deal with property and the right to sue’.²⁷ This position shifted in the late twentieth century and was replaced with the ‘residuum principle’.²⁸ This principle is that a person sentenced to imprisonment retains all their rights other than those unavoidably lost by virtue of their imprisonment, such as liberty.²⁹

The common law residuum principle, *prima facie*, complies with the core feature of international human rights law in relation to prisons, which is that people who are incarcerated do not lose any of their human rights other than the right to liberty.³⁰ However, the reality is complicated by numerous factors, including corrections legislation allowing for limits on rights based on security concerns (discussed later in this chapter, under ‘Corrections Legislation’); courts being reluctant to interfere in prison

25 Debeljak, above n 10, 48.

26 Dixon, above n 18, 85.

27 Melinda Ridley-Smith and Ronnit Redman, ‘Prisoners and the Right to Vote’ in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (Federation Press, 2002) 284. As recently as 1978, the High Court held that the doctrine of ‘civil death’ was part of Australian law, in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583. For a more detailed discussion of this history and how it stemmed from the United Kingdom see Matthew Groves, ‘The Second Charters of Prisoners’ Rights’ in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 188.

28 *Raymond v Honey* [1983] 1 AC 1, 10 (Lord Wilberforce).

29 Naylor, above n 14, 396. This has been described as the basis for the *Crimes (Administration of Sentences) Act 1999* (NSW) by Basten JA in *Clark v Commissioner for Corrective Services* [2016] NSWCA 186, [8].

30 As required under Principle 5 of the United Nations *Basic Principles for the Treatment of Prisoners* (1990), which stipulates: ‘Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants’.

administration (discussed in Chapter 3); and legislation that specifically limits imprisoned people's rights, such as electoral legislation that precludes certain categories of imprisoned people from voting (discussed above).

As Brown has argued, “civil death” and a variety of practices it spawned, are clearly evident in relation to prisoners'.³¹ The denial of the franchise for all people sentenced to imprisonment for three years or more is an example of this. This historical background is crucial for understanding the rights of imprisoned people at present.

Human Rights Legislation

The ACT's *Human Rights Act 2004* ('HRA') commenced on 1 July 2004 and Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('Charter') commenced on 1 January 2007.³² The *Human Rights Act 2019* (Qld) ('QHRA') was passed on 27 February 2019 and commenced on 1 January 2020.³³ The recency of this Act's assent means that the provisions of the QHRA are referred to in this discussion, but no comments may be made about their operation. There are several key components of the HRA, Charter and QHRA, which will be discussed in turn. These are: (1) the rights and permissible limitations, (2) legislative scrutiny provisions, (3) the interpretation and declaration of incompatibility powers of the courts and (4) the duties imposed on public authorities. A discussion of each is followed by a summary of the judicial interpretation of the HRA and Charter.

It is important to note that all three Acts fall within the 'dialogue' model of human rights protection. That is, the Executive, Parliament and Judiciary all have particular roles set out under the Acts such that none have a monopoly over the protection of human rights.³⁴ This model does

31 David Brown, 'Prisoners as Citizens' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (Federation Press, 2002) 310.

32 With the exception of divs 3 and 4 of pt 3 which commenced on 1 January 2008.

33 Queensland Government, *Human Rights* <<https://www.qld.gov.au/law/your-rights/human-rights>>.

34 Debeljak, above n 10, 59. See also George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 77. For an evaluation of whether the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') has been successful in creating such 'dialogue' see Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing, 2019) Part III, 222–7.

not require the three branches of government to agree; rather, it ‘exposes each arm of government to the diverse perspectives on rights of those with different institutional strengths, motivations and forms of reasoning’.³⁵

The Rights and Permissible Limitations

The Acts guarantee a set of human rights, which in essence reflect the rights contained in the ICCPR.³⁶ Importantly, for the purposes of complying with the OPCAT, all Acts prohibit TCID.³⁷ They also require that people deprived of their liberty be ‘treated with humanity and with respect for the inherent dignity of the human person’ in accordance with art 10(1) of the ICCPR.³⁸ The third major requirement under the ICCPR—that the aim of the prison system be ‘reformation and social rehabilitation’ as set out in art 10(3)—has not been incorporated into any of the Acts. None of the jurisdictions provide adequate justification for this omission, and this will be discussed further in Chapter 6 where it is argued that the third prerequisite for human rights compliance for prisons in Australia should be to shift the focus of imprisonment to the goal of rehabilitation in accordance with this international law requirement.

Rights of special importance to imprisoned people provided in the Acts include the right to life,³⁹ the right to security of the person,⁴⁰ the right to privacy⁴¹ and the specification that a person can only be deprived of liberty according to legal procedures.⁴²

Other rights that are also relevant include (but are not limited to) the right to equality before the law and not to be discriminated against;⁴³ the right to protection of family and children;⁴⁴ the right to peaceful assembly and

35 Julie Debeljak, ‘Rights Dialogue Where There is Disagreement Under the Victorian Charter’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020) 275. Debeljak’s chapter provides detailed case studies of the interplay between the judicial and executive branches of government in Victoria: at 282–320.

36 *Human Rights Act 2004* (ACT) pt 3 (‘HRA’); *Charter* pt 2; *Human Rights Act 2019* (Qld) pt 2 div 2 (‘QHRA’).

37 *HRA* s 10; *Charter* s 10; *QHRA* s 17.

38 *HRA* s 19; *Charter* s 22; *QHRA* s 30.

39 *HRA* s 9; *Charter* s 9; *QHRA* s 16.

40 *HRA* s 18; *Charter* s 21; *QHRA* s 29.

41 *HRA* s 12; *Charter* s 13; *QHRA* s 25.

42 *HRA* s 18; *Charter* s 21; *QHRA* s 29(3).

43 *HRA* s 8; *Charter* s 8; *QHRA* 15.

44 *HRA* s 11; *Charter* s 17; *QHRA* s 26.

freedom of association;⁴⁵ the right to freedom of thought, belief and religion;⁴⁶ and the right to culture and religion.⁴⁷ The *QHRA* also contains a ‘right to access health services without discrimination’, which is a right from the *International Covenant on Economic, Social and Cultural Rights*.⁴⁸

All of these rights can be subject to limitations pursuant to s 7(2) of the *Charter*, s 28 of the *HRA* and s 13 of the *QHRA*.⁴⁹ Specifically, these limitations are to be ‘reasonable’ and ‘demonstrably justified in a free and democratic society’.⁵⁰ Whether there is a limit on rights, and whether it is reasonable and ‘demonstrably justified’, will be a matter the court determines based on the facts and evidence in the particular case.⁵¹ In the ACT and Victoria, the courts have held that the government bears the burden of satisfying the court that the limit is justified.⁵² A great deal of confusion has been created about the operation of these provisions resulting from a 3:3 split in the High Court’s interpretation of the *Charter* provisions on an appeal (in a decision that Boughey describes as a ‘train wreck’).⁵³

A particularly pertinent example of a limitation in the prison context is the need to maintain security.⁵⁴ This potential limitation was clear in Queensland. The Bill that led to the *QHRA* also made amendments to the Queensland corrections legislation to make it explicit that when taking into consideration the human rights protected by the *QHRA*, it is not a breach of the *QHRA* for corrections managers to also consider ‘the security and good management of corrective services facilities’.⁵⁵ This is an additional limitation that may be taken into account when interpreting the

45 *HRA* s 15; *Charter* s 16; *QHRA* s 22.

46 *HRA* s 14; *Charter* s 14; *QHRA* s 20.

47 *HRA* s 27; *Charter* s 19; *QHRA* s 27. The *QHRA* also provides protection of Aboriginal and Torres Strait Islander cultural rights in s 28.

48 *QHRA* s 37; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 12.

49 For an overview of the differences between the Queensland and Victorian provisions see Bruce Chen, ‘The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria’ (2020) 45(1) *Alternative Law Journal* 1, 2.

50 In accordance with the *HRA* s 28, *Charter* s 7 and *QHRA* s 13.

51 Christopher Tran, ‘Facts and Evidence in Litigation Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT)’ (2012) 36 *Melbourne University Law Review* 287, 289.

52 *Ibid* 309, 316.

53 The High Court’s decision is *Momcilovic v The Queen* (2011) 280 ALR 221. Boughey, above n 34, 210. See discussion in Williams and Reynolds, above n 34, 79; Will Bateman and James Stellios, ‘Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Rights’ (2012) 36 *Melbourne University Law Review* 1.

54 Naylor, above n 14, 414.

55 *QHRA* s 126 inserting new section 5A into the *Corrective Services Act 2006* (Qld).

rights protected in the *QHRA* and poses a serious limitation to the right to humane treatment, particularly when deprived of liberty under s 30. Chen surmises that it may have the effect of exempting prison managers from the obligation to comply with this right, representing a ‘marked abdication of human rights responsibilities in closed environments’.⁵⁶ He further notes that this concern was raised during the inquiry about the provisions of the Bill, but given that no change was made to the proposed provision, its operation will need to be considered as part of the first review of the *QHRA*.⁵⁷

Corrections legislation is replete with examples of situations where rights can be overridden by security concerns, such as provisions to deny or terminate visits for security reasons,⁵⁸ provisions to keep a person in solitary confinement for security purposes,⁵⁹ and limitation or denial of access to religious or cultural services if they would ‘undermine security or good order at a correctional centre’.⁶⁰ As Owers points out, emphasis on security is a legitimate concern for prison managers. However, the danger is that ‘security can come to have the quality of the parental “because I say so”; the trump card, the excuse rather than the reason’.⁶¹ Thus, there is a need to balance the competing concerns of maintaining security and ensuring limitations on the human rights of imprisoned people are reasonable and demonstrably justified. Every occasion of such a balancing exercise must be articulated according to the legislative criteria in an open and transparent way.

Legislative Scrutiny Provisions

Since the *HRA* and *Charter* have been in operation, new legislation introduced into Parliament has been subject to a two-stage scrutiny process. The *QHRA* introduces a similar scrutiny process. The first stage is for the Bill to be accompanied by a statement of compatibility with human rights when it is introduced into the relevant Parliament.⁶²

⁵⁶ Chen, above n 49, 6.

⁵⁷ *Ibid* 6–7.

⁵⁸ *Corrections Act 1986* (Vic) s 43.

⁵⁹ *Correctional Services Act 1982* (SA) s 36(2)(d).

⁶⁰ *Corrections Management Act 2007* (ACT) s 55(3)(a) (*‘CMA’*).

⁶¹ Anne Owers, ‘Prison Inspection and the Protection of Human Rights’ (2004) 2 *European Human Rights Law Review* 107, 109.

⁶² *HRA* s 37; *Charter* s 28; *QHRA* s 38. Note that the *Charter* requirement applies to any member of Parliament introducing a Bill, whereas the *HRA* requirement only applies to Bills introduced by a Minister and requires the Attorney-General to prepare the compatibility statement.

This process is intended to ensure that human rights are at the forefront of policymakers' and politicians' minds when new legislation is being developed and enacted.

In the context of the *Charter*, Debeljak has described how this fits into the dialogue model as follows: '[s]ection 28 statements allow the executive to identify *its* understanding of the open-textured rights because an assessment of whether a right is limited by legislation contains information about the executive's assessment of the scope of the right'.⁶³ Victorian statements of compatibility have been observed to be of variable quality.⁶⁴ Also, in the context of Victoria, Debeljak has noted that the statements may simply note an incompatibility without detailing what this is (such as which right is infringed or limited, and how).⁶⁵ Thus, this mechanism does not stop rights-infringing legislation from being introduced and passed. What it does do is make this occurrence slightly more transparent.

The second stage is for the Bill to be considered by a parliamentary committee that provides a report to Parliament about any human rights issues it may raise.⁶⁶ In the ACT, it is the relevant standing committee of the Legislative Assembly that provides Scrutiny Reports. In Victoria, it is a specialised scrutiny committee—the Scrutiny of Acts and Regulations Committee (SARC)—that produces reports in an Alerts Digest. In Queensland, similar to the ACT, Bills will be referred to '[t]he portfolio committee', rather than a standalone scrutiny committee.⁶⁷

63 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue Under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 28 (emphasis in original).

64 Boughey, above n 34, 222.

65 Julie Debeljak, 'Rights Dialogue Under the Victorian Charter: The Potential and the Pitfalls' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 415. For a detailed discussion of statements of compatibility in Victoria see Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020).

66 *Charter* s 30; *HRA* s 38; *QHRA* s 39. There is also a Commonwealth scrutiny committee (the Joint Committee on Human Rights), but this is not discussed here because states and territories are responsible for legislation governing imprisonment. For information about the operation of the Commonwealth committee see Fletcher, above n 6.

67 *QHRA* s 39. For a discussion of scrutiny in Queensland prior to the passage of the *QHRA* see Charles Sampford, 'Queensland Scrutiny in Context' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020).

This also fits into the dialogue model. To again cite Debeljak, in relation to Victoria, ‘the SARC report, the parliamentary debate, and the final legislation similarly indicate to the executive and the judiciary what *parliament’s* understanding of the rights are, whether the legislation limits rights, and whether the limits are justified under s 7(2)’.⁶⁸

This mechanism sounds better on paper as a rights-protection mechanism than it is in practice, particularly in Victoria. There have been examples of Victorian Bills where debate has concluded before the SARC has prepared a report.⁶⁹ This occurs in a context where the SARC is also generally unable to report on all of the Bills in the timeframe it is given (two weeks or less).⁷⁰ The frequency of references to SARC reports in parliamentary debates has declined over the years that the *Charter* has been in operation.⁷¹ Even when the SARC does produce a report raising human rights concerns about a Bill this, in the words of a Chair of the SARC, ‘has had little influence over the content of legislation’.⁷²

The impact of legislative scrutiny in the ACT has been better. In 2014, there were 100 amendments to Bills in response to Committee reports.⁷³ One example of an ACT Bill that was amended as a result of this scrutiny process is summarised as follows:

In 2008, for example, the Scrutiny of Bills Committee made comments in relation to the ACT Civil and Administrative Tribunal Bill recommending that the Bill be amended to include notes explicitly preserving the privilege against self-incrimination in the new Tribunal. The government agreed to the amendment.⁷⁴

68 Debeljak, above n 10, 66.

69 Debeljak, above n 65, 411.

70 Ibid 415. See also George Williams and Daniel Reynolds, ‘A Human Rights Act for Queensland? Lessons From Recent Australian Experience’ (2016) 41(2) *Alternative Law Journal* 81, 83 and the case studies provided in Sharon Mo, ‘Parliamentary Deliberation in the Operation of the Victorian Human Rights Charter’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020).

71 Boughey, above n 34, 222–3.

72 Carlo Carli MP, cited by Debeljak, above n 65, 415.

73 Williams and Reynolds, above n 70, 84.

74 Helen Watchirs and Gabrielle McKinnon, ‘Five Years’ Experience with the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia’ (2010) 33(1) *UNSW Law Journal* 136, 144.

From 2015–2018, there have been amendments to seven ACT Bills in response to the Scrutiny Committee’s recommendations and it has been noted that the ‘unicameral Assembly, with its preponderance of minority governments’ may explain why the ACT’s scrutiny process has been more successful than Victoria’s.⁷⁵

Interpretation and Declaration of Incompatibility Powers of the Courts

Another way the legislation protects human rights is by requiring that the court interpret all laws in a manner that is compatible with human rights ‘as far as it is possible to do so’ consistently with their purpose.⁷⁶ This provision applies even when there is no ambiguity about the relevant provision, and applies to all legislation, rather than just legislation impacting the relationship between government and individuals.⁷⁷ All of the Acts allow the court to refer to international law and the judgments of international courts when conducting this interpretation.⁷⁸

The interpretation of legislation in a rights-compatible manner may provide a remedy in some instances—‘that is, a rights-compatible interpretation of a law is a complete remedy for a person whose rights would have otherwise been violated had the law been interpreted rights-*in*compatibly’.⁷⁹ However, there have been several instances in Victoria where a court has adopted a rights-compatible interpretation of legislation and the legislature has then responded by amending the legislature to ensure this

75 Helen Watchirs, Sean Costello and Renuka Thilagaratnam, ‘Human Rights Scrutiny Under the Human Rights Act 2004 (ACT)’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020) 186. On the role of the ACT Committee generally see their discussion from 183–6.

76 *HRA* s 30; *Charter* s 32; *QHRA* s 48.

77 Simon Evans and Carolyn Evans, ‘Legal Redress Under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264, 267, 269.

78 *HRA* s 31; *Charter* s 32(2); *QHRA* s 48(3).

79 Debeljak, above n 10, 65 (emphasis in original). In relation to the *Charter*, Boughey has observed that ‘[i]n the early years of the *Charter*, there was a view among some judges and scholars that s 32 permitted courts to adopt a “remedial” approach to interpreting legislation’, similar to the UK. However, Boughey goes on to explain that since the High Court’s decision in *Momcilovic v The Queen* (2011) 245 CLR 1, ‘Victorian courts have taken the view that s 32 simply codifies the common law principle known in Australia as the “principle of legality” and extends its application to a wider range of rights’: Boughey, above n 34, 210.

rights-compatible interpretation is not possible in future.⁸⁰ Such changes show the limitations of a rights-compatible interpretation—they may be precluded by a ‘rights-incompatible’ statutory amendment.

If it is not possible for the court to interpret the law in a manner compatible with human rights, the court has the power to make a declaration of ‘incompatibility’ (ACT and Queensland⁸¹) or ‘inconsistent interpretation’ (Victoria).⁸² Such a declaration does not affect the validity or operation of the legislation in any jurisdiction.⁸³ Debeljak explains that it is ‘simply a warning to the executive and parliament that legislation is inconsistent with the *judiciary’s understanding* of the protected rights’.⁸⁴ It is up to the responsible Minister in Victoria and Queensland, and the Attorney-General in the ACT, to respond to the declaration in Parliament.⁸⁵ In all three jurisdictions, there is a six-month timeframe imposed for such a response.⁸⁶

Declarations complete the dialogue between the three arms of government. The Judiciary makes its interpretation clear, and the Executive and Parliament are then required to respond to this interpretation, although such a response may not necessarily be a change to the law.⁸⁷ The response may be to defend the existing legislative provisions, despite the Judiciary’s declaration that they are inconsistent with human rights.

There has only been one declaration made in the ACT and Victoria to date.⁸⁸ The Victorian declaration was the subject of a High Court appeal that has created uncertainty about how courts should use these provisions, leading Williams and Reynolds (writing before the introduction of the Queensland legislation) to argue that if Queensland goes ahead with the

80 Debeljak gives two illustrations of this, one of which is the interpretation of the *Serious Sex Offender Monitoring Act 2005* (Vic) in *RJE v Secretary to the Department of Justice* [2008] VSCA 265 that was overturned by amendments passed in the next sitting of Parliament. See Debeljak, above n 65, 409–10.

81 *HRA* s 32; *QHRA* s 53.

82 *Charter* s 36. The interpretation of this provision is somewhat unclear since the High Court decision in *Momcilovic v The Queen* (2011) 280 ALR 221, where the court was split as to whether a ‘weaker’ or ‘stronger’ remedial approach was to be taken: Debeljak, above n 10, 66.

83 *HRA* s 32(3); *Charter* s 36(5); *QHRA* s 54.

84 Debeljak, above n 10, 64 (emphasis in original).

85 *HRA* s33; *Charter* s 37; *QHRA* s 56.

86 *HRA* s 33; *Charter* s 37; *QHRA* s 56(1).

87 Debeljak, above n 10, 67.

88 Williams and Reynolds, above n 70, 82. For a discussion of the ACT declaration made in *The Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 see Watchirs, Costello and Thilagaratnam, above n 75, 192–3.

introduction of human rights legislation, they should adopt a different legislative provision for this purpose.⁸⁹ The Queensland interpretative provision is worded slightly differently to the Victorian one considered by the High Court, but it remains unclear whether these small differences will lead Queensland courts to adopt a different approach.⁹⁰

Duties Imposed on Public Authorities

The final way the legislation provides protection of human rights is by imposing a duty on public authorities/entities. ‘Public authorities’ are defined by the ACT and Victorian Acts to include the police, government ministers and public officials (among others).⁹¹ This definition clearly covers the Alexander Maconochie Centre (AMC) as a publicly run prison, as well as Victorian public prisons. It is a more complicated position for the three privately managed prisons in Victoria.⁹² In addition to purely public bodies, the *Charter* applies to private entities that carry out public functions. Section 4 gives a privately managed prison as an example of an entity that is considered to carry out ‘correctional services’, and this is generally considered to be a government function. Therefore, Victoria’s private prisons are also considered public authorities for the purposes of the *Charter*. However, they only have human rights obligations when carrying out their public functions.

The *QHRA* uses the term ‘public entity’, rather than ‘authority’, which is defined to include entities carrying out ‘functions of a public nature’ and, therefore, includes public prisons.⁹³ Privately managed prisons come within the meaning of what is described in the explanatory notes to the Human Rights Bill 2018 as a ‘functional public entity’.⁹⁴ The *QHRA* lists operating a ‘correctional services facility’ as a public function,⁹⁵ then the explanatory statement helpfully clarifies that ‘a private company managing a prison’ is an example of such a public entity.⁹⁶

89 Williams and Reynolds, above n 70, 84. The High Court decision was *Momcilovic v The Queen* (2011) 245 CLR 1.

90 The wording of the provision could have been improved further: see the discussion by Williams and Reynolds, above n 70, 85. For a discussion of the differences between the *Charter* and *QHRA* interpretive provisions see Chen, above n 49, 3–5.

91 *HRA* s 40; *Charter* s 4.

92 Fulham Correctional Centre, Port Phillip Prison and Ravenhall Correctional Centre.

93 *QHRA* s 9(1)(h).

94 This refers to s 10 of the *QHRA* that concerns entities that are carrying out functions that are ‘of a public nature’.

95 *QHRA* s 10(3)(a).

96 Explanatory Notes, Human Rights Bill 2018, 15.

The duty imposed on public authorities/entities has two components. First, it is unlawful for public authorities/entities to act or decide inconsistently with the human rights protected by the legislation. Second, when making decisions, ‘proper consideration’ must be given to these rights.⁹⁷ These may be described as the ‘substantive’ and ‘procedural’ obligations, respectively.⁹⁸ The introduction of these requirements led Victoria to conduct an audit of policies to ensure rights consistency with *Charter* rights in Victoria prior to the commencement of the *Charter*.⁹⁹

There is an exemption to this duty in all three Acts for situations where it is not possible for the public authority to have made a different decision or acted in a different way.¹⁰⁰ This would occur where, for example, the legislation is not compatible with human rights.¹⁰¹

If an imprisoned person considers that a prison authority has breached their human rights obligations as a public authority/entity, the remedy available is different in the ACT on the one hand, and in Victoria and Queensland on the other. In the ACT, the person may bring an action in the Supreme Court directly—the breach being a breach of a statutory duty, and the *HRA* being the statute so breached (s 40C(2)). In the first application made to the Supreme Court under s 40C of the *HRA*, the Court developed seven questions that need to be considered when an application is made under the provision.¹⁰² These questions surround identifying the act or decision, identifying the human right, assessing whether the entity is a public authority, assessing whether the act or decision is inconsistent with the right, determining if there is a limitation and whether it is reasonable and demonstrably justifiable, assessing whether the decision-maker gave enough consideration to the right, and assessing whether there is a discretion that may be exercised consistently with the right.¹⁰³

97 *HRA* s 40B; *Charter* s 38; *QHRA* s 58.

98 Explanatory Notes, Human Rights Bill 2018, 34.

99 The audit is detailed in Victorian Government, Submission 324 to Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, 2011, [7]–[17].

100 *HRA* s 40B(2); *Charter* s 38(2); *QHRA* s 58(2).

101 There are exceptions provided for religious bodies in Victoria and Queensland, which is not relevant to this discussion: *Charter* s 38(1); *QHRA* s 58(3).

102 *Hakimi v Legal Aid Commission (ACT)* (2009) ACTLR 127.

103 *Ibid* [137].

The ACT Supreme Court can grant any type of relief with the exception of damages.¹⁰⁴ It has been argued that the unavailability of damages has limited litigation to enforce the duties imposed on public authorities, because it ‘removes an incentive for private law firms to take on human rights cases for impecunious litigants on a pro bono or “no win, no fee basis”’.¹⁰⁵

In Victoria and Queensland, an action can only be brought if the person has another cause of action.¹⁰⁶ The human rights claim must be linked to that other cause of action, in tort law for example, or for judicial review of an administrative decision.¹⁰⁷ Both Acts specifically provide that damages cannot be awarded for a breach of human rights; however, damages may be available for the other cause of action to which the human rights claim is attached.¹⁰⁸

The requirement to attach a claim to another cause of action has been described as ‘convoluted and counter-productive’.¹⁰⁹ When the Queensland Bill was under consideration, human rights experts strongly recommended that Queensland follow the ACT approach of providing a standalone cause of action, rather than the much more convoluted Victorian approach.¹¹⁰ Queensland did not follow this advice and Chen argues that this is a ‘missed opportunity’ and that ‘[l]itigants will undoubtedly be similarly hamstrung in their ability to obtain an effective relief or remedy for a breach of the Qld HRA in court and tribunal proceedings’.¹¹¹ The requirement to attach the human rights claim to another cause of action adds an additional hurdle to imprisoned people

104 *HRA* s 40C(4).

105 Watchirs and McKinnon, above n 74, 158–9.

106 *Charter* s 39(1); *QHRA* s 59(1).

107 In relation to the *Charter* see Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities Under the *Charter* of Rights’ (Paper presented at the Law Institute of Victoria *Charter* of Rights Conference, Melbourne, 18 May 2007) 12. The second example is mentioned in s 39(2) of the *Charter*.

108 *Charter* s 39(3); *QHRA* ss 59(3), 59(6). In relation to the *Charter* see Bronwyn Naylor, Julie Debeljak and Anita Mackay, ‘A Strategic Framework for Implementing Human Rights in Closed Environments’ (2015) 41 *Monash University Law Review* 218, 240. Also in relation to the *Charter*, Boughey provides a number of references for the academic critique of s 39 and notes that it has been ‘recommended that it be repealed or redrafted’: Boughey, above n 34, 219.

109 Williams and Reynolds, above n 70, 83.

110 *Ibid.* Submissions were made recommending that the Queensland Civil and Administrative Tribunal have jurisdiction under the *QHRA*: Louis Schetzer, ‘Queensland’s Human Rights Act: Perhaps Not Such a Great Step Forward’ (2020) (Advance) *Alternative Law Journal* 1, 4.

111 Chen, above n 49, 7–8.

who already face numerous barriers to taking legal action (including, getting legal representation and practical facilities such as computers to access online legal materials).¹¹²

The Victorian Supreme Court, like its ACT counterpart, has also developed a guide for assessing whether a public authority has given proper consideration to *Charter* rights (which Dixon J refers to as a ‘road map’).¹¹³ There are five questions, including whether there is a relevant human right, whether it has been limited, if the limit is reasonable and whether proper consideration was given to the right.¹¹⁴

Finally, it is worth noting that the courts’ interpretive power interacts with the obligation of public authorities. For example, if a public authority claims the s 38(2) exception under the *Charter*, s 32 of the *Charter* may operate as a remedy, as Debeljak explains:

Once the law is given a rights-compatible interpretation, the potential violation of human rights will be avoided. The rights-compatible interpretation, in effect, becomes your remedy – the law is re-interpreted to be rights-compatible, the public authority has obligations under s 38(1), and the s 38(2) exceptions to unlawfulness do not apply.¹¹⁵

Judicial Interpretation

Chapter 3 analysed some of the claims brought by imprisoned people under the *Charter* and *HRA* and concluded these claims met limited success. In summary, the general position is that, irrespective of human rights legislation, judges are reluctant to interfere with the discretion of corrections administrators. More specifically, where human rights are afforded by legislation, in some cases people have been unable to prove their claims. For example, in several ACT cases brought by Mr Islam and Mr Eastman in reliance on a variety of rights protected by the *HRA*,

112 Naylor, Debeljak and Mackay, above n 108, 240. See the detailed discussion of cases concerning access to computers from a variety of jurisdictions in Carolyn McKay, ‘Digital Access to Justice from Prison: Is There a Right to Technology?’ (2018) 42 *Criminal Law Journal* 303.

113 These were submitted by the Victorian Equal Opportunity and Human Rights Commission as intervener, and accepted by the Court in *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251 [174], and Dixon J referred to them as a ‘road map’ in *Minogue v Dougherty* [2017] VSC 724 [74].

114 *Minogue v Dougherty* [2017] VSC 724 [74].

115 Debeljak, above n 107, 19.

the ACT Supreme Court either found that the conduct could not be proven to have occurred, or did not accept that the conduct amounted to breaches of the *HRA*.¹¹⁶

In Victoria, Ms Castles did get the outcome she wanted (that is, an order that she was entitled to in-vitro fertilisation (IVF) treatment), but the rights provided for in the *Charter* were not determinative of that outcome.¹¹⁷ Mr Minogue and Mr Haigh both successfully showed that their *Charter* rights had been breached when a book addressed to Mr Minogue was returned to sender and when Mr Haigh was denied certain Tarot cards that he required for the practice of his religion. Both cases were notable for admissions by the relevant decision-makers in the prison that they had failed to consider *Charter* rights when making the particular decisions.¹¹⁸ There were other cases where *Charter* claims could have been made but were not.¹¹⁹

Summary

The enforcement mechanisms under the *Charter* and *QHRA*, and to a lesser extent the *HRA*, provide a relatively weak protection of human rights. For instance, it is entirely possible for rights to be limited in the initial drafting stages and justified throughout the scrutiny process. If a court reaches a rights-compatible interpretation, the legislature may quickly amend the legislation to clarify that they intended it to be rights incompatible. Even if the Judiciary holds that the legislation is incompatible with human rights, the Parliament may respond that such incompatibility is justified, willing to risk the political consequences this may entail.

Further, in Victoria and Queensland, a breach of duty by public authorities/entities cannot give rise to an independent cause of action and it may be difficult to reach the threshold for other causes of action to

116 *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322; *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 (25 February 2016); *Islam v Director-General, Justice and Community Safety Directorate* [2015] ACTCA 60 (16 December 2015); *Eastman v Chief Executive of the Department of Justice and Community Safety* [2011] ACTSC 33 (4 March 2011); *David Harold Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4 (12 January 2010).

117 *Castles v Secretary to the Department of Justice* [2010] VSC 310 (9 July 2010).

118 *Minogue v Dougherty* [2017] VSC 724 [36], [83], [85]; *Haigh v Ryan* [2018] VSC 474 [68]–[69].

119 *Collins v The Queen* [2012] VSCA 163; *DPP v Foster & Ors* [2014] VCC 312; *Weaven v Secretary, Department of Justice* [2012] VSC 582. See further Julie Debeljak, 'The Rights of Prisoners Under the Victorian Charter: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332.

which a *Charter* or *QHRA* claim may be added. Accordingly, the *Charter* has not generated very much prison-related litigation.¹²⁰ While it is easier to bring an action under the *HRA*, imprisoned people face substantial barriers to litigating and the litigation to date has not led to substantive rights enforcement. It remains to be seen how the *QHRA* will be relied upon in litigation and interpreted by courts.

Corrections Legislation

In Victoria, Tasmania and the ACT, corrections legislation affords imprisoned people additional rights. The ACT provisions are far more detailed than the Victorian and Tasmanian provisions. This is because the ACT corrections legislation was introduced after the *HRA* was in operation, whereas the Victorian corrections legislation is from 1986 and has not been updated since the introduction of the *Charter*.¹²¹ The Tasmanian Corrections legislation will be discussed in the same section as Victoria because the rights contained therein (introduced in 1997) were modelled on the Victorian provisions. The corrections legislation of other Australian jurisdictions is then discussed, and it will be seen that rights protection is scant, entirely lacking or, in fact, rights infringing.

Corrections Management Act 2007 (ACT)

Despite the fact that the *HRA* does not incorporate art 10(3) of the ICCPR, there are a number of provisions in the *Corrections Management Act 2007 (ACT)* (*CMA*) stating that the goal of the AMC is to rehabilitate people. Section 7(d) provides that an object of the *CMA* is ‘promoting the rehabilitation of offenders and their reintegration into society’. Section 9(f) of the *CMA*, which is about the treatment of detainees generally, provides that ‘[f]unctions under this Act in relation to a detainee must be exercised as follows ... (f) if the detainee is an offender—to promote, as far as practicable, the detainee’s rehabilitation and reintegration into society’. There is a further reference to rehabilitation in s 52 of the *CMA* concerning case management plans. As detailed elsewhere, the intention behind the ACT building a prison was rehabilitation focused.¹²²

120 Matthew Groves, ‘Prisoners and the Victorian Charter’ (2010) 34 *Criminal Law Journal* 217, 217.

121 The *CMA* commenced on 1 August 2007; *Corrections Act 1986* (Vic).

122 Anita Mackay, ‘The Road to the ACT’s First Prison (the Alexander Maconochie Centre) was Paved with Rehabilitative Intentions’ (2012) 11(1) *Canberra Law Review* 33.

The objects of the *CMA* include a requirement that functions under the Act be exercised in a manner that ensures prison management ‘respect and protect the detainee’s human rights’ (s 9(a)), and promote ‘the detainee’s rehabilitation and reintegration into society’ (s 9(f)). The objects also reinforce the provisions in the *HRA* about treating people in a humane and respectful way (in accordance with art 10(1) of the ICCPR). Section 7(c) provides that one object of the Act is ‘ensuring that detainees are treated in a decent, humane and just way’.

There are some provisions prohibiting TCID that operate at the overarching level. For example, s 9(c) (concerning the treatment of detainees generally) provides that ‘[f]unctions under this Act in relation to a detainee must be exercised ... to preclude torture or cruel, inhuman or degrading treatment’.

Section 12 prescribes the minimum living conditions for detainees that the Director-General ‘must ensure, as far as practicable’.¹²³ Examples include ‘suitable accommodation and bedding for sleeping in reasonable privacy and comfort’;¹²⁴ ‘reasonable access to the open air and exercise’ (at least one hour per day);¹²⁵ reasonable opportunity to have visitors;¹²⁶ confidential communication with a lawyer;¹²⁷ access to health services;¹²⁸ and opportunities for religious, spiritual and cultural observance.¹²⁹

The *CMA* makes a distinction between these minimum living conditions on the one hand, and privileges on the other. Section 154 of the *CMA* defines ‘privileges’ as ‘any amenity, facility or opportunity the detainee may have the benefit of in detention’. That provision also gives examples that include ‘participating in activities other than those forming part of a detainee’s case management plan’ and ‘pursuing hobbies and crafts’. The importance of this distinction is that privileges can be removed for disciplinary purposes. They may be withdrawn if, for example, an imprisoned person has committed a disciplinary breach,

123 This section is to be read in conjunction with Chapter 6 of the *CMA*, which imposes concomitant requirements on the Director-General.

124 *CMA* ss 12(d), 43.

125 *Ibid* ss 12(e), 45.

126 *Ibid* ss 12(g), 49.

127 *Ibid* ss 12(h), 50, 51.

128 *Ibid* ss 12(j), 53, 54.

129 *Ibid* ss 12(k), 55.

such as assaulting someone.¹³⁰ The living conditions, on the other hand, are designated as ‘entitlements’.¹³¹ These cannot be removed for disciplinary purposes.

Significantly, the *CMA* requires that imprisoned people be provided with medical care of an equivalent standard to people in the community.¹³² This is in accordance with Principle 9 of the United Nations Basic Principles which provides that ‘[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation’.¹³³

These provisions are comprehensive and the ACT has the most rights-compliant corrections legislation in Australia. However, there is no enforcement mechanism for failure to comply with them. For this reason, the few cases that have been brought since the AMC commenced operations have instead relied upon the right to bring a case before the Supreme Court under s 40C(2) of the *HRA*. When this has occurred, and the Supreme Court has had to consider the interaction between a right protected by the *HRA* and the provisions of the *CMA*, it has sometimes led to a narrow interpretation of the right. For example, in one case the Supreme Court held that the interference with the applicant’s right to privacy was not ‘arbitrary’ because it was conducted in accordance with the search and seizure provisions contained in the *CMA*.¹³⁴ This is an illustration of security concerns limiting a right.

Victorian and Tasmanian Corrections Acts

The Victorian and Tasmanian corrections legislation both afford imprisoned people a number of rights.¹³⁵ The Victorian provisions were considered progressive when they were introduced in 1986, and in 1991

130 ‘Disciplinary breach’ is defined in s 152 of *ibid*.

131 *Ibid* s 154.

132 *Ibid* s 53(1)(a).

133 See also Rule 24 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015) (‘the Mandela Rules’).

134 *R v Cringle* [2013] ACTSC 34 (5 March 2013). Another example is *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70 where the Court was asked to determine the ‘adequacy’ of contact between Mr Miles and another person detained in the AMC (referred to as CU) where CU was Mr Miles’ chosen ‘advisor’ under s 22(2)(b) of the *HRA* (the right to ‘communicate with lawyers or advisors chosen by him or her’ when preparing a defence to criminal charges). The Court held that it would not interfere with the AMC management’s decision that contact by mail was ‘adequate’: at [40]–[41].

135 *Corrections Act 1986* (Vic) s 47; *Corrections Act 1997* (Tas) s 29.

the Royal Commission into Aboriginal Deaths in Custody recommended that similar provisions be introduced at the national level.¹³⁶ Only Tasmania followed suit, in 1997.

The rights contained in both of these Acts include:

- the right to reasonable access to the open air and exercise (at least one hour per day)¹³⁷
- opportunity to communicate with, and receive visits from, family members and friends¹³⁸
- access to medical treatment and health care¹³⁹
- opportunity to communicate with lawyers and complaints handling bodies such as human rights commissions, Official Visitors and Ombudsmen,¹⁴⁰ and in Tasmania more recently, the Custodial Inspector.¹⁴¹

Some of these rights do align with some international human rights law protections. For example, the rights to communication with family members and to correspond with family members and lawyers and complaint handling bodies. These are consistent with art 17 of the ICCPR which prohibits ‘arbitrary interference’ with ‘privacy, family, home or correspondence’, and art 14(3)(b) of the ICCPR which protects the right of persons ‘charged with a criminal offence’ ‘[t]o communicate with counsel of his [sic] own choosing’. However, the absence of the prohibition of TCID and the requirement that imprisoned people be treated with humanity and respect is significant.

In theory, these rights offer useful protections. However, in practice, there are at least two problems with them, aptly summed up by Groves: ‘[t]he imprecise nature of the rights contained in these statutory charters, coupled with the absence of any means by which those rights may be enforced, detracts significantly from their value for prisoners’.¹⁴²

136 Groves, above n 27, 192.

137 *Corrections Act 1986* (Vic) s 47(1)(a); *Corrections Act 1997* (Tas) s 29(1)(a).

138 *Corrections Act 1986* (Vic) ss 47(1)(k), 37; *Corrections Act 1997* (Tas) ss 29(1)(j), 29(1)(k), 29(1)(m). This is consistent with the protection of families provided for by s 17 of the *Charter* and the right to privacy provided for by s 13 of the *Charter*.

139 *Corrections Act 1986* (Vic) s 47(1)(f); *Corrections Act 1997* (Tas) s 29(1)(f).

140 *Corrections Act 1986* (Vic) ss 47(1)(j), 47(1)(m), 40; *Corrections Act 1997* (Tas) ss 29(1)(l), 29(1)(o).

141 *Corrections Act 1997* (Tas) s 29(1)(l).

142 Groves, above n 27, 194.

First, the ‘imprecise’ nature of the rights and other limitations of the way they are drafted. Some are vague, such as, the ‘right to take part in educational programmes’ contained in s 47(1)(o) of the Victorian Act. Naylor has noted that this does not provide any ‘detail about the standard of programme, or the regularity or quality of teaching’.¹⁴³ Others are contingent on certain preconditions—such as (in s 29(1)(a) of the Tasmanian Act), ‘the right to be in the open air for at least an hour each day *if the facilities of the prison are suitable* for allowing the prisoner or detainee to be in the open air’.¹⁴⁴ Others leave it up to management to determine whether the right is available, with security representing a ‘trump card’.¹⁴⁵ An example is ‘the right to practise a religion of the prisoner’s choice and, *if consistent with prison security and good prison management* to join with other prisoners in practising that religion and to possess such articles as are necessary for the practice of that religion’.¹⁴⁶ These are all ways in which the protections are weakened.

Second, there is the lack of an enforcement mechanism, or provision for remedies should they be breached. Groves gives the example of the entitlement to food contained in s 47(1)(c) of the *Corrections Act 1986* (Vic), which provides ‘the right to be provided with special dietary food where the Governor is satisfied that such food is necessary for medical reasons or on account of the prisoner’s religious beliefs or because the prisoner is a vegetarian’. When Mr Weaven sought to rely on this provision because he was not being provided with an adequate yeast-free diet, the Judge opined, ‘[i]t is not my function, in any general sense, to adjudicate on the daily machinations of prison culture’ and ‘I am not satisfied that the Secretary is currently refusing to discharge her duty’.¹⁴⁷

There have been only four successful cases relying on the provisions since their enactment in 1986 in Victoria and 1997 in Tasmania. These are the Tasmanian Supreme Court ruling concerning a breach of the right to be provided with information about rules governing behaviour under s 29(p) of the *Corrections Act 1997* (Tas),¹⁴⁸ and the Victorian Supreme Court decisions concerning (1) Ms Castle’s entitlement to IVF treatment under s 47(1)(f)

143 Naylor, above n 14, 404.

144 Emphasis added.

145 Owers, above n 61, 109.

146 *Corrections Act 1986* (Vic), s 47(1)(i) (emphasis added).

147 *Weaven v Secretary, Department of Justice* [2012] VSC 582, [35], [36]. See Groves, above n 27, 194.

148 *Pickett v The State of Tasmania* [2011] TASSC 907 (20 April 2011). Section 29(p) protects ‘the right to be provided with information about the rules and conditions which will govern the prisoner’s or detainee’s behaviour in custody’.

of the *Corrections Act 1986* (Vic), which provides a right to access medical care and treatment;¹⁴⁹ (2) the breach of Mr Minogue's right to receive mail under s 47(1)(n);¹⁵⁰ and (3) Mr Haigh's being denied access to certain Tarot cards he required to practise the Pagan religion under s 47(1)(i).¹⁵¹ The latter two cases were unlikely to have succeeded without reliance on the *Charter* rights because they hinged on admissions by prison staff that they had failed to take into account *Charter* rights when making the decisions in question. All of these cases were discussed in detail in Chapter 3.

Corrections Legislation in Other Jurisdictions

There are limited references in corrections legislation to respectful treatment of imprisoned people as an object of the legislation. For example, s 3(3)(a) of the *Corrective Services Act 2006* (Qld) stipulates, '[t]his Act also recognises—the need to respect an offender's dignity'.

Corrections legislation in other jurisdictions does not provide imprisoned people with any rights. There are some examples of specific entitlements, such as:

- 'prisoners are entitled to receive and send letters' in South Australia¹⁵²
- an entitlement to be visited every two weeks in South Australia¹⁵³
- an entitlement to access legal aid in South Australia¹⁵⁴
- an entitlement to private correspondence with organisations such as the Ombudsman and, in Western Australia, the Office of the Inspector of Custodial Services¹⁵⁵
- in NSW, '[e]ach inmate (other than one who is confined to cell under s 53 or s 56 of the Act) is to be allowed at least 2 hours each day for exercise in the open air'.¹⁵⁶

149 *Castles v Secretary to the Department of Justice* [2010] VSC 310 (9 July 2010). Section 47(1)(f) protects 'the right to have access to reasonable medical care and treatment necessary for the preservation of health'.

150 *Minogue v Dougherty* [2017] VSC 724. Section 47(1)(n) protects the 'right to send and receive other letters uncensored by prison staff'.

151 *Haigh v Ryan* [2018] VSC 474. Section 47(1)(i) provides 'the right to practise a religion of the prisoner's choice and, if consistent with prison security and good prison management to join with other prisoners in practising that religion and to possess such articles as are necessary for the practice of that religion'.

152 *Correctional Services Act 1982* (SA) s 33(1)(a).

153 *Ibid* s 34(1).

154 *Ibid* s 35.

155 *Prisons Act 1981* (WA) s 67.

156 *Crimes (Administration of Sentences) Regulations 2008* (NSW) Reg 50. This entitlement is somewhat weak given that it is found in regulations rather than an Act of Parliament.

There are also some examples of provisions that are expressed using the language ‘may’, which is a weak form of entitlement because it is quite easy for correctional administrators to deny these. For example, in the Northern Territory, ‘[a] prisoner may send and receive mail’ or ‘make and receive telephone calls’, ‘in accordance with the Commissioner’s Directions’.¹⁵⁷

The *Corrective Services Act 2006* (Qld) also contains as an object that entitlements should not be taken away, except to the extent necessitated by imprisonment. For example, ‘an offender’s entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded’.¹⁵⁸

In corrections legislation in some jurisdictions, not only do imprisoned people have no rights, they are specifically denied basic rights, such as the right to consent to medical treatment. For example, the *Corrective Services Act 2006* (Qld) s 21(1) provides that ‘[a] prisoner *must* submit to a medical examination or treatment by a doctor if the doctor considers the prisoner requires medical attention’ (emphasis added). The section goes on to state, ‘[i]f a prisoner does not submit to an examination or treatment as required under this section, the doctor and anyone acting at the doctor’s direction may use the force that is reasonably necessary to carry out the examination or treatment’.¹⁵⁹ Section 51 of the *Correctional Services Act* (NT) provides:

1. A prisoner *must* submit to a prescribed alcohol/drug test if directed by the General Manager to do so.
2. If the prisoner does not submit to the test as required under section 195(2):
 - (a) the prescribed sampler may take the required sample *without the prisoner’s consent*.¹⁶⁰

157 *Correctional Services Act* (NT) ss 106(1), 104(1).

158 *Corrective Services Act 2006* (Qld) s 3(2). This echoes the ‘residuum principle’ recognised at common law by *Raymond v Honey* [1983] 1 AC 1, 10 (Lord Wilberforce).

159 *Corrective Services Act 2006* (Qld) s 21(8). See also the similar provision in Western Australia: *Prisons Act 1981* (WA) s 95D.

160 Emphasis added. See also *Crimes (Administration of Sentences) Act 1999* (NSW) s 73.

In summary, corrections legislation does not provide a source of rights outside the ACT, Victoria and Tasmania, and in these jurisdictions the rights have not (with limited exceptions) been enforceable in practice. Thus, the majority of jurisdictions have neither human rights legislation, nor enforceable rights in corrections legislation. In short, there is no effective legislative protection of human rights for imprisoned people.

Non-Legislative Regulation of Prisons

In addition to the human rights legislation in the ACT and Victoria and corrections legislation outlined above, there are two main types of non-legislative regulation of Australian prisons.

The first is the *Guiding Principles for Corrections in Australia* ('Guiding Principles') discussed in Chapter 2.¹⁶¹ These operate at the national level, are non-binding and—despite being published after the United Nations updated the *Standard Minimum Rules for the Treatment of Prisoners* in 2015 (when they became known as the Mandela Rules)—are significantly out of alignment with the Mandela Rules.

The second is the inspection codes and standards used by the prison inspectorates in the states and territories with prison inspectorates discussed in Chapter 3. These operate in the ACT, WA, NSW and Tasmania. The ACT Standards are aligned with the Mandela Rules, but the other jurisdictions' inspection codes and standards all refer to the 1955 United Nations Rules, rather than the Mandela Rules.

Neither of these constitute domestic incorporation of the treaty obligations into *law*, as required by international law. They are unenforceable in court and generally provide a poor substitute for legislation. However, it will be seen in the state- and territory-based assessment of Australian law below that in some states and territories only these non-legislative regulations are in place.

161 Corrective Services Administrators' Conference (Cth), *Guiding Principles for Corrections in Australia* (2018).

Assessment of Alignment of Domestic Legislation with International Human Rights Law Obligations

As the above discussion suggests, there is considerable variation between jurisdictions in Australia in the extent to which their prison-relevant legislation meets international treaty obligations. These can be ranked from ‘most aligned’ to ‘least aligned’. This process can suggest to individual jurisdictions both areas for improvement and models to draw from. Four broad areas for reform can also be identified.

State- and Territory-Based Assessment

The ACT’s legislation governing the operations of the AMC is currently the most closely aligned with Australia’s international obligations of all the jurisdictions. The *HRA* protects most of the relevant human rights (the only key ICCPR article it does not incorporate is the goal of imprisonment as rehabilitation) and provides people with direct access to the court when they consider a right has been breached.

The *CMA* is the most up to date corrections legislation in Australia and was passed pursuant to the *HRA*’s scrutiny requirements. The objects and overarching provisions of the *CMA* refer to rehabilitation, the right to humane and respectful treatment and the prohibition of TCID. The *CMA* also prescribes minimum living conditions, which is unique in Australian corrections legislation.

When considering the combined effect of the *HRA* and *CMA*, Bartels and Boland have concluded that ‘[t]ogether, they cover a lot of ground, and, in many respects, provide a template – if not the beginnings of an entirely new model – for the administrative and legal protection of prisoners’ human rights’.¹⁶² This is a conclusion to be endorsed.

As outlined in Chapter 3, the ACT has also recently established an Inspector of Correctional Services who published inspections standards in 2019 that align with the Mandela Rules and have taken into account

162 Lorana Bartels and Jeremy Boland, ‘Human Rights and Prison. A Case Study from the Australian Capital Territory’ in Leanne Weber et al (eds), *The Routledge International Handbook of Criminology and Human Rights* (Routledge, 2017) 560.

the OPCAT.¹⁶³ The Inspector may refer to the *Human Rights Principles for ACT Correctional Centres*, which provide some additional detail to that contained in the *HRA* and *CMA* that may assist the Inspector assessing compliance.¹⁶⁴ For example, s 53(1)(b) of the *CMA* requires that medical care be ‘appropriate’. There are eight principles about health care that refer to matters such as access to an ‘interdisciplinary health team’, ‘harm minimisation’ for people going through drug withdrawal, ‘Indigenous-specific health services’ and appropriate health care for ‘all detainees, including those who are female, transgender or intersex’.¹⁶⁵ This is a level of detail that may assist the inspector with assessing compliance with the provisions of the *CMA*, as will other principles.

The Inspector’s reports to the Legislative Assembly are required to include ‘an assessment about whether the rights under international and territory law of detainees at a correctional centre subject to review are protected’.¹⁶⁶ Therefore, the Inspector will be specifically required to assess compliance with the rights contained in the *HRA* and *CMA*.

Victoria is the next best jurisdiction for the legislative protection of the rights of imprisoned people. There are key rights protected by the *Charter*, including the prohibition of TCID and a requirement that people deprived of their liberty be treated humanely and with respect. The problem with the *Charter* is that claims for breaches of rights must be attached to other legal claims. The *Corrections Act 1986* (Vic) contains a number of rights, notwithstanding the limitations noted with their drafting and lack of enforceability.¹⁶⁷

Queensland, having recently incorporated ICCPR rights into domestic legislation via the *QHRA*, ranks next. Importantly for OPCAT compliance, this includes the prohibition of TCID. It is also positive that it requires that people deprived of their liberty be treated humanely and with respect. How this may affect or assist imprisoned people in practice is another matter. The *QHRA* is likely to suffer the same problem as the *Charter* in relation to enforcement because there is no option to bring a standalone claim for its breach.

163 ACT Inspector of Correctional Services, *ACT Standards for Adult Correctional Services* (2019) 7. The Standards are required by the *Inspector of Correctional Services 2017* (ACT) s 20.

164 ACT Government, Justice and Community Safety, *Human Rights Principles for ACT Correctional Centres* (January 2019).

165 Principles 10.2, 10.5, 10.7 and 10.8 respectively: *ibid* 10.

166 *Inspector of Correctional Services 2017* (ACT) s 27(1)(c).

167 *Corrections Act 1986* (Vic) s 47.

Tasmania has a number of rights contained in the *Corrections Act 1997* (Tas).¹⁶⁸ Some of these align with rights contained in the ICCPR, but there is no prohibition of TCID in Tasmania, nor a requirement that people deprived of their liberty be treated humanely and with respect. These are very significant omissions. The rights contained in the *Corrections Act* have been relied upon once, successfully, with the Supreme Court making a ruling concerning a breach of the right to be provided with information about rules governing behaviour under s 29(p).¹⁶⁹

Tasmania also has a new Custodial Inspector and the standards used for inspection of adult prisons that refer to the 1955 United Nations Rules (as detailed in Chapter 3).¹⁷⁰ Therefore, they need to be updated to reflect the changes introduced by the Mandela Rules.

Both WA and NSW have inspectors (both called the Inspector of Custodial Services). Both inspectors have standards that have the advantage of being specific to prisons and, similar to Tasmania, both refer to the 1955 United Nations Rules (as detailed in Chapter 3).¹⁷¹ Therefore, these also need to be updated to reflect the changes introduced by the Mandela Rules. However, having human rights protections in non-binding inspection standards is insufficient to meet the prerequisite of *legislative* protection of human rights. Nevertheless, it is better than a complete absence of recognition of the existence of human rights.

Finally, there is the Northern Territory and South Australia. Both have corrections legislation only—legislation that cannot be said to provide rights protections. They also have the Guiding Principles, but these are non-binding and not aligned with the Mandela Rules. These jurisdictions need to seriously consider legislative reform to achieve compliance with this prerequisite.

168 *Corrections Act 1997* (Tas) s 29.

169 *Pickett v The State of Tasmania* [2011] TASSC 907 (20 April 2011).

170 Office of the Custodial Inspector Tasmania, *Inspection Standards for Adult Custodial Services in Tasmania* (2018).

171 Office of the Inspector of Custodial Services, *Code of Inspection Standards for Adult Custodial Services, Version 1* (19 April 2007); NSW Inspector of Custodial Services, *Inspection Standards for Adult Custodial Services in New South Wales* (2014).

Legislative and Regulatory Reform Options

It has been demonstrated that most Australian jurisdictions do not have legislation that aligns with the international human rights law obligations that apply to prisons. There are three options for addressing this. The first is to introduce a national Human Rights Act that prohibits TCID nationally. The second would be for the states and territories to individually introduce legislative human rights protections, either in specific human rights legislation for all people (in all jurisdictions other than the ACT, Victoria and Queensland), or as amendments to their corrections legislation, applying only to imprisoned people. Finally, the regulatory framework could be updated. This should be in addition to legislative amendment and would be where additional detail could be located.

A National Human Rights Act

A national Human Rights Act would implement an oft-made recommendation by United Nations treaty monitoring bodies. For example, the Human Rights Committee, in ‘Concluding Observations’ in December 2017 on Australia’s periodic report, wrote, ‘The Committee reiterates its recommendation (see CCPR/C/AUS/CO/5, para. 8) that the State party should adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions’.¹⁷² While it should be recognised at the outset that a national Human Rights Act (assuming it was based on the *HRAI Charter* model) would not necessarily introduce a dialogue model in relation to prison legislation (because this is the responsibility of state and territory governments), it would clarify that TCID is prohibited nationally and protect the rights of imprisoned people consistently across all jurisdictions.

There has been consideration of introducing statutory human rights protection at the national level dating back to the 1970s and 1980s, with Bills introduced that did not pass.¹⁷³ More recently, the National Human Rights Consultation in 2009 found that 87 per cent of submissions supported a national Human Rights Act and recommended to the government that such an Act be adopted modelled on the *Charter* and

172 Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 2.

173 Williams and Reynolds, above n 70, 81.

HRA.¹⁷⁴ Despite this, the government did not accept the recommendation. Instead, on 21 April 2010, it released a Human Rights Framework with the centrepiece being the Joint Committee on Human Rights that scrutinises Commonwealth legislation.¹⁷⁵

There has been no indication since that a national Act will be introduced. In a 2016 report to the Human Rights Committee, the Australian Government provided the following statement: ‘Australia notes that there is no requirement for a single national law to implement the ICCPR and notes that this would be inappropriate for Australia’s federal system of government’.¹⁷⁶ In 2018, Fletcher concluded that ‘the prospects for an Australian Human Rights Act seem no brighter than in the past’.¹⁷⁷

State and Territory Human Rights Acts

Tasmania is the only state currently giving any consideration to a state-based Human Rights Act, and even this is only in the form of a petition.¹⁷⁸

There were consultation processes about human rights legislation conducted in both Tasmania and Western Australia in 2007.¹⁷⁹ Despite recommendations supporting human rights legislation in both cases, these processes were stalled while awaiting the outcome of the National Consultation, and were then shelved when the National Consultation failed to lead to the introduction of national-level human rights legislation. Fletcher notes that seven of the eight states and territories have considered human rights legislation since 1998, with only South Australia not having officially considered such legislation within that timeframe.¹⁸⁰

174 National Human Rights Consultation, above n 7; Phillip Lynch, ‘Australia’s Human Rights Framework: Can There be Action Without Accountability?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) 20–1.

175 For discussion of the framework see Fletcher, above n 6, Chapter 2; Williams and Reynolds, above n 34, Chapter 5. For a discussion of the impact of this Committee see Fletcher, above n 6, Chapters 4 and 5.

176 Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Sixth Periodic Reports of States Parties Due in 2013 Australia*, UN Doc CCPR/C/AUS/6 (2 June 2016) 2.

177 Fletcher, above n 6, 53.

178 Tasmanian Human Rights Act Campaign, <<https://www.tashumanrightsact.org/>>.

179 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007) discussed by Rose Mackie and Anja Hilkmeyer, ‘Tasmania: Time to Move Beyond the Smoke and Mirrors’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020) 533; *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, (2007). For a discussion of consideration of Human Rights Acts prior to this see Williams and Reynolds, above n 34, 66–7.

180 Fletcher, above n 6, 34.

There is no reason at this point in time to be optimistic that additional states and territories (beyond Victoria, the ACT and Queensland) will introduce Human Rights Acts.

Amending Corrections Legislation

Corrections legislation in many Australian jurisdictions dates from the 1980s and does not reflect Australia's international human rights obligations in relation to imprisoned people.¹⁸¹ The exception is the *CMA*, which is the most recent corrections Act passed, having been passed in 2007. The *CMA* undoubtedly provides the best example of human rights-compliant corrections legislation in Australia. However, jurisdictions that do not have a Human Rights Act would need to carefully consider the connections between the *HRA* and *CMA* if they wished to pass a standalone corrections Act based on the *CMA*.

Updates to corrections legislation in the states and territories also seem unlikely in the foreseeable future. To take Victoria as an example, the *Charter* has been in operation for over a decade, yet the government has not shown any signs of updating the *Corrections Act 1986* (Vic) to ensure consistency with the *Charter*. This is because the majority of jurisdictions are pursuing a 'tough on crime' agenda, which is leading to longer prison sentences, overcrowded prison conditions (as outlined in Chapters 1 and 4) and, consequently, harsher prison conditions and exacerbation of the pains of imprisonment (also discussed in Chapter 1).¹⁸² Introducing human rights protections in corrections legislation would counter these trends.

Updating the Regulatory Framework

Another option is for Australia to address non-legislative regulations to ensure that there are nation-wide standards. These could then be used by organisations comprising the NPM in conducting OPCAT inspections. This is also where a lot of the detail that cannot be included in legislation may be located.

181 For example, *Corrections Act 1986* (Vic), *Correctional Services Act 1982* (SA) and *Prisons Act 1981* (WA).

182 See, eg, Michelle McDonnell and James Farrell, 'Tough, Tougher, Toughest? A New Government's Approach to Sentencing Laws in Victoria' (2012) 37(3) *Alternative Law Journal* 238; Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1. See also the discussion of sentencing law reforms in Chapter 4.

There are two ways of doing this. The first would be for Corrections Ministers to overhaul the Guiding Principles to properly align them with the 2015 Mandela Rules.¹⁸³ This seems unlikely, given that the Guiding Principles were updated recently (in 2018) and three years after the Mandela Rules.

The second is to introduce national-level prison inspection standards. The ACT Standards would provide a useful starting point for this because they are comprehensive and draw on the extensive experience of Her Majesty's Inspectorate of Prisons.

The latter may be preferable because Australia needs to ensure the NPM meets all of the six criteria stipulated in the OPCAT and, as noted in Chapter 3, one of those is regular visits with the aim of providing protection against TCID, requiring clear inspection standards.¹⁸⁴ The standards are also more detailed and practical in focus than the Guiding Principles; therefore, they have more scope for direct application.

Conclusion

The legislation governing the administration of prisons in Australia is predominantly out of alignment with Australia's international human rights law obligations. This means Australia is in breach of the Treaty obligation to incorporate human rights into domestic legislation.

There is one positive exception, the ACT, which has both statutory human rights protections (the *HRA*) and human rights-compliant corrections legislation (the *CMA*). This model is a useful one for other jurisdictions that wish to improve their legislation.

This is necessary to achieve this second prerequisite for human rights compliance in Australian prisons. It is significant for Australia's implementation of the OPCAT because TCID needs to be prohibited in domestic legislation. As it stands, only the ACT, Victoria and Queensland have done so.

183 See further Anita Mackay, 'Human rights guidance for Australian prisons: Complementing implementation of the OPCAT' (2020) (Online Advance) *Alternative Law Journal*.

184 OPCAT art 19(a).

This chapter has outlined several ways that Australia may achieve this prerequisite, including by introducing a national Human Rights Act; state and territory Human Rights Acts in all states and territories other than the ACT, Victoria and Queensland; and/or amendments to corrections legislation. These are not mutually exclusive. However, there is not much reason for optimism that any of these reform options will be pursued soon. The main reason for optimism is the ratification of the OPCAT, which will result in visits by the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), as well as the requirement for an NPM to conduct inspections using standards that prevent TCID.

Changes to legislation are also necessary to achieve other prerequisites put forward in this book. The prerequisite of shifting the focus of imprisonment to the goal of rehabilitation discussed in Chapter 6 will require legislative change in all jurisdictions, including the ACT, because the *HRA* does not incorporate art 10(3) of the ICCPR. Legislation should also mandate that prison staff treat people in a human rights-consistent manner (the fourth prerequisite, discussed in Chapter 7) and establish objective benchmarks for ensuring decent physical conditions in all prisons (the fifth prerequisite, discussed in Chapter 8).

It would be naïve to suggest that domestic legislative protection of the human rights of imprisoned people in Australia guarantees good prison conditions in practice. It is a necessary, but not sufficient, requirement for achieving human rights compliance. This is because, without legislating a commitment to protecting specific rights and supplementing this with detailed regulation, it is difficult to articulate how rights will be protected and enforced domestically.¹⁸⁵

185 Naylor, Debeljak and Mackay include domestic legislation as part of the regulatory framework that forms one of the three pillars of the strategic framework for protecting human rights in closed environments: Naylor, Debeljak and Mackay, above n 108, 224–48. The other two pillars are external monitoring and culture change.

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