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The Fifth Prerequisite: Ensure Decent Physical Conditions in All Prisons

Introduction

For those unfamiliar with prisons, it may seem that emphasis on physical conditions is misplaced, given the more serious problems, such as violence, that occur in prisons. However, physical conditions have great importance for imprisoned people. People in prison live in what Goffman termed a 'total institution', in that every aspect of their existence occurs within the prison surrounds.¹

Perhaps it is for this reason that complaints about deficiencies in the physical conditions within prisons form a large proportion of the international communications to treaty monitoring bodies about the application of human rights law in prisons. Decent prison conditions are important for ensuring an absence of 'cruel, inhuman or degrading treatment or punishment' (TCID) (particularly important for compliance with the *Optional Protocol to the Convention against Torture and Other*

1 Erving Goffman, *Asylums. Essays on the Social Situation of Mental Patients and Other Inmates* (Aldine Publishing Company, 1962). See the discussion in Chapter 1.

Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)) and treatment with humanity and respect as required by art 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).²

Physical conditions are also a chief concern of organisations monitoring prisons. Thus it is also likely to be the case for both the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and National Preventive Mechanisms (NPMs) (responsible for monitoring under the OPCAT at the international and domestic levels respectively). As Dame Anne Owers, former Chief Inspector of prisons in the United Kingdom (UK), argues, ‘protecting human rights in closed environments has to start at the level of the everyday, not the extreme’. She refers to Colin Allen, former Deputy Chief Inspector, who, when he left Her Majesty’s Inspectorate of Prisons (HMIP):

posted only one message for his successor, which sat on his notice board until the day he too left. It simply said ‘underpants’: don’t forget the importance of apparently mundane things in an environment where everything – what and if you eat, whether and if you get out of your cell, what you wear and do – is controlled by someone else.³

It can nevertheless be acknowledged that physical conditions may not be the highest priority when seeking to achieve human rights compliance in prisons. This is because deficiencies in physical conditions can be ameliorated by the way people are treated. For example, if a prison is old and the cells do not have enough natural light or ventilation, the harmful effects of this can be reduced if the cells are only occupied for sleeping.⁴ Plenty of access to fresh air and natural light during the day can compensate. On the other hand, it does not matter how modern

2 The prohibition against torture, cruel, inhuman or degrading treatment or punishment stems from art 7 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); art 15 of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’); and is required by the *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’) and *Optional Protocol to the Convention against Torture*, adopted 18 December 1992, UN Doc A/RES/57/199 (entered into force 22 June 2006) (‘OPCAT’).

3 Anne Owers, ‘Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection’ in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (Federation Press, 2014) 217.

4 Andrew Coyle and Helen Fair, *A Human Rights Approach to Prison Management. Handbook for Prison Staff* (Institute for Criminal Policy Research Birkbeck, University of London, 3rd ed, 2018) 45.

a cell is if a person is kept in that cell in excess of 20 hours per day. This is cruel treatment for which even the best possible physical conditions are no compensation. Decent physical conditions should not be viewed as sufficient in themselves for achieving human rights compliance.

This is another example of the interdependence of the prerequisites proposed in this book. Good physical conditions become easier to achieve when there is reduced reliance on prison in accordance with the first prerequisite. People then have more space and better access to goods and services. This is in contrast to the current situation where overcrowding is the norm in most Australian prisons, such that people are sharing cells and competing for insufficient goods and services (as discussed in Chapter 4).

In defining the scope of physical conditions in prisons—which includes matters such as the built environment and access to basic necessities—reference to cases in which judges have found that physical conditions violate human rights is helpful. Because there is a limited amount of Australian case law, this discussion draws on international cases where relevant, including decisions of the European Court of Human Rights (ECtHR) (of which there is a much greater volume).⁵ Moreover, the ECtHR's decisions in the past have also been considered by the Australian High Court to be 'instructive'.⁶

Concerns about physical conditions have also been raised by the SPT, which Australian prison administrators should be aware of, given that this Subcommittee will soon be visiting Australia. The recently published report of the visit to New Zealand is particularly instructive on these issues, given the similarities between Australian and New Zealand prisons.⁷

5 Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 *Human Rights Law Review* 251, 253. It has been noted that the 'conditions of imprisonment are frequent sources of individual applications' before the European Court of Human Rights (ECtHR): Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey. The European Convention on Human Rights* (Oxford University Press, 7th ed, 2017) 204.

6 Gleeson CJ referring to the ECtHR decision in *Hirst v United Kingdom [No 2]* (2005) 42 ECHR 41: *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9. Gleeson CJ cautioned that 'uncritical translation' is unwise, given the important differences in the Australian constitutional framework, but opined that 'aspects of the reasoning [of such cases] are instructive': at 178–9.

7 The Committee visited New Zealand in 2013, and the report was made publicly available in 2017: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party. Report of the Subcommittee*, UN Doc CAT/OP/NZL/1 (10 February 2017).

The case law and reports by the SPT draw attention to the matters that are pertinent to the fulfilment of Australia's human rights obligations by identifying concrete circumstances that have been found to breach imprisoned people's human rights. It will be shown that Australian prisons generally do not meet the standards required for human rights-compliant physical conditions. Positive examples of ways to improve physical conditions in Australian prisons are then considered.

There is one preliminary point to be made prior to this discussion: lack of resources is not an acceptable reason for failing to comply with this prerequisite. Around the world, governments often claim they lack the resources to improve physical conditions in instances where they are imprisoning people in old buildings with design features that run counter to the human rights of imprisoned people. The Human Rights Committee (HR Committee) has made it clear, in an individual communication concerning Cameroon, that 'certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development'.⁸ The ECtHR has echoed the view that lack of resources does not absolve governments of their human right obligations. For example, in *Gusev v Russia*,⁹ the ECtHR held that 'it is incumbent on the respondent Government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties'.¹⁰

Physical Conditions and Human Rights Concerns

There are two relevant aspects of physical conditions in prisons: characteristics of the built environment (or architecture); and people's access to basic necessities of life, such as food, clothing and personal hygiene.

8 Human Rights Committee, *Views: Communication No 458/91*, UN Doc CCPR/C/51/D/458/1991 (21 July 1994) ('*Mukong v Cameroon*').

9 *Gusev v Russia* [2008] ECHR 67542/01.

10 *Ibid* [58]. See also *Dybeku v Albania* [2007] ECHR 41153/06, [50]; *Aliiev v Ukraine* [2003] ECHR 41220/98, [151].

Built Environment

Building design is fundamental to how people in prison are able to meet basic living requirements. These requirements include adequate ventilation and natural light, sufficient personal space, and privacy when using the toilet and shower facilities. There also needs to be outdoor space for people in prison to get fresh air and exercise.

Although many international human rights obligations are relevant to such matters, international human rights law does not provide specific guidance about how to comply with these obligations in practice.¹¹ They do not, for example, specify how much cell space each imprisoned person should have. Rather, the Mandela Rules, in relation to accommodation, specify only that ‘[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation’.¹²

As noted in Chapter 4, the 2012 *Standard Guidelines for Corrections in Australia* referred to the cell size being consistent with the ‘Standard Guidelines for Prison Facilities in Australia and New Zealand (1990)’.¹³ The Office of the Inspector of Custodial Services (OICS) in Western Australia has helpfully summarised these requirements (as noted in Chapter 4) as follows:

The Standard Guidelines for Prison Facilities in Australia and New Zealand 1990 (Australasian Standard Guidelines 1990) provide that a single person cell without ablution facilities (toilet, shower, and basin) should be a minimum of 7.5 m² (‘dry cells’). An additional 1.25 m² is required for cells that include ablution facilities (‘wet cells’). If a cell is to be shared, a further 4.0 m² is required for each additional person.¹⁴

11 See, eg, the ICCPR arts 7 (the prohibition against cruel, inhuman or degrading treatment or punishment), 9 (security of the person), 10 (the requirement that people deprived of their liberty be treated with humanity and respect for inherent dignity), 12 (right to liberty and freedom of movement), 17 (right to privacy), 18 (right to freedom of freedom of thought, conscience and religion), 27 (rights of ethnic minorities to enjoy their own culture).

12 United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015) Rule 10 (‘the Mandela Rules’).

13 The Corrective Services Ministers’ Conference (Cth), *Standard Guidelines for Corrections in Australia* (2012) 2, Guideline 2.3.

14 Office of the Inspector of Custodial Services (OICS), *Western Australia’s Prison Capacity* (2016) 10. The ECtHR has held that shared cells must be at least three square metres, because cells smaller than this are likely to lead to degrading conditions: Rainey, Wicks and Ovey, above n 5, 206.

There remains a need to explore physical conditions in more depth. Space is only a superficial measure of the environment in which a person spends their entire existence for the duration of their incarceration.

There is no need to repeat here the detailed discussion about overcrowding and cell sharing (and their implications for human rights) included in Chapter 4. Instead, three other issues are considered: (1) the way architecture and prison regimes can be designed to be in violation of human rights from the outset, (2) prison buildings that are not built for the climate and (3) the specific needs of some groups within the prison population in relation to the built environment.¹⁵

Architecture and Prison Regimes

Four illustrations of problematic architecture and prison regimes will be provided here. The first two can be described as issues both of architecture and of regime. They are, first, the dormitory-style accommodation in the recently built New South Wales (NSW) ‘rapid build’ prisons, and, second, ‘supermax’ prisons. The second two illustrations are confined to architectural problems. These are, first, an underground facility in Victoria, and, second, the ongoing failure of prisons around Australia to remove hanging points.

Dormitory-Style Prisons in New South Wales

It was noted in Chapter 4 that NSW has recently built two ‘rapid build’ prisons, and there is another 1,700-bed facility planned. Jewkes has observed that ‘[t]he very fact that “rapid-build prison” has become part of the lexicon of prison planning is arguably shocking ... conjuring up as it does an industrial scale, factory-line production of units in which to foment human misery’.¹⁶ Then there is that fact that these prisons house imprisoned people in dormitories, with 25 cubicles in each dormitory and that ‘[e]levated catwalks overlook the dormitories so that staff can observe what is occurring within a dormitory without having to enter it’.¹⁷

15 For a more general discussion of the problems with prison architecture, which argues it shares features of ‘sick building syndrome’, see NSW Inspector of Custodial Services, *Report No. 1 - The Invisibility of Correctional Officer Work* (2014) 18–20.

16 Yvonne Jewkes, ‘Just Design: Health Prisons and the Architecture of Hope’ (2018) 51(3) *Australian & New Zealand Journal of Criminology* 319, 325.

17 New South Wales, Parliament Legislative Council Portfolio Committee No. 4 – Legal Affairs, *Parklea Correctional Centre and Other Operational Issues* (2018) 76. See also NSW Government, *Department of Justice Annual Report 2017-18* (2018) 52–3.

There are serious incursions on the human rights of imprisoned people inherent in this regime. They are the risks of violence (including sexual violence) and intimidation and the complete lack of privacy, due to the number of other people in the shared sleeping space and being monitored by staff from above.

It was also noted in Chapter 4 that cell sharing, even when it is only by two imprisoned people, causes increased risks of violence, with shared cells being one of the places in prisons where the risk of sexual assault is highest.¹⁸ These risks are intensified in dormitories, and Australia's past experience with dormitory-style accommodation in prisons is informative in this regard.

A 1983 Victorian Parliamentary inquiry found that dormitory-style accommodation at the Pentridge prison (which closed in 1997) was 'unfit for human habitation' and went on to recommend that 'the first priority should be to move substantially from dormitory accommodation to single cells in Victorian gaols'.¹⁹ There had been a series of sexual assaults in the Pentridge dormitories, a riot and a fire in the 1970s. When the Victorian Attorney-General announced the closure of these dormitories, he made it clear that '[t]he conditions in the dormitories are unacceptable in this day and age. They are intolerable for both inmates and staff ... and can only be described as Dickensian'.²⁰

Dormitory-style accommodation has also been dispensed with in juvenile detention centres, with a NSW Ombudsman's report finding that 'reliance upon dormitory accommodation is generally not conducive to detainees' safety or their privacy'.²¹

Other countries currently use dormitory-style accommodation in prisons and the parliamentary committee reviewing 'rapid build' prisons in NSW heard evidence of the problems in these countries, as follows:

18 Brian Steels and Dot Goulding, *Predator or Prey? An Exploration of the Impact and Incidence of Sexual Assault in West Australian Prisons* (November 2009) 50–1.

19 Victorian Parliament Legislative Council, Select Committee of the Legislative Council upon the Victorian Prisons Service, *Interim Report* (1984).

20 Referred to in Carolyn McKay, *Responses to Questions on Notice to the Inquiry into Parklea Correctional Centre and Other Operational Issues on Friday 28 September 2018* (October 2018) 2 <www.parliament.nsw.gov.au/lcdocs/other/11917/AQON%20-%20Dr%20Carolyn%20McKay.pdf>.

21 NSW Ombudsman, *Inquiry into Juvenile Detention Centres* (NSW Ombudsman, 1996) vol 1, cited in Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [20.40].

International experiences regarding the use of dormitory-style complexes have revealed significant problems for the security and safety of individuals inside them. In the United States and Romania, it has been reported that issues such as group and personal tension, increased assault against prisoners and staff, sexual assault and theft have increased within these prisons. The lack of privacy and personal space for prisoners in these facilities has exacerbated mental illnesses, which ultimately diminish a prisoners' capacity for reintegration upon release.²²

In short, the combination of this architecture and regime in NSW prima facie violates the rights of imprisoned people to security of the person (ICCPR art 9), privacy (ICCPR art 17) and to be treated with humanity and respect (ICCPR art 10(1)), as well as potentially violating the prohibition against TCID.

'Supermax' Prisons

'Supermax' facilities were originally designed in the United States of America from the 1970s to impose a severe regime of isolation on the segments of the prison population seen to be the most difficult to manage (eg, due to being violent).²³ In a 'supermax' prison, imprisoned people spend 23 hours per day in their cell and, when out of their cell, have no contact with other imprisoned people or staff. If they are allowed contact with people outside, this may be via videoconference, rather than in person.²⁴ This is why this is described as a regime, in addition to an approach to architectural design.

There have been a number of examples of so-called 'supermax' facilities around Australia at various times, such as the high-risk management unit in Goulburn prison in NSW, the Melaleuca unit in Barwon prison in Victoria and the Woodford prison in Queensland.

The former Katingal unit within Sydney's Long Bay prison was specifically designed to have 'no natural light in the building and only from enclosed exercise yards surrounded by high walls could prisoners see the sky, and then only through roof bars'.²⁵ The unit operated for three years, closing in

22 New South Wales, above n 17, 85.

23 Derek Jeffreys, 'Segregation and Supermax Confinement. An Ethical Evaluation' in Yvonne Jewkes et al (eds), *Handbook on Prisons* (Routledge, 2016) 174–5.

24 Ibid 175.

25 Chris Cunneen et al, *Penal Culture and Hyperincarceration. The Revival of the Prison* (Ashgate, 2013) 126.

1978 after a Royal Commission finding that ‘the cost of Katingal is too high in human terms’,²⁶ with Grant and Jewkes noting the ‘sensory deprivation conditions were considered to be an abuse of inmate human rights’.²⁷

A current example of ‘supermax’ conditions is the Woodford prison in Queensland, which is specifically designed to house people convicted under anti-association legislation targeted at ‘Criminal Motorcycle Gangs’ (mentioned in Chapter 4). People in this prison are held in solitary confinement for 22 hours per day without access to sunlight during that period. The policy states, ‘[o]ut of cell time restricted to at least two daylight hours a day’.²⁸

These type of ‘supermax’ conditions are quite likely to attract the criticism of the SPT, as they have done in New Zealand. The SPT has expressed the following concerns:

the delegation noted with grave concern that the newly built management cells at the Auckland maximum security prison (where persons were held in solitary confinement) were extremely small, were under constant video surveillance, afforded little room for internal movement or activity and could best be likened to a tin can. The so-called exercise yard was a small cage situated immediately across the corridor from the cells and afforded no opportunity for exercise at all ... It considers the use of them for any prolonged period to amount to ill-treatment.²⁹

Therefore, ‘supermax’ prisons in Australia are also likely to violate the prohibition against TCID.

Underground Prison in Victoria

The Melbourne Custody Centre is located underground—underneath the Melbourne Magistrates’ Court—such that there is no natural light or fresh air. It is intended to be used to accommodate people on a short-term basis prior to their appearance in court. However, more recently, due to

26 Justice Nagle, *Report of the Royal Commission into NSW Prisons* (1978) 165; *ibid* 127. Another past example of such a unit is the Jika Jika unit in Pentridge Prison in Victoria: Bree Carlton, *Imprisoning Resistance: Life and Death in an Australian Supermax* (Institute of Criminology Press, 2007).

27 Elizabeth Grant and Yvonne Jewkes, ‘Finally Fit for Purpose: The Evolution of Australian Prison Architecture’ (2015) 95(2) *The Prison Journal* 223, 237.

28 Cited by Applegarth J in *Callanan v Attendee Z* [2013] QSC 342, [27]. For eight other examples of ‘supermax’ prisons see Mirko Bagaric, Richard Edney and Theo Alexander, ‘(Particularly) Burdensome Prison Time Should Reduce Imprisonment Length – and Not Merely in Theory’ (2014) 38 *Melbourne University Law Review* 409, 414.

29 SPT, above n 7, 17–18.

overcrowding in Victorian prisons, it has been used to accommodate people for 14 days or longer.³⁰ Imprisoned people have described the conditions in the Centre in interviews as follows: '[t]hirty days. I did not see daylight for 30 days' and '[I] wouldn't keep my dog like this'.³¹

The General Manager has admitted to the Victorian Ombudsman that the facility fails to comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'): 'It doesn't, we breach it [the *Charter*]. We all know that the Centre was designed to cater, to manage prisoners for a daily court occurrence, and then go to prison, or get bail or whatever. Not to be kept overnight and certainly not to be kept for 14 or 17 days'.³² Further, the Victorian Coroner has described it as 'totally inappropriate, inhumane', and 'completely unacceptable in a modern society'.³³ The Victorian Ombudsman has concluded, '[i]n my view, detainees should not be held at the Melbourne Custody Centre for greater than five consecutive days'.³⁴

The physical design of this facility arguably cannot be modified sufficiently to comply with the human rights of imprisoned people. Yet policies to ameliorate the effects of the physical environment, such as mandating a maximum length of stay, have not been employed.

Hanging Points

In the discussion about the failure to implement recommendations by monitoring bodies in Chapter 3, it was noted that in 1991 the Royal Commission into Aboriginal Deaths in Custody highlighted the serious risks posed by the prison environment for Indigenous people in general. A specific concern raised was hanging points in cells.³⁵ Despite more than 25 years having passed since this inquiry, many prisons in Australia have not made the necessary adjustments to implement the recommendations, and the built environment continues to pose risks to this vulnerable segment of the prison population.³⁶

30 Ombudsman Victoria, *Investigation into Deaths and Harms in Custody* (2014) 10.

31 Bronwyn Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (Federation Press, 2014) 97.

32 Ombudsman Victoria, above n 30, 46.

33 Ombudsman Victoria and Office of Police Integrity, *Conditions for Persons in Custody. Report of Ombudsman Victoria and Office of Police Integrity July 2006* (2006) 49.

34 Ombudsman Victoria, above n 30, 51.

35 Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) [165].

36 Lorana Bartels, 'Twenty Years On: Indigenous Deaths in Police Custody and Lessons from the Frontline' in Isabelle Bartkowiak-Théron and Nicole Asquith (eds), *Policing Vulnerabilities* (Federation Press, 2012).

Even worse, there have been new prisons built in the Northern Territory (NT) with hanging points in the cells. The NT has the highest rate of Indigenous imprisonment in Australia, with 83.4 per cent of the prison population being Indigenous.³⁷ The NT Coroner stated in a coronial inquest report that ‘it beggars belief that a prison designed and constructed in the 21st century has such classic hanging points with no mitigation of that risk’.³⁸ This comment relates to the Darwin Correctional Precinct which was opened in 2014.³⁹ Concerns about hanging points in other jurisdictions were noted in Chapter 3.

Climatic Conditions

The Australian climate is harsh and there are prisons built in some very hot and cold parts of the country. To begin with an example of a prison in an extremely hot part of the country, the OICS in WA has specifically reviewed the ‘thermal conditions’ in WA prisons and highlighted concerns about the Roebourne prison, described as being ‘in one of the harshest climatic parts of Western Australia’.⁴⁰ The Inspector noted the prison had been built from unsuitable building material and the result was temperatures that were ‘a significant threat to prisoner health’, noting that ‘[t]he non-air-conditioned cells rarely recorded temperatures below 30°C and attained temperatures close to 40°C’.⁴¹ The Inspector noted some of the points made in Chapter 1 about the prison as a ‘total institution’ and the poor general health of the prison population, specifically, that imprisoned people have no choice about when they are in these hot cells and also have higher rates of health conditions that make them more susceptible to the heat.⁴²

In contrast, Hobart in Tasmania is a particularly cold part of Australia during winter. Yet the design of some of the prisons there was modelled on Californian prisons, making them inappropriate for Tasmanian winter temperatures.⁴³ The Tasmanian Office of the Custodial Inspector

37 Australian Bureau of Statistics, *Prisoners in Australia 2019* (5 December 2019) Table 14.

38 *Inquest into the Death of Roy Melbourne* [2017] NTLC 017 [47].

39 ‘New \$500 Million Darwin Prison at Holtze Opens with Smoking Ceremony’, *ABC News* (Australia), 9 September 2014.

40 OICS, *Thermal Conditions of Prison Cells* (2015) iii.

41 *Ibid.* See the summary of temperature data collected by the Inspector on page 10.

42 *Ibid.* ii.

43 In relation to the Ron Barwick prison: Tasmanian Custodial Inspector, *Inspection of Adult Custodial Services in Tasmania, 2017 Care and Wellbeing Inspection Report* (October 2018) 44. In relation to the Risdon prison: Grant and Jewkes, above n 27, 227.

(TOCI) has raised concerns about the thermal conditions in the Ron Barwick Minimum Security Prison, noting that the ‘cells are cold even in summer’.⁴⁴ In winter, there are problems with excessive condensation on cell walls to the extent that the paint peels of the walls and certain cells are unusable due to the build-up of mould.⁴⁵ Imprisoned people are also strip searched in a cold room.⁴⁶ The TOCI does not deal specifically with the health implications of this, but the OICS has insightfully noted that imprisoned people’s poor health is likely to be exacerbated by thermal discomfort, whether due to cold or heat.⁴⁷

Specific Needs of Some Groups Within the Prison Population

It has been emphasised throughout this book that the prison population display multiple vulnerabilities. The challenges faced by Indigenous people and older people in prisons demonstrate the importance of modifications being made to the built environment to cater for the needs of specific groups.

Indigenous People

Grant conducted qualitative research about the needs and preferences of Indigenous people in relation to prison accommodation in South Australia to document the ways in which they are not met by typical prison infrastructure.⁴⁸ Five matters of significance to have emerged from this research.

First, connection to country is vital for Indigenous people because this ‘increased their feelings of wellbeing and decreased their feelings of disorientation’.⁴⁹ This is the case regardless of whether they are from an ‘urban, rural or remote’ area.⁵⁰ Most imprisoned Indigenous people in Australia are located a long distance from their country and denied the ability to practise their customary lore.⁵¹

44 Tasmanian Custodial Inspector, above n 43, 44.

45 Ibid 44–5.

46 Ibid 44.

47 OICS, above n 40, 4. That report also dealt with some West Australian prisons facing challenges with cold conditions: see the discussion of Bandyup and Albany prisons in *ibid* 12–15.

48 Elizabeth Grant, ‘Prison Environments and the Needs of Australian Aboriginal Prisoners: A South Australian Case Study’ (2008) 12(2) *Australian Indigenous Law Review* 66.

49 Ibid 69.

50 Elizabeth Grant, ‘Designing Carceral Environments for Indigenous Prisoners: A Comparison of Approaches in Australia, Canada, Aotearoa New Zealand, the US and Greenland (Kalaallit Nunaat)’ (2016) (1) *Advancing Corrections Journal* 26, 37.

51 Ibid 69.

Second, maintaining links to community, family and kin is essential to improve wellbeing and reduce incidence of suicide.⁵² Yet, due to ‘[a] lack of affordable or reliable transport, the poor health of family members, and long distances to the prison’, Indigenous people often do not get many, or indeed any, visits during their incarceration.⁵³

Third, social groupings are an important form of support during imprisonment and Grant found these to be ‘based on family/kin relationships, language groupings, shared histories of institutional life and mutual activities’.⁵⁴ However, these are complex, and Indigenous people preferred not to be forced to share with other Indigenous people solely because of their shared identity as such. In fact, problems can be created by putting certain groups in close proximity.⁵⁵

Fourth, single cells are preferred for privacy and security. This is contrary to current policy where Indigenous people are housed in dormitories or shared cells, with overcrowding causing significant distress in many cases.⁵⁶

Fifth, due to the poor health of many Indigenous people in prison (as referred to in Chapter 1), it is important that they are provided with a healthy prison environment with adequate health care. Grant notes that the design needs to take into account people’s health needs.⁵⁷

Elderly People

In Chapter 1, it was noted that the Australian Institute of Criminology defines elderly people in prison to be those over 50 years of age, which takes into account that the health of people in prison is generally worse than that of people in the general community.⁵⁸ The increase in elderly people in prisons and some of the reasons for this increase were also outlined.

52 Also recognised during the Royal Commission into Aboriginal Deaths in Custody, above n 35, [24.3.111]–[24.3.122], [25.3.1]–[25.3.2].

53 Grant, above n 48, 70.

54 Ibid 71.

55 Ibid 71–2.

56 Ibid 72; Grant, above n 50, 36.

57 Grant, above n 50, 41–2. This has led some prisons in Canada to introduce ‘healing lodges’: see further at 31–2.

58 Susan Baidawi et al, *Older Prisoners—A Challenge for Australian Corrections* (Trends and Issues in Crime and Criminal Justice No 426, 2011) 1.

The main challenge faced by elderly people in prison relate to their physical and mental health needs, which differ to those of younger people in the prison population. They are similar to those faced by older people in the general community. Physical health problems include 'frailty, reduced mobility, incontinence and sensory impairment' and mental health problems include dementia, Alzheimer's disease and depression.⁵⁹ Some of these problems may be exacerbated by the prison environment,⁶⁰ particularly when (if any) thought was given to the inhabitants of the building, the imagined inhabitants were fit, able-bodied young men. For example, shared cells have bunk beds, often without ladders, and older people find it difficult to access the top bunk. More generally, there are stairs and uneven surfaces in many prisons and the showers are not designed for people who cannot stand under them, nor the toilets for people who cannot easily sit and stand without a railing to hang on to.

Elderly people in prison do not all have special needs. However, of those who do have particular age-related requirements, their needs are diverse, depending on such matters as their mobility levels, general health and length of time spent in prison.⁶¹ The focus of this discussion is how the needs of this group relating to the built environment may be accommodated.

It is not impossible to accommodate the needs of this group through changes to the built environment. The following suggestions are based on the NSW Inspector of Custodial Services review of managing elderly people in NSW prisons. However, some additional strategies and recommendations from HMIP in the UK have been included because the UK has been grappling with the challenges posed by the ageing prison population for longer than Australia.⁶² The problems and the way they might be addressed are outlined in Table 8.1.

59 NSW Inspector of Custodial Services, *Old and Inside: Managing Aged Offenders in Custody* (2015) 26.

60 For an analysis of how the prison environment contributes to psychological distress see Susan Baidawi, Christopher Trotter and Catherine Flynn, 'Prison Experiences and Psychological Distress Among Older Inmates' (2016) 59(3) *Journal of Gerontological Social Work* 252.

61 Ibid 29. Her Majesty's Inspectorate of Prisons raised a similar concern: see Her Majesty's Inspectorate of Prisons (HMIP), *'No Problems – Old and Quiet': Older Prisoners in England and Wales. A Thematic Review by HM Chief Inspector of Prisons* (2004) v.

62 This is partly because, in 2001, the United Kingdom's Department of Health issued a 'National Service Framework for the Care of Older People' referring to the needs of older people in prisons, and this led to the HMIP examination of these needs: *ibid*. This topic has also been examined in Canada: The Correctional Investigator Canada, *Aging and Dying in Prison. An Investigation into the Experiences of Older Individuals in Federal Custody* (2019).

Table 8.1: Catering for the Needs of Elderly People in Prison

Problem identified by New South Wales Inspector of Custodial Services	Modification recommended by New South Wales Inspector of Custodial Services	Modification recommended by Her Majesty's Inspectorate of Prisons (HMIP)
Older people being allocated a top bunk. Older people find top bunks difficult to get into—particularly because no ladders are provided—and instances of people falling off them, leading to them requiring medical attention. ⁶³	Bunk beds should be fitted with ladders and protective rails. ⁶⁴	Elderly imprisoned people should be given single cells, or at least allocated the bottom bunk in shared cells. ⁶⁵
People requiring mobility aids, including walkers and wheelchairs, cannot get these into their cells due to narrow doorways and lack of space in the cells. This increases the risk of falls. ⁶⁶	Placement decisions include a consideration of the mobility needs of the person. ⁶⁷	
Lack of seating and shelter in the outdoor areas, where people are locked out during 'out-of-cell hours'. ⁶⁸	Ensure there is 'shelter and appropriate seating' to cater for elderly people in the outdoor areas. ⁶⁹	
Lack of rails to help people sitting and standing when using the toilet. ⁷⁰	Fixtures need to be improved so that they are suitable for elderly people. ⁷¹	
Those with mobility problems having difficulty navigating stairs (eg, to get to the yard), 'steep gradient ramps, and high-gloss slippery, uneven surfaces' to access facilities such as the medical clinic and library. ⁷²	Placement decisions include a consideration of the mobility needs of the person. ⁷³	Special provisions, such as the installation of lifts, need to be made for people with limited mobility or in wheelchairs. ⁷⁴

63 NSW Inspector of Custodial Services, above n 59, 9. This is a concern that has also been raised in relation to the Alexander Maconochie Centre in the ACT: ACT Inspector of Correctional Services, *Report of a Review of a Correctional Centre by the ACT Inspector of Correctional Services Healthy Prison Review of the Alexander Maconochie Centre* (2019) 98.

64 Ibid 29, Recommendation 1.

65 HMIP, above n 61, 3.

66 NSW Inspector of Custodial Services, above n 59, 10, 30, 43.

67 Ibid 34, Recommendation 34.

68 Ibid 31.

69 Ibid 32, Recommendation 3.

70 Ibid 29, 43.

71 Ibid 43, Recommendation 11.

72 Ibid 27, 43. HMIP raised a similar concern: see HMIP, above n 61, 8.

73 NSW Inspector of Custodial Services, above n 59, 34, Recommendation 34.

74 HMIP, above n 61, 8.

As the number of elderly people in prisons continues to grow, it will become increasingly necessary for modifications to be made to the built environment to cater to their needs. The ACT Inspector has recently recommended that a specific policy be developed that ‘articulates and responds to the needs of older detainees’.⁷⁵ This recommendation is broader than just considering the physical conditions in prison. It is advisable that all jurisdictions give this matter appropriate attention.

Access to Basic Necessities

There are other aspects of prison conditions, in addition to the physical design of buildings, relevant to the human rights of imprisoned people. These conditions are not just a matter of what is desirable; rather, they have a crucial impact on the mental and physical health of imprisoned people. The four factors discussed below—food and drink, personal hygiene, clothing and access to outside areas—are all examples of what Sykes termed ‘deprivation of goods and services’ (as summarised in Chapter 1). Medical care is also a basic necessity (and falls under what Sykes terms ‘deprivation of autonomy’), but this was dealt with in Chapter 7.

While these basic necessities are discussed separately, for the purposes of clarifying the types of basic necessities prison authorities should give attention to, there are two important points to note about their interrelationships.

First, many of the cases discussed below involve complaints about a multitude of basic necessities. It is unlikely that a situation will ever be identified where an imprisoned person lacks only one basic necessity. The courts take into account the totality of the prison conditions when determining whether relevant human rights have been violated. This is encapsulated by the ECtHR statement, ‘[w]hen assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant’.⁷⁶

Second, the courts are unlikely to find the mere absence of basic necessities to constitute TCID in breach of art 7 of the ICCPR. There is a threshold that must be reached, and the court’s assessment will include consideration of the likely effect of the conditions on the particular person making the

⁷⁵ ACT Inspector of Correctional Services, above n 63, 98.

⁷⁶ *Bădilă v Romania* [2012] ECHR 31725/04, [70].

complaint. The statement of the HR Committee in its views in *Brough v Australia* is illustrative in this regard: ‘The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim’.⁷⁷

These interrelationships provide important context for the case illustrations given in the following discussion. In particular, a human rights violation may have been found to have occurred, but this finding is likely to have been connected to the denial of multiple basic necessities as well as the effect of the deprivation on the particular complainant.

Food and Drink

The type, availability and variety of food and drink provided to people in prison are of major significance for their nutrition and wellbeing. They may also be of significance for their religious beliefs. This is recognised in the *Guiding Principles for Corrections in Australia*, which stipulate that food be ‘nutritious’, ‘adequate for good health’ and ‘meets prisoners’ cultural, religious and dietary needs’.⁷⁸ Three relevant cases illustrate how these concerns have arisen in Australian prisons.

First, Mr Islam sued the Australian Capital Territory (ACT) for failing to provide him with food consistent with his religious beliefs as a Muslim. The claim relied on the protection of freedom of religion by s 14 of the *Human Rights Act 2004* (ACT) (‘HRA’) and s 40 of the *Corrections Management Act 2007* (ACT) (CMA) which requires the Director-General to ‘ensure, as far as practicable, that allowance is made for the religious, spiritual and cultural needs of detainees in relation to the provision of food and drink’.

The Court heard evidence that there are occasions where imprisoned people are not provided with food consistent with their dietary requirements (including their religious beliefs), but that on most occasions this is rectified at the time.⁷⁹ On one occasion, Mr Islam was provided with a roll for lunch containing processed chicken, which he does not eat, and

77 Human Rights Committee, *Views: Communication No 1184/2003*, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) (‘*Brough v Australia*’) [9.2]. The position of the ECtHR is similar. See, eg, *Husayn (Abu Zubaydah) v Poland* [2014] ECHR 7511/13, [500].

78 Principles 4.2.2 and 4.2.3: Corrective Services Administrators’ Conference (Cth), *Guiding Principles for Corrections in Australia* (2018) 22.

79 *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322, [102], [109], [116]–[118].

the prison did not rectify the situation such that he did not have any lunch that day.⁸⁰ Prison staff gave evidence that imprisoned people with dietary requirements were required to fill in a ‘special diet request’ form, but Mr Islam and an imprisoned person involved in delivering food gave evidence that they had never heard of this form and Mr Islam had not had the opportunity to fill in such a form.⁸¹

The Court found that the kitchen at the prison generally accommodates dietary requirements ‘as far as practicable’ within the meaning of the *CMA*,⁸² and that the *HRA* requires there to be a system in place for providing for dietary requirements. There was such a system, in the form of the ‘special diet request’ form. The Court found that non-compliance with that system was ‘not of such a degree as to amount to a contravention of Mr Islam’s human rights to practice his religion through adherence to a particular diet’.⁸³

Second, Mr Minogue sued the Victorian Department of Corrections on the basis that he was not provided with nutritious vegetarian meals and was provided with meals consisting of ‘identical ingredients presented in an identical manner’ twice per day for three years.⁸⁴ His claim was based on two arguments: art 10(1) of the ICCPR, which the Court held was not enforceable in an Australian court (the case was decided before the *Charter* was enacted),⁸⁵ and the ‘right to be provided with special dietary food’ contained in s 47(1)(c) of the *Corrections Act 1986* (Vic), which the Court held did not provide an enforcement mechanism.⁸⁶ Therefore, Mr Minogue’s claim was unsuccessful.⁸⁷

Third, Mr Mahommed, a Muslim, made a complaint to the Queensland Anti-Discrimination Tribunal about the lack of availability of fresh halal meat. For some of the time Mr Mahommed was imprisoned, he was provided with the general menu containing non-halal meat.⁸⁸

80 Ibid [103].

81 Ibid [86]–[90], [104], [108], [120].

82 Ibid [116]–[118].

83 Ibid [119]–[123]. The Court noted that there did need to be better communication about the process to follow: at [121].

84 See *Minogue v Williams* [1999] FCA 1585, [4].

85 Ibid [35].

86 Ibid [34].

87 The decision was upheld on appeal in *Minogue v Williams* [2000] 60 ALD 366. For another example of a claim concerning the provision of vegetarian food—one that was successful—see *Monteiro v State of New South Wales (No 2)* [2015] NSWSC 1901 (15 December 2015).

88 *Mahommed v State of Queensland* [2006] QADT 21 (4 May 2006), [3].

For a different period of time, he was provided with only vegetarian food.⁸⁹ Then, for yet a further period, he was provided with four cans of halal meat per week in addition to fresh vegetarian meals.⁹⁰ Due to limitation periods under the *Anti-Discrimination Act 1991* (Qld), the Tribunal was only able to consider the last two types of diet.⁹¹ The Tribunal held that Mr Mahommed had been treated less favourably because he had been provided with vegetarian meals when he was not a vegetarian, and because he did not receive any fresh meat.⁹² He was awarded \$2,000 compensation.⁹³

For the purposes of international law, the HR Committee has provided an opinion that failure to supply food or drink to a person in police custody for five days (followed by a period of very little thereafter) violated art 10 of the ICCPR.⁹⁴ The ECtHR has also found the provision of inadequate food—specifically, a daily ration of ‘100 grams of porridge with water twice a day and a soup consisting of mainly water for lunch, with an additional 400 grams of bread for the whole day’—to violate art 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)⁹⁵ (art 3 specifies that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’). This was in the context of the deprivation of other basic necessities and also took into account the period for which the applicant was kept in such conditions.⁹⁶

Of particular relevance, the SPT has raised concerns about the lack of nutritious food provided to imprisoned people in New Zealand, and the fact that no food was provided for a long period between 3.30 pm and 8.30 am the next morning. The SPT recommended that ‘the quality, variety, nutritional value and times of meals be reviewed’.⁹⁷ These are the type of matters the SPT is likely to review when they visit Australia.

89 Ibid [4].

90 Ibid [6].

91 Ibid [8].

92 Ibid [29]–[31].

93 Ibid [65]. The Queensland Government’s appeal of the decision was dismissed by the Supreme Court: *State of Queensland v Mahommed* [2007] QSC 18 (19 February 2007). Another example of a person of Muslim faith not being provided with halal meat led to the claim in *Ali v State of Queensland* [2013] QCAT 319 (6 August 2013).

94 Human Rights Committee, *Views: Communication No 526/93*, UN Doc CCPR/C/59/D/526/1993 (2 April 1997) (*Hill and Hill v Spain*).

95 *Ciorap v Moldova* [2007] ECHR 12066/02, [9].

96 Ibid [69]–[71].

97 SPT, above n 7, 17.

Personal Hygiene

There are two components to the basic necessity of personal hygiene. The first is ensuring people are not exposed to unhygienic conditions. The second is the positive obligation to provide facilities for people to maintain their personal hygiene. The latter includes having access to showers and other washing and personal grooming facilities. Access to such facilities is important for preventing skin problems and other diseases, and, more generally, for being able to take pride in one's appearance, which relates to a person's dignity. The international cases relating to personal hygiene most often arise in situations of severe overcrowding.

In relation to unhygienic conditions, the HR Committee has considered exposure to unhygienic conditions in circumstances where imprisoned people were forced to sleep on the floor, share a toilet with 150 other people, and use a bathroom that had defective drainage, 'forcing the authors to bath in six inches of dirty water'.⁹⁸ The ECtHR has also considered situations where cells 'were dirty and infested with cockroaches, bed-bugs and lice' to be problematic.⁹⁹

The OICS has frequently criticised cell sharing in WA prisons leading to people having to use a toilet in front of others. In 2016, the Inspector noted that people locked in prisons for more than 12.5 hours per day were required to use an 'unscreened' toilet in front of others.¹⁰⁰ In 2013, they noted that '[t]his lack of privacy, now common throughout the Western Australian prison system, is fundamentally degrading'.¹⁰¹

In addition to being degrading, as the above quotation highlights, this is a situation contrary to the requirements of art 7 of the ICCPR, and in violation of imprisoned people's right to privacy under art 17 of the ICCPR. Having to use a toilet in front of another person, or people, is another reason that the physical environment in Australian prisons is not human rights compliant.

A South Australian Coroner's report referred to a lack of privacy for use of the toilet due to people sharing the cell, the lack of hygiene given that the deceased was sharing a cell with a person with a communicable disease,

98 Human Rights Committee, *Views: Communication No 676/1996*, UN Doc CCPR/C/62/D/676/1996 (30 March 1998) ('*Yasseen and Thomas v Guyana*') [2.3].

99 *Mayzit v Russia* [2005] ECHR 63378/00, [40]–[41].

100 OICS, *Western Australia's Prison Capacity* (2016) 15.

101 OICS, *Report of an Announced Inspection of Greenough Regional Prison* (2013) 26.

and the fact that the deceased was sleeping on a mattress on the floor next to the toilet.¹⁰² Women were also found to be sleeping on trundle beds on the floor with their heads next to the toilet in a WA women's prison.¹⁰³

The NSW Inspector of Custodial Services has also raised concerns about various unhygienic conditions in NSW prisons in reports, including:

- '[t]here is one bubbler in the yard. There is no separate tap for hand washing. So when inmates use the toilet they must wash their hands in the same bubbler as the inmates use for drinking'¹⁰⁴
- following a review of bedding in correctional centres in NSW, the Inspector found that at one centre, the mattresses were 'dirty, stained, torn and unhygienic, with raw foam exposed'.¹⁰⁵

In relation to the positive obligation to provide facilities to maintain personal hygiene, in the ECtHR case of *Bădilă v Romania*, being denied the ability to maintain personal hygiene in circumstances where no running water was provided was found by the Court to constitute TCID.¹⁰⁶ One of the 'cumulative' factors leading to an art 3 violation in *Bazjaks v Latvia* was that 'the applicant did not receive any personal hygiene products such as soap, toothbrush or toilet paper'.¹⁰⁷ Another instance was where people were only allowed to shower every 10 days.¹⁰⁸ The combination of this factor, and other conditions of detention, led to a finding that art 3 of the ECHR had been breached.¹⁰⁹

A relevant problem identified in Queensland is that during a drought in 2009, a number of prisons imposed restrictions on the number of times toilets may be flushed per day (four to six times), as well as restrictions on the number and length of showers people could take (one shower per day lasting no more than three or four minutes).¹¹⁰ This policy was applied

102 W C Chivell, *Inquest into Death of Marshall Freeland Carter*, South Australia Coroners Court, 2000, 14–15.

103 OICS, *Report of an Announced Inspection of Bandyup Women's Prison* (2014) vi, viii, 19.

104 NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (2015) 61.

105 NSW Inspector of Custodial Services, *Prison Greens: The Clothing and Bedding of Inmates in NSW* (2017) 31. This concern was also raised in NSW Inspector of Custodial Services, above n 59, 30.

106 *Bădilă v Romania* [2012] ECHR 31725/04, [77]–[79].

107 *Bazjaks v Latvia* [2010] ECHR 71572/01, [116].

108 *Aliiev v Ukraine* [2003] ECHR 41220/98, [139].

109 *Ibid* [151].

110 The different numbers relate to the different application of the policy in various prisons: Prisoners' Legal Service, *Inside Out* (Issue No 58, June 2013) 16, 23.

to women who were menstruating, arguably in breach of Rule 5 of the Bangkok Rules which requires that a 'regular supply of water' 'be made available for the personal care of children and women, in particular women [... who are] menstruating'.¹¹¹ This policy made it difficult for people to maintain personal hygiene, particularly in the hot, humid climate typical in Queensland.

Another concern relating to women being able to maintain their personal hygiene while menstruating was raised by the NT Ombudsman. Women in the Alice Springs prison were required to request sanitary products from male staff members.¹¹² The Ombudsman suggested this policy be reviewed and the processes be modified such that women could request these items from female staff, or access them from a vending machine.¹¹³ There have also been problems with elderly males in NSW prisons with incontinence getting access to continence aids and sufficient access to clothing and bedding to maintain good hygiene.¹¹⁴

Clothing

The type of clothing people in prison wear, their access to appropriate clothing for the climatic conditions, and the frequency and process for these to be washed, are also important to their wellbeing. It may also contribute to an absence of personal hygiene if clothing is not washed frequently enough. Mandela Rule 19 stipulates:

1. Every prisoner who is not allowed to wear his or her own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him or her in good health. Such clothing shall in no manner be degrading or humiliating.
2. All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

Clothing as a basic necessity is unlikely to, of itself, lead to the finding of a human rights violation. However, when considered in the context of other conditions and treatment, it will be a relevant factor. In the previously mentioned HR Committee case of *Brough v Australia*, all of

111 Ibid 23.

112 Ombudsman NT, *Ombudsman NT Investigation Report. Women in Prison II - Alice Springs Women's Correctional Facility* (2017) vol 2, 103.

113 Ibid vol 1, 62.

114 NSW Inspector of Custodial Services, above n 59, 32.

the applicant's clothes except his underwear were removed when he was put into an isolation cell because they may have been used to obstruct the cameras.¹¹⁵ When he was later found trying to construct a noose using his underwear, this item was also removed.¹¹⁶ The combined effects of the lack of heating, absence of clothing and blankets, and other conditions and treatment led the HR Committee to the view that art 7 of the ICCPR had been violated.¹¹⁷

The ECtHR has heard cases where complaints about clothing were made together with complaints about other aspects of conditions. Two examples will suffice. In *Dankevich v Ukraine*, an imprisoned person complained that he only had 'light' clothes to wear in temperatures of -20°C.¹¹⁸ The ECtHR found that the totality of the prison conditions had violated art 3 of the ECHR. These conditions included being locked up for 24 hours per day with no access to natural light or contact with people outside the prison.¹¹⁹ In *Bazjaks v Latvia*, the complainant's 'clothes were never taken to the prison laundry, so that he was obliged to wear the same underwear for two months'.¹²⁰ The ECtHR was not satisfied based on the evidence available that art 3 had been violated in this instance.¹²¹

There are two relevant Australian examples, the first relating to outerwear in Queensland and the second relating to underwear in Tasmania. In Queensland, a requirement was introduced that people convicted under Queensland 'Criminal Motorcycle Gang' legislation wear bright pink overalls in prison.¹²² This was intended to be a form of humiliation, with Premier Newman reportedly stating that '[w]e know that asking them - well, not asking them telling them - to wear pink is going to be embarrassing for them'.¹²³ This is contrary to Mandela Rule 19(1) quoted above that specifically prohibits 'humiliating' clothing.¹²⁴ In addition to

115 Human Rights Committee, *Views: Communication No 1184/2003*, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) ('*Brough v Australia*') [2.8].

116 *Ibid* [2.10].

117 *Ibid* [3.3].

118 *Dankevich v Ukraine* [2003] 40679/98, [113].

119 *Ibid* [141].

120 *Bazjaks v Latvia* [2010] ECHR 71572/01, [27].

121 *Ibid* [95].

122 Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1, 21. Legislation to control motorcycle clubs was discussed in Chapter 4.

123 David Lewis, 'Officers Who Question Qld Police Bikies Crackdown Told to "Reconsider Their Future"', *ABC News* (Australia), 22 October 2013.

124 Coyle and Fair, above n 4, 45.

the problematic nature of requiring people to wear particular clothing for the purposes of humiliation, it is also a discriminatory implementation of a clothing policy given that it only applies to one subset of the prison population in one particular prison (Woodford).¹²⁵

In Tasmanian prisons, upon arrival, people were being issued with inadequate amounts of underwear and socks (two pairs of each) that had also previously been used by other people. This was not enough underwear for the maintenance of personal hygiene. The Tasmanian Custodial Inspector wrote of this situation, '[i]t is not considered acceptable for prisoners to wear previously used underwear, even if it has been freshly washed' and recommended that the prison service cease this practice.¹²⁶

Access to Outside Areas

Access to outside areas to get fresh air, sunshine and exercise play a part in the health (both physical and mental) of imprisoned people. It affects, for example, people's ability to produce vitamin D and build or maintain physical health and fitness. Deprivation of natural light for 23 hours per day (other than one hour of daily recreation), in the view of the HR Committee, may amount to violation of art 10(1) of the ICCPR.¹²⁷ It was also a violation in a situation where a person was only allowed out of their windowless cell for one to two hours on weekdays, and not at all on weekends and holidays (due to a lack of staff availability).¹²⁸

This is also something that has been raised by the SPT. For example, when inspecting prisons in New Zealand, the SPT noted that many imprisoned people only had a short time outdoors, for example, 30 minutes, and that the outdoor areas were covered, thus restricting access to sunlight. As a consequence, many had developed vitamin D deficiencies.¹²⁹

125 This policy only lasted nine months. Following a change of government in Queensland, it was described by the incoming Police Minister as 'a brain snap; it was a stupid and ridiculous idea': Josh Bavas, 'Newman Government's Pink Bikie Prison Uniforms to be Sold Off as Breast Cancer Charity Fundraiser', *ABC News* (Australia), 2 June 2015.

126 Tasmanian Custodial Inspector, above n 43, 29.

127 Human Rights Committee, *Views: Communication No 676/1996*, UN Doc CCPR/C/62/D/676/1996 (30 March 1998) ('*Yasseen and Thomas v Guyana*') [7.6].

128 Human Rights Committee, *Views: Communication No 683/1996*, UN Doc CCPR/C/74/D/683/1995 (26 March 2002) ('*Wanza v Trinidad and Tobago*') [9.2].

129 SPT, above n 7, 17.

All people kept in solitary confinement in Australian prisons have insufficient access to outside, as detailed in Chapter 7, as do those kept in the ‘supermax’ prisons discussed earlier in this chapter.

Improving Physical Conditions in Australian Prisons

There is certainly huge scope for improvement in the prison conditions in Australian prisons, both in terms of the built environment and access to basic necessities. Nevertheless, there are some positive examples. The first is the way that human rights were taken into account in the design of the Alexander Maconochie Centre (AMC) in Canberra—a fairly new prison opened in 2009—which had the intended aim of being a human rights-compliant prison.¹³⁰ There has also been at least one attempt to meet the specific needs of Indigenous people.

These matters all relate to the built environment. In relation to access to basic necessities, it is hoped that the discussion of what not to do in the preceding sections will provide clear enough guidance about how to avoid human rights violations in future. It has certainly identified issues that the SPT and NPM will be looking for when they inspect Australian prisons.

The Alexander Maconochie Centre

The project manager for the ACT prison project that culminated in the building of the AMC was Dr John Paget, and the subject of his doctoral thesis was the role of architecture in the creation of human rights-compliant prisons.¹³¹ Paget’s thesis starts from the premise that the prison population is made up of people who are vulnerable, with the specific vulnerabilities including higher than average rates of mental illness, disability and victimisation. There are large numbers of Indigenous people in prison, people with mental illness and people from a low socio-economic background.

130 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.

131 John Paget, *Human Rights and Prison Architecture: The Alexander Maconochie Centre from Conception to Construction* (PhD Thesis, Charles Sturt University, 2008).

Therefore, Paget explored aspects of architecture that may be calming, or healing, to the extent that this is possible within the institutional setting of a prison. He raised numerous architectural considerations, all of which are features in the design of buildings, such as hospitals. They include the importance of:

- having access to the natural environment, which can be therapeutic¹³²
- minimising the amount of noise people in prison are exposed to, which may reduce their stress levels¹³³
- having windows in cells, noting that '[i]n the prison cell or room the window provides sunlight penetration and a view which facilitates connection to the world outside the prison and to memories of normality'¹³⁴
- research by the UK Home Office about the use of colour in correctional facilities to impact the mood of people in prison.¹³⁵

These design features are reflected in modern prison design in Europe:

An absence of hard fixtures and furnishings, the use of psychologically effective colour schemes, an attention to the maximum exploitation of natural light, and the incorporation of unevenness and differing horizons in the belief that distances, shadows and minimization of spatial repetition ward off monotony, are all to be found in prison buildings throughout Europe.¹³⁶

The ways in which these features apply in practice is exemplified by the AMC, which makes use of secure glazing on cell windows instead of bars, and has been designed to ensure that the view from cell blocks is of open space, rather than of other cell blocks.¹³⁷ The AMC has cottages that allow people to live in a more normal environment. For example, they can cook

132 Ibid 126.

133 Ibid 138. The NSW Inspector of Custodial Services has reported that prisons are typically very noisy, writing: '[e]xcessive noise in the custodial setting arises from the clashing of steel doors against steel door frames and the continuous low frequency rumble of air-conditioning or other climate control systems together with the noise arising from the concentration of many people in limited spaces': NSW Inspector of Custodial Services, above n 15, 19.

134 Ibid 142.

135 The Home Office has produced a *Colour Design Guide* (2007) for correctional facilities which is discussed by ibid 156–8.

136 Philip Hancock and Yvonne Jewkes, 'Architectures of Incarceration: The Spatial Pains of Imprisonment' (2011) 13(5) *Punishment and Society* 611, 621.

137 John Hargreaves, "'Beyond Rehab': Where Does the Prison Fit?" (2009) 21(1) *Current Issues in Criminal Justice* 148, 151.

their own meals in the kitchen and are expected to do their own cleaning (until recently, all women were accommodated in the cottages).¹³⁸ The AMC is also ‘a ‘campus-style’ facility with a central “town square”, and program, education and industries blocks’.¹³⁹

Consideration was given to the design of the visitors’ area to ensure that it is ‘welcoming and normalised’. There is a children’s play area with toys, a café staffed by imprisoned people and ‘café style’ seats.¹⁴⁰ Paget noted that the design of the visiting area was intended to ‘allow children to be seated with a prisoner to give effect to the principle that children should not suffer for the transgressions of their parents or relatives’.¹⁴¹

Designing for the Needs of Indigenous People

The specific needs of Indigenous people outlined earlier in this chapter were taken into account during the design of the new West Kimberley Regional Prison (Kimberley prison), which opened in late 2012. Before the design of this prison is outlined, a note of caution is in order. This prison is an example of positive steps being taken to overcome specific concerns; however, culturally sensitive prison design initiatives should *not* be used as a justification for imprisoning more Indigenous people. Instead, active steps should be taken to reduce Indigenous over-representation (justice reinvestment, as referred to in Chapter 4, may be a useful strategy in this regard). Further, regardless of the built environment, imprisonment will always be a damaging place for all people, and especially for Indigenous people.¹⁴²

138 ACT Human Rights and Discrimination Commissioner, *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre* (2014) 7, 38. Women were relocated out of the cottages in 2017 due to the number of women in custody exceeding capacity: ACT Inspector of Correctional Services, *Report of a Review of the Care and Management of Remandees at the Alexander Maconochie Centre* (2019) 10, 73. The accommodation that the women are currently in has been criticised by the Inspector of Correctional Services as unsuitable for a range of reasons: at 73–8.

139 ACT Auditor-General, *The Rehabilitation of Male Detainees at the Alexander Maconochie Centre (Report No 2 of 2015)* (2015) 27.

140 ACT Human Rights and Discrimination Commissioner, above n 138, 58–9.

141 Paget, above n 131, 277. It is noted that due to expansion of the Alexander Maconochie Centre, combined with the number of people detained exceeding the capacity of the prison, visits are restricted: ACT Inspector of Correctional Services, above n 138, 65.

142 See the discussion about daily life in Australian prisons in Chapter 1. In relation to Indigenous people, the damaging nature of prisons was well documented by the Royal Commission into Aboriginal Deaths in Custody, above n 35.

The Kimberley prison was designed in consultation with the local community.¹⁴³ The prison is located on the country of many of those sentenced to it, and people live in housing units arranged into clusters. Grant explains the rationale for this as follows:

When people come into regional centers, they tend to locate their homes or camps in a radial manner aligning with the direction of their particular 'country' ... These arrangements are mirrored in the housing clusters at the prison, allowing inmates to live with countrymen in housing that is more closely aligned with their home 'country'.¹⁴⁴

People are housed with others from their own family or language group, and attention is paid to separating groups who may be in conflict.¹⁴⁵ Each unit houses six to eight people, and each person has their own room. There are communal kitchens, living rooms and bathrooms.¹⁴⁶ Some units afford the opportunity for people to sleep outdoors on a secure veranda.¹⁴⁷ There is also an Australian Rules football field which provides an opportunity for people to play football together and gather with their family when they visit.¹⁴⁸

Concluding Remarks on Improving Physical Conditions

The ACT's consideration of human rights when designing the AMC and Western Australia's consideration of the needs of Indigenous people when designing the Kimberley prison are in many ways atypical. Most jurisdictions around Australia are in a position of having to manage with very old buildings where there are structural features contrary to the human rights of imprisoned people. These include, for example, lack of in-cell sanitation, lack of windows and/or adequate heating and cooling.

There are also examples across Australia of brand new prisons built without taking into account human rights compliance, such as the new dormitory-style accommodation in NSW 'rapid build' prisons. There are hanging points in a recently built prison in the NT.

143 Elizabeth Grant, 'Innovation in Meeting the Needs of Indigenous Inmates in Australia' (2013) 75(4) *Corrections Today* 52, 57.

144 *Ibid* 54.

145 *Ibid*.

146 *Ibid*.

147 *Ibid* 56.

148 *Ibid* 54.

Whether a prison is old or new, neither the infrastructure nor a lack of resources can be used as a defence for failing to provide a built environment that is human rights compliant, or for sustaining a prison environment that exposes people to TCID. A similar point may be made here to that made in Chapter 3 about the cost of preventive monitoring versus the costs of imprisonment overall;¹⁴⁹ prison expansion; compensation payments;¹⁵⁰ and Royal Commissions, coronial inquests and other mechanisms to investigate deaths, harm and human rights violations after they have occurred. Ensuring decent physical conditions in prisons will cost a fraction of the cost of dealing with the human and economic costs of the problems caused by not having such conditions.

Conclusion

Physical conditions and the provision of basic necessities in prisons have been the subject of much litigation internationally and in Australia. This may be because it is easier to prove cases involving poor physical conditions than it is to prove other breaches of international human rights law, such as not being treated with ‘dignity and respect’ and denial of opportunities for rehabilitation. Nevertheless, it is true that physical conditions play a central role in people’s experience of incarceration, largely because prisons are ‘total institutions’. This, in turn, impacts on imprisoned people’s overall wellbeing.

Once again, Australian prisons cannot be shown to meet the prerequisite of providing physical conditions that are human rights compliant. Problems have been identified in both the built environment and access to basic necessities. Appropriate provision of food and drink, the ability to maintain personal hygiene and access to outside areas have all been the subject of litigation. These problems are part of the deprivation of goods and services component of the ‘pains of imprisonment’.¹⁵¹

149 Imprisoning people costs \$3.8 billion each year nationally: Lorana Bartels, ‘Criminal Justice Reform Challenges for the Future: It’s Time to Curb Australia’s Prison Addiction’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 123.

150 For example, the Western Australian Government’s \$3.2 million compensation payment to the family of Mr Ward who died in a prison transport van: Chalpat Sonti, ‘Multimillion-Dollar Payout to Mr Ward’s Family After Prison Van Death’, *WA News* (Western Australia), 29 July 2010.

151 Gresham Sykes, *Society of Captives; A Study of a Maximum Security Prison* (Princeton University Press, 1958). See the discussion of the relevance of this to Australian prisons in Chapter 1.

Some major adjustments are required to the physical conditions in Australian prisons to satisfy international human rights law requirements. The first priority must be to reduce reliance on imprisonment in accordance with the first prerequisite. Overcrowding is undoubtedly the number one barrier to decent physical conditions in Australian prisons.

When considering the built environment, there is an urgent need to reconsider harmful regimes such as ‘supermax’ facilities and ‘rapid build’ dormitory-style prisons. There is also a need to ensure adequate attention is given to the thermal conditions in prison cells. Specific attention needs to be given to groups with particular needs, particularly Indigenous and elderly people. There are some examples of best practice from around Australia that can be drawn on in this endeavour.

In relation to provision of basic necessities (food and drink, personal hygiene, clothing and access to the outside), it should be just that—basic. People should not have to use a toilet in front of another person, they should not be provided with second-hand underwear, if they need special dietary requirements they should be catered for, people need clothing that is suitable for the climatic conditions and they need regular access to sunlight and the outdoors. The cases discussed in this chapter should provide insight into the parameters of the human rights requirements for the provision of basic necessities.

Perhaps the simplest approach would be for policymakers and architects approaching prison design to consider this question: Would I want my brother or sister to be accommodated here in these conditions if they were convicted of a crime? If the answer is ‘no’, then it should be back to the drawing board.

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