

Conclusions

There is a large gap between the international human rights law applicable to prisons, which Australia has chosen to be bound by, and daily prison operations in individual prisons across Australia. This gap exists for a number of reasons, including the lack of international enforcement mechanisms, lack of effective human rights protections nationally and difficulty in translating some of the requirements into practice. Australian imprisonment policy is formulated in the absence of human rights legislation in five jurisdictions out of eight, and in the absence of a well-established human rights culture in the broader community.

Most importantly, there are certain characteristics of Australian society as a whole, and also within its prisons, that are antithetical to both the spirit and the letter of international human rights law. Australian imprisonment policy prioritises punitiveness and related goals such as deterrence and retribution, at the expense of rehabilitation and restoration. This has arguably led to increasing prison populations, the over-representation of certain vulnerable groups in the community within the prison population and a consistent picture of overcrowded prisons across the country.¹

The culture within Australian prisons is consistent with the observations of sociological literature on prisons as ‘total institutions’ and on the ‘pains of imprisonment’ detailed in Chapter 1.² There is also a heavy emphasis on ‘security and good order’ in both corrections legislation and training programs undertaken by staff. The latter two themes were addressed in Chapters 5 and 7.

1 Termed ‘hyperincarceration’ by Chris Cunneen et al, *Penal Culture and Hyperincarceration. The Revival of the Prison* (Ashgate, 2013).

2 In reliance on the sociological analyses of Goffman (‘total institutions’) and Sykes (‘pains of imprisonment’): Erving Goffman, *Asylums. Essays on the Social Situation of Mental Patients and Other Inmates* (Aldine Publishing Company, 1962); Gresham Sykes, *Society of Captives; A Study of a Maximum Security Prison* (Princeton University Press, 1958).

It is undoubtedly the case that Australian prisons do not currently comply with Australia's international human rights law obligations. Indeed, the situation is such that it is easy to despair. Yet there is at least some reason for hope.

First, Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) in December 2017 represents a significant opportunity for a change to this situation.³ The OPCAT shifts the focus to *prevention*, whereas the current monitoring regime in Australia is predominantly reactive (that is, dealing with deaths and harms after they have occurred). Australia's ratification was voluntary and opens it to a level of ongoing monitoring that will make the ingrained non-compliance with international human rights law in Australian prisons (both in policy and practice) more difficult to ignore.

Second, it is clear what needs to be done to improve Australia's compliance with its international human rights obligations in line with the commitment displayed by the ratification of the OPCAT. To this end, this book has proposed five prerequisites that will help to achieve the preventive aims of the OPCAT, particularly the prevention of 'torture and other cruel, inhuman or degrading treatment or punishment' (TCID). They are:

1. reduce reliance on imprisonment (Chapter 4)
2. align domestic legislation with Australia's international human rights law obligations (Chapter 5)
3. shift the focus of imprisonment to the goal of rehabilitation and restoration (Chapter 6)
4. support prison staff to treat imprisoned people in a human rights-consistent manner (Chapter 7)
5. ensure decent physical conditions in all prisons (Chapter 8).

The prerequisites provide clarity about how international human rights law should be operationalised in Australian prisons, including by clarifying abstract terms such as 'rehabilitation' and treatment 'with humanity and with respect for the inherent dignity',⁴ identifying the parameters of the

³ *Optional Protocol to the Convention against Torture*, adopted 18 December 1992, UN Doc A/RES/57/199 (entered into force 22 June 2006) ('OPCAT').

⁴ As required, respectively, by arts 10(3) and 10(1) 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').

obligations and providing practical strategies that should be put in place to achieve compliance with the international human rights law obligations. Moreover, the prerequisites reinforce each other. There are connections between these prerequisites that suggest that striving to achieve one may have positive implications for achieving all five.

Achieving prerequisite one (reduced reliance on imprisonment) can contribute to the achievement of all other prerequisites except for two (legislative change). Prison occupancy rates have a significant impact on the physical conditions in prisons (prerequisite five). It is crucial for avoiding cell sharing and the concomitant risk of violence and lack of privacy. Reducing the prison population is also of assistance in ensuring there are enough resources to provide programs and facilities for the purposes of rehabilitation and restoration (prerequisite three), and to ensure the prison population is small enough to foster positive relationships, based on care and respect, between staff and imprisoned people (prerequisite four).

Prerequisite two (domestic legislation), if achieved, also has considerable potential to assist with the implementation of several others. The Treaties Australia has signed require domestic incorporation of the human rights contained in therein.⁵ It is important that the National Preventive Mechanism (NPM) has domestic legislation to refer to when carrying out inspections of prisons, in the way that the Australian Capital Territory (ACT) Inspector of Correctional Services is required by legislation to provide reports to the ACT Legislative Assembly containing ‘an assessment about whether the rights under international and territory law of detainees at a correctional centre subject to review are protected’.⁶

Australian legislation across all jurisdictions (that is, beyond the ACT, Victoria and Queensland) needs to incorporate the prohibition against TCID and *International Covenant on Civil and Political Rights* (ICCPR) art 10(1) requirement that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. Then there can be an Australia-wide commitment to the preconditions both for the staff duty to treat imprisoned people in a human rights–consistent manner (prerequisite four), and decent physical

5 ICCPR art 2; *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’).

6 *Inspector of Correctional Services Act 2017* (ACT) s 27(2)(c).

conditions (prerequisite five). Moreover, this legislation can establish the goal of the prison system as rehabilitation in accordance with art 10(3) of the ICCPR (prerequisite three), contrary to current corrections and sentencing legislation that prioritise other goals.

If a focus on rehabilitation and restoration can be established (prerequisite three), it will soon become clear that this is more difficult to achieve in overcrowded conditions and that prerequisite one must be addressed. Nor can rehabilitation and people's early release from prison be achieved without the support of staff—staff who need to be trained and assisted to develop appropriate attitudes and skills to provide respectful and caring treatment, as required by prerequisite four.

Respectful treatment in and of itself has been found in empirical research to be extremely important to imprisoned people's experience of incarceration. Respectful treatment can improve wellbeing, whereas the absence of respect can cause distress, anxiety and depression.⁷ When respectful treatment is prioritised, TCID is less likely to occur.

Respectful treatment and avoidance of TCID (prerequisite four) are both easier to foster in smaller prisons, where it is more likely that staff can build interpersonal relationships with imprisoned people. Reduced reliance on imprisonment is thus important for achieving human rights-consistent treatment. Respectful treatment also supports the prerequisite of rehabilitation. An important way to prepare people for their release from prison is to improve their ability to relate to others. It is useful when respectful treatment is mandated by law (prerequisite two), although a legal requirement is merely a starting point. Factors such as staff training and human rights-focused leadership are necessary for this to work in practice.

Finally, decent physical conditions (prerequisite five) are difficult, if not impossible, to achieve when prisons are overcrowded. It was argued that the prerequisite for decent physical conditions is lower in the hierarchy of prerequisites than others because it can be ameliorated by compliance with other prerequisites in a way that they cannot. However, it still forms a crucial concern from the perspective of imprisoned people who spend 24 hours per day seven days per week in the physical environment of

7 Karin Beijersbergen et al, 'Procedural Justice and Prisoners' Mental Health Problems: A Longitudinal Study' (2014) 24 *Criminal Behaviour and Mental Health* 100, 101.

the prison. It is also likely to be a subject that takes up a lot of time of the NPM if the experience of existing prison inspectorates and other monitoring organisations is anything to go by.

International case law demonstrates that unsatisfactory physical conditions may breach the prohibition of TCID. This is something both the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and NPM will be examining. It is also important that the physical conditions are modified to cater for the needs of particular groups in the prison population, including Indigenous and elderly people. The physical conditions of prisons may also play a part in fostering rehabilitation because there needs to be enough space available for educational programs and work opportunities (prerequisite three).

Towards Human Rights Compliance: One Prerequisite at a Time

The picture of Australian prisons painted throughout this book is not positive. There is no state or territory operating prisons without human rights violations occurring, or that are entirely human rights compliant. These violations occur because of macro-level goals across prisons that have a surprising degree of consistency, despite the fact that prisons are the responsibility of the states and territories. Those goals place too much emphasis on punishment and punitiveness, security and good order—at the expense of goals such as rehabilitation and humane treatment.

There are numerous state and territory legislative provisions and policies that preclude humane treatment of imprisoned people by prison staff. These include policies relating to shackling of imprisoned people seeking medical assistance, policies mandating strip searching and legislation that overrides imprisoned people’s right to consent to medical treatment (this is not to suggest that daily interactions between staff and imprisoned people are never positive).

The Australian Government’s ratification of the OPCAT indicates a commitment to improving prison conditions around Australia. This preventive focus should lead to a significant shift in emphasis for prison monitoring domestically, as well opening up places of deprivation of liberty to scrutiny by the expert members of the SPT. In particular, the

OPCAT's preventive focus identifies ways that TCID can be prevented and prison policy and operations improved. Therefore, the government's ratification of the OPCAT is a reason for hope.

The prerequisites identified in this book echo this preventive focus. Each prerequisite has provided an illustration of national best practice and/or a combination of strategies that may be employed to work towards improvements. Moreover, while many of the practices identified in earlier chapters are disheartening, there are signs of movement towards positive changes. Some can be identified in relation to most prerequisites.

With respect to the first prerequisite, justice reinvestment has led to some reductions in prison populations overseas, with the State of Texas in the United States of America often referred to as a success because of the reduction in prison growth and redirection of funds to community-based programs such as substance abuse treatment programs.⁸ Some Australian trials also indicate some early successes with this approach (eg, Bourke in New South Wales (NSW)), although the trials are in preliminary stages. The ACT has also extended its justice reinvestment strategy due to the initial success of some trials.⁹ If the recommendations about justice reinvestment made by the Australian Law Reform Commission in 2017 (including the establishment of a national coordinating body)¹⁰ are implemented, justice reinvestment may help curb Australia's 'addiction to prisons'.¹¹ This will need to be pursued alongside other reductionist strategies, including amendments to sentencing legislation, outlined in Chapter 4.

There is a very good model of a legislative scheme aligned with Australia's international human rights law obligations in the ACT. This is a comprehensive model for the second prerequisite. The ACT has statutory protection of human rights by the *Human Rights Act 2004* (ACT) ('HRA'), as well as corrections legislation that is the most recent in

8 Australian Institute of Criminology (AIC), *Justice Reinvestment in Australia: A Review of the Literature* (Research Report No 9, 2018) 51.

9 Jordan Hayne and Niki Burnside, 'Canberra's Only Jail is Running Out of Cells, But the Government Wants to "Build Communities Not Prisons"', *ABC News* (Australia), 15 February 2019.

10 Australian Law Reform Commission (ALRC), *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 137–8, Recommendations 4-1, 4-2.

11 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) 119.

Australia (passed in 2007) and aligned with the *HRA*.¹² It has appointed a new Inspector of Correctional Services required by legislation to monitor how well the Alexander Maconochie Centre complies with the *HRA* and international human rights law.¹³ The Inspector has published detailed inspection standards based on the World Health Organization's 'healthy prison' test, which has been used as a basis for prison inspections by Her Majesty's Inspectorate of Prisons in the United Kingdom for over a decade.¹⁴ A set of human rights principles provide further detail to that contained in the *HRA*, Corrections Act and standards and may also be of assistance to the Inspector when carrying out inspections.¹⁵ Other Australian jurisdictions need look no further than the ACT to find a model of best practice for domestic legislative protection of imprisoned people's rights (prerequisite two).

Making the goal of imprisonment consistent with art 10(3) of the ICCPR to achieve the third prerequisite is complex. There is a lack of guidance from the United Nations Human Rights Committee about how this article is to be implemented by states parties to the ICCPR. For this reason, it has been recommended that Australia focus on rehabilitation *and restoration*. Restorative justice is well established in Australia, which may make transferring restorative principles into prisons easier. The 'Sycamore Tree' program operated in West Australian prisons may provide a starting point for development of restorative prisons.¹⁶

The fourth prerequisite—staff duty to treat imprisoned people in a human rights—consistent manner—has two sides to it: a positive duty to treat people with humanity and respect for their human dignity (as required by art 10(1) of the ICCPR) and the prohibition of TCID. Many policies need to be revised to achieve compliance with this prerequisite because it is recognised that staff are bound to follow policies.

12 *Corrections Management Act 2007* (ACT).

13 *Inspector of Correctional Services Act 2017* (ACT) s 27(2)(c).

14 ACT Inspector of Correctional Services, *ACT Standards for Adult Correctional Services* (2019).

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

16 Dot Goulding, Guy Hall and Brian Steels, 'Restorative Prisons: Towards Radical Prison Reform' (2008) 20(2) *Current Issues in Criminal Justice* 231, 236, 239–40. For a more recent discussion of the 'Sycamore Tree' program see Jane Anderson, 'Introducing and Theorising an In-Prison Restorative Justice Programme: The Second-Generation Sycamore Tree Project' (2018) 1(2) *International Journal of Restorative Justice* 210.

There are also specific practical strategies that can be pursued in addition to policy and legislative changes. The first is training. The human rights–focused training provided by the ACT to give staff a solid grounding in their human rights obligations is a useful starting point for other states and territories to learn from.¹⁷ The second is increasing the value placed on prison work by the wider community. The ‘National Corrections Day’ held in NSW is a positive step in this direction.¹⁸ Improving the length of training provided to Australian prison staff would help both to improve their preparedness for the work and increase recognition by the community, because they would be gaining accreditation in provision of a social service (helping prepare staff to be law-abiding citizens upon their release). Expanded training is also required to ensure that training covers all the international human rights law requirements comprehensively, and to support staff to manage the complex vulnerabilities found within the Australian prison population. The third is leadership, and the changes made in the Tihar Central Prison in New Delhi demonstrate that one progressive leader can achieve a lot in a short amount of time.¹⁹

Finally, the improvement of physical conditions in prisons, to achieve the fifth prerequisite, will require that all new prisons are built with human rights at the forefront of design, in the way that the Alexander Maconochie Centre was designed.²⁰ It is unlikely that all older prison buildings will be decommissioned or rebuilt, but modifications can be made to existing buildings. These should include removing hanging points; installing air-conditioning and heating to protect against climatic conditions; and providing appropriate sleeping, toilet and shower arrangements for elderly people. Serious consideration needs to be given to the use of ‘supermax’ and dormitory-style ‘rapid build’ prisons because these are unlikely to be able to be modified to be human rights compliant. Architecture is no barrier to provision of basic necessities, including food and drink, personal hygiene,

17 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) 564.

18 NSW Government, Communities and Justice, *National Corrections Day* <<https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/national-corrections-day.aspx>>.

19 A J W Taylor and John Rynne, ‘Exemplary Prisoner Management’ (2016) 49(4) *Australian & New Zealand Journal of Criminology* 512, 519–20. Taylor and Rynne’s discussion of other innovative prison managers is also useful.

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

clothing and access to outside areas, and there should be no excuse for Australian prisons not providing these. The minimum living conditions guaranteed by legislation in the ACT are a useful starting point.²¹

Concluding Remarks

It may be trite to say that ‘prevention is always better than cure’, but when one considers the litany of human rights abuses occurring in Australian prisons across all jurisdictions on a daily basis, it is important to remember it. For there is no ‘cure’ in the sense that deaths are irreversible, and an already vulnerable population is being harmed by practices including solitary confinement, strip searching, being shackled while receiving medical care, being left to give birth unaided in a prison cell, being forced to share overcrowded prison cells and other practices.

The OPCAT requires that human rights abuses be prevented before they occur. This book has demonstrated that there are a range of practical ways this may be achieved, with five overarching prerequisites, and detailed consideration of practical strategies that will help to implement each of them. Australia will benefit from the assistance of the SPT in establishing an NPM. The branch of the NPM responsible for prison monitoring will build on the monitoring expertise of existing prison inspectorates, Ombudsmen and human rights commissions. It will hopefully plug the gaps in the existing monitoring regime and offer the benefit of a national coordinated approach to improving prison operation across the states and territories. A national approach will provide opportunities for good practices to be transferred between prisons and between jurisdictions, consistent with the preventive aim of the OPCAT.

The OPCAT is nevertheless not a panacea, as shown by the erratic progress made in some of the countries that ratified the OPCAT many years ago.²² But the OPCAT does represent an opportunity to reimagine

21 *Human Rights Act 2004* (ACT) s 12; *Corrections Management Act 2007* (ACT) ch 6. However, case law demonstrates that there are problems in practice with the provision of food and drink. See, eg, *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 (discussed in Chapter 8).

22 For example, the United Kingdom has had a National Preventive Mechanism (NPM) in place since 2009. A recent annual report of the NPM raised concerns about a range of matters relating to prisons, including the number of self-inflicted deaths and insufficient time out of cells: NPM, *Monitoring Places of Detention. Ninth Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2017 – 31 March 2018* (2019) 13.

the purpose of imprisonment in Australia, focus attention on the inherent risks associated with the deprivation of people's liberty and proactively counter those risks. Australia has elected to ratify the OPCAT, as well as the Treaties that protect the human rights of imprisoned people. People in prison deserve the benefit of any protection international human rights law may provide and any improvement it may offer to their treatment and the prison conditions in which they live their lives.

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