

Introduction

In the 1840s, there was a short-lived experiment in prison reform in the penal settlement of Norfolk Island under the leadership of Captain Alexander Maconochie. Maconochie's starting premise was that penal settlement regimes, such as Van Diemen's Land, that focused on cruel treatment damaged not only those who were subject to such regimes, but the society that applied such treatment.¹ This is because people would return to society at least as dangerous as they were beforehand, if not more so. Maconochie opined that 'he had never known a bad man made better by punishment, though he had known many good men made worse'.²

Maconochie instead adopted a system intended to, in his own words, 'train them [convicts] to return to society, honest, useful and trustworthy members of it'.³ His initiatives were extensive and included removing the gallows, allowing the convicts to eat with forks instead of their hands, teaching people to read and providing them with plots for farming produce they could then trade.⁴ The men were also organised into groups with accountability for each other's conduct, which was intended to create a sense of social responsibility.⁵ He introduced a reward system for good behaviour, with the men given 'marks', the collection of which

1 John Barry, 'Alexander Maconochie. 1787–1860' in Hermann Mannheim (ed.), *Pioneers in Criminology* (Patterson Smith Publishing Corporation, 1972) 85–6. This was a conclusion Maconochie reached following a detailed study of the penal system in Van Diemen's Land (Alexander Maconochie, *Report on the State of Prison Discipline in Van Diemen's Land* (London, 1838)): at 88–9.

2 Kenneth Maconochie, 'Captain Alexander Maconochie: Sociologist and Penal Reformer' (2009) 9(3) *The Howard Journal of Criminal Justice* 235, 236.

3 Cited by Barry, above n 1, 91.

4 Ibid 95–6.

5 John Moore, 'Alexander Maconochie's "Mark System"' (2011) 198 *Prison Service Journal* 38, 42; Barry, above n 1, 94.

would then reduce their time in the settlement. The aim was to provide an incentive for responsible behaviour.⁶ Loss of marks was the only form of punishment imposed by Maconochie.⁷

People released from Norfolk Island during Maconochie's leadership became known as 'Maconochie's gentlemen',⁸ with a reconviction rate of 3 per cent, compared to 9 per cent for those released from Van Diemen's Land.⁹ To some extent then, Maconochie was achieving his stated reformist aim, namely, '[i]t is the duty, and even still more the interest of society, in dealing with its criminals, to try earnestly while they are in custody, to reform them'.¹⁰

Maconochie's experiment was short lived, lasting only from 1840–44, after which he was recalled to London.¹¹ His reforms were too much of a departure from the prevailing view that punishment should be the focus of imprisonment.¹²

There have been analyses suggesting that there are continuing lessons to be learned from Maconochie as a reformer.¹³ Maconochie has been described by Taylor and Rynne as one of five—in their terms—'idealistic prison managers' that 'braved the punitive tide to apply reformatory principles'.¹⁴

6 A J W Taylor and John Rynne, 'Exemplary Prisoner Management' (2016) 49(4) *Australian & New Zealand Journal of Criminology* 512, 515.

7 Barry, above n 1, 93.

8 As reflected by the title of Norval Morris's book, *Maconochie's Gentlemen. The Story of Norfolk Island and the Roots of Modern Prison Reform* (Oxford University Press, 2002). K Maconochie makes the point that 'after a year or so a new phrase was born which without further reference could get a man a job anywhere in the Australian colonies—if he could simply say: "I'm one of Captain Maconochie's men"': above n 2, 240.

9 K Maconochie, above n 2, 240.

10 Cited in John Barry, *Alexander Maconochie of Norfolk Island. A Study of a Pioneer in Penal Reform* (Oxford University Press, 1958) 214. This brief overview should not be taken to suggest Maconochie's leadership was entirely humane. He did, for example, use corporal punishment: Moore, above n 5, 44.

11 Barry, above n 1, 97.

12 K Maconochie, above n 2, 236. The start of Maconochie's experiment coincided with the grant of representative legislative institutions in the Australian colonies in 1840. Whether the two are related is unclear, though it has been noted that before 1840 many social and political issues were contested in the courts: David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1992). The advent of some form of representative legislative institutions may have fostered a climate where novel changes could be attempted through other means.

13 See Morris's chapter entitled 'Contemporary Lessons from Maconochie's Experiment' in Morris, above n 8. K Maconochie also notes specific examples where Maconochie's philosophy has been followed since: above n 2, 235.

14 Taylor and Rynne, above n 6, 512.

The Australian Capital Territory named their only prison—opened in 2009—the ‘Alexander Maconochie Centre’ after Captain Maconochie due to its purported commitment to rehabilitation.¹⁵

At this distance in time, we are unlikely to be able to fully understand what Maconochie thought himself to be doing or exactly which aspects of his context he was reacting against. It may also seem far-fetched to compare a penal settlement in the 1840s to Australian prisons in 2020.¹⁶ Yet there is at least one clear parallel between the society of which Maconochie was a part and contemporary Australia: both harbour(ed) conflicting opinions about the purposes of imprisonment. Is imprisonment about punishment (which sits at one end of the spectrum) or rehabilitation (which sits at the other)?

Those currently responsible for criminal justice policy in Australia, like Maconochie’s contemporaries, valorise punishment (more commonly referred to as ‘retribution’). Imprisonment is a central feature of the ‘tough on crime’ agenda that governments pursue Australia wide. Examples include the abolition of alternative sanctions to prison (such as home detention, which was abolished in Victoria in 2012), mandatory minimum sentences for a range of offences (including murder and sex offences in the Northern Territory), tightening the eligibility for parole (including ‘no body, no parole laws’ in South Australia, Victoria and the Northern Territory)¹⁷ and ‘supermax’ prisons being established for certain categories within the prison population (such as the Woodford Correctional Centre in Queensland for members of ‘Criminal Motorcycle Gangs’).¹⁸

Predictably, the ‘tough on crime’ agenda has resulted in prison capacity failing to keep up with increases of the prison population. This is despite extensive investment to expand prison capacity (including ‘rapid build’ prisons in New South Wales).¹⁹ Detailed statistics are provided in Chapter 1, and may be described as alarming. By way of overview, in the

15 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, 52–3.

16 In 2002, Morris drew a parallel between ‘supermax’ prisons in the United States of America and the Norfolk Island colony prior to Maconochie taking over, noting that ‘[t]his deep end of the prison system raises similar problems to those that Maconochie confronted in 1840, with the distinction that the passage of years has led us to impose a degree of sensory deprivation on prisoners that Norfolk Island never attained’: above n 8, 197–8.

17 These reforms are detailed in Chapter 4.

18 ‘Supermax’ prisons, including Woodford, are discussed in Chapter 8.

19 Detailed in Chapter 4.

period from 2002–16, there have been increases in the imprisonment rate of 81 per cent in South Australia, 78 per cent in the Northern Territory and 74 per cent in Western Australia.²⁰ Nationally, prisons were operating at 121.2 per cent of capacity in 2016–17 on average (the most recent year for which a reliable national rate is available).²¹

Consequently, the Australian prison system is characterised by overcrowding, increasing levels of violence, lack of adequate treatment for people with mental illness and disability, lack of resources for educational and work programs, and other problems, all of which will be documented throughout this book. All of the above factors make it less likely that Australian prisons can ‘reform’ (as Maconochie would have put it) or ‘rehabilitate’ the people moving through them.²² There is also the question of the damage this is doing to Australian society more broadly, as perceptively identified by Maconochie.

There are two pressing reasons why Australia’s current valorisation of punishment and retributive goals of imprisonment, and the prison conditions that stem from this, require attention. The first is that imprisoned people should not be subjected to ‘harsh conditions, humiliation or violence’.²³ It is simply unacceptable to degrade and brutalise people, regardless of the crime they may have committed. It is now widely accepted, including by courts, that people are sent to prison *as* punishment, not *for* punishment.²⁴

20 Don Weatherburn, ‘Australian Imprisonment 2002-2016: Crime, Policing and Penal Policy’ (2018) 51(4) *Australian & New Zealand Journal of Criminology* 537, 538.

21 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018, Volume C: Justice* (Commonwealth of Australia, 2018) 8.14, Table 8A.13. The figure is 115.6 per cent for 2017–18, but Victoria, New South Wales (NSW) and South Australia did not provide data and, given that Victoria and NSW operate two of the larger prison systems in Australia, this skews the data: Steering Committee for the Review of Government Service Provision, *Report on Government Services 2019, Part C: Justice* (Commonwealth of Australia, 2019) 8.17.

22 The debates about the ability of prisons to achieve ‘rehabilitation’ are discussed in Chapter 6.

23 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* (The Federation Press, 2014) 84.

24 *Rich v Secretary of the Department of Justice* [2010] VSC 390, [45]; Bronwyn Naylor and Stan Winford, ‘Implementing OPCAT Through Prison Monitoring: The Relevance of Rehabilitation’ (2019) 25(1) *Australian Journal of Human Rights* 113, 113.

The second reason is that Australia has international legal obligations relating to the treatment of imprisoned people—obligations that it has voluntarily (and in one case quite recently) committed itself to—that must be complied with. Strategies for compliance with these obligations is the principal concern of this book.

Of particular relevance are Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) to ensure that the 'essential aim' of the prison system should be 'reformation and social rehabilitation' (art 10(3)), and that those deprived of their liberty should be treated with 'humanity and respect for the inherent dignity of the human person' (art 10(1)).²⁵ Australia has also ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and is therefore required to prevent torture and 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' in prisons.²⁶

As recently as December 2017, Australia ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).²⁷ The OPCAT establishes a system of monitoring of places where people are deprived of their liberty (defined in art 2, and definitely including prisons) that operates at the international and national level. At the international level, visits are conducted by the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) (established by art 2). Australia is also expected to establish a national-level National Preventive Mechanism (NPM) that meets the criteria set out in the OPCAT (required under art 3). Both the SPT and NPM are required to ensure the *prevention* of torture, cruel, inhuman or degrading treatment or punishment. This is significantly different from the monitoring currently carried out in Australia by organisations such as Ombudsmen and Coroners, that tends to be predominantly reactive.²⁸

25 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Australia ratified the ICCPR on 23 November 1980.

26 Article 2 defines torture and Article 16 contains the requirement to prevent 'other acts': *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'). Australia ratified the CAT on 10 December 1985.

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

28 This is discussed further in Chapter 3.

Often the relevant international human rights contained in these treaties and the OPCAT apply very generally across many sites where people are deprived of their liberty. Therefore, to understand the precise implications of these treaties for the operation of prisons, it is necessary to refer to a large body of additional rules,²⁹ principles³⁰ and, particularly, to the views, observations and General Comments of relevant treaty monitoring bodies and United Nations Special Rapporteurs.³¹ This book clearly outlines the application of the treaties to Australian prisons and the practical steps required to comply.

Despite these layers of international law, it is possible to condense the requirements down to the position that once a person is imprisoned, while they may be denied their liberty, they maintain all their other rights.³² There are numerous policies and practices in Australian prisons that do not meet this requirement. For example, people are routinely denied the right to personal safety by exposure to violence, and denied the right to privacy by being forced to use a toilet in front of a cellmate.³³ There are examples of torture and other cruel, inhuman or degrading treatment or punishment in Australian prisons, including:

- imprisoned people being shackled to their hospital beds when seeking medical treatment, including while giving birth or receiving end-of-life care (which is policy in South Australia)³⁴
- a woman who was left to give birth in her prison cell in Western Australia alone without medical assistance in 2018, posing significant risks to both her and her baby³⁵

29 Such as, for example, the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).

30 Such as, for example, the United Nations *Basic Principles for the Treatment of Prisoners* and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

31 Such as, for example, the Human Rights Committee established under the First Optional Protocol to the ICCPR and Committee against Torture established under the CAT. These mechanisms are detailed in Chapter 2. The need to refer to a 'large body' of material to understand the meaning of 'treating prisoners with humanity' in accordance with the ICCPR art 10(1) is identified by Andrew Coyle, *Humanity in Prison. Questions of Definition and Audit* (International Centre for Prison Studies, 2003) 22.

32 *Basic Principles for the Treatment of Prisoners*, Principle 5.

33 More detailed discussion of these matters is found in Chapters 4, 7 and 8. See, eg, Victorian Ombudsman, *Investigation into Deaths and Harms in Custody* (2014); Office of the Inspector of Custodial Services (OICS), *Western Australia's Prison Capacity* (2016) 15.

34 Ombudsman South Australia, *Ombudsman Investigation into the Department of Correctional Services in Relation to the Restraining and Shackling of Prisoners in Hospitals* (2012) 1. This policy is discussed in detail in Chapter 7.

35 OICS, *The Birth at Bandyup Women's Prison in March 2018. Inspector's Summary* (2018). This incident is discussed in detail in Chapter 7.

- a man with a psychosocial disability being kept in solitary confinement for 19 years in a Queensland prison.³⁶

To date, much of the academic literature concerning human rights of imprisoned people focuses on the case law concerning situations where state parties have violated their obligations to imprisoned people—that is, the literature examines reactive responses, not proactive ones.³⁷ This book takes a different approach—one that aligns closely with the preventive objective of the OPCAT. It clarifies the treaty obligations, then asks what Australia *ought* to do to comply with them. In other words, it identifies proactive steps that should be taken to avoid human rights violations.

The proactive steps put forward in this book are categorised into five prerequisites for human rights compliance in Australian prisons:

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

These prerequisites address the gap between current prison operations and Australia’s international human rights law requirements. They will assist policymakers and prison managers in three ways. First, by clearly outlining the international law requirements that apply in prisons. Second, by clarifying the practices that are likely to breach these requirements through detailed consideration of international and domestic case law. Third, by setting out practical steps for reform. The aim is to help Australia, as a party to the OPCAT, prepare for visits by the SPT, and to help individual prisons be better placed when preventive monitoring by the NPM commences.

36 Human Rights Watch, *I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia* (2018) 43. Solitary confinement is discussed in detail in Chapter 7.

37 See, eg, Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* (Oxford University Press, 3rd ed, 2009); Tim Owen and Alison Macdonald (eds), *Livingstone, Owen, and Macdonald on Prison Law* (Oxford University Press, 5th ed, 2015).

The book has three parts. The first part explores the gaps between current practice in Australian prisons and Australia's international human rights law obligations and explains the way that the current system of monitoring will need to shift from reactive to preventive. The second part details the national-level, system-wide changes necessary to close those gaps—the first three prerequisites. The remaining two prerequisites can be pursued within individual prisons, and these more micro-level actions are detailed in the third part.

The case for a departure from the prevailing approach to imprisonment in Australia is compelling. It is all the more compelling because there are alternatives available that, if implemented, would benefit both the individuals who are incarcerated and society as a whole. In this respect, the situation is reminiscent—at least in the starting premise and spirit—of the very practical reforms Captain Alexander Maconochie attempted 175 years ago.

Note Concerning Terminology

This book does not use the term 'prisoner' except when quoting other sources. Instead, this book uses the phrases 'imprisoned person' or 'person in prison' to place the shared humanity of people in prison at the forefront of the analysis. It is of the upmost importance that our shared humanity is reinforced if Australia is to act consistently with the dual international human rights law requirements that (1) people do not lose their human rights when imprisoned (other than the right to liberty) and (2) people be treated with 'humanity and respect for the inherent dignity of the human person'. To apply labels—including 'prisoner', 'offender', 'criminal', 'detainee', 'terrorist' and/or 'sex offender'—is to risk subtly justifying substandard, inhumane or less-than-optimal treatment—the very opposite of this book's purpose.

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