



Human Rights Audit and Review of Treatment of Women at AMC

Submission to ACT Human Rights Commission

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Prepared by Associate Professor Bronwyn Naylor and Anita Mackay

Overview

This submission focusses on international human rights law relevant to women in prison generally, which is intended to provide a broader context for the Australian Capital Territory ('ACT') Human Rights Commission's consideration of the human rights of women in the Alexander Maconochie Centre ('AMC'). The researchers who prepared this submission have not had any direct contact with the women at the AMC, and therefore cannot comment on the specific treatment of women at the AMC.

The researchers preparing the submission are based at Monash University and are finalising an Australian Research Council Linkage grant titled *Applying Human Rights in Closed Environments: A Strategic Framework for Compliance* which has been investigating the human rights of people in closed environments (including prisons) in three jurisdictions (the Commonwealth, Victoria and Western Australia).¹ This submission is informed by the findings of this project.

This submission covers the following topics.

1. Prison should be a penalty of last resort, especially in light of national statistics about the vulnerability of women who are sentenced to imprisonment and the argument that resources currently allocated to imprisonment could be better spent on community services (known as justice reinvestment);
2. Those women who are imprisoned maintain all of their rights other than the right to liberty and the *Human Rights Act 2004* and *Corrections Management Act 2006*, if complied with, provide a comprehensive legislative framework for the protection of the human rights of women in the AMC;
3. The AMC's emphasis on rehabilitation and purposeful activity applies equally to women and men in the AMC, and to apply these legislative requirements and policies differentially may breach the *Human Rights Act 2004* and the *Discrimination Act 1991*; and
4. A comprehensive system of independent external monitoring is necessary to ensure that this legislation is being complied with, and that there are mechanisms for redress in instances of noncompliance.

¹ For further information about this project see the project website at: <http://www.law.monash.edu.au/castancentre/projects/hrce.html>.

1) Prison as a last resort and justice reinvestment

Offences committed by women

It is useful to gain an overview of the types of offences committed by women that lead to their imprisonment. The key features here are that compared to men, women commit offences that pose less danger to other people, and are imprisoned for shorter periods of time.

A summary of the profile of different offences committed by men and women in Victoria was provided by the Sentencing Advisory Council in 2010 to be as follows:

Men predominate in offences such as assault (11.8% of men versus 7.5% of women), sex offences (18.5% versus 3.5%) and unlawful entry with intent (burglary) (11.0% versus 6.0%), while women most commonly appear in prison with property offences (including theft) (21% of women versus 6.1% of men) and deception offences (10.0% versus 3.1%).²

When women do commit violent offences, it has been observed that '[m]ost violent offences by women are one-off events and few women are repeat violent offenders'.³

Women tend to be imprisoned for short sentences and the Victorian Sentencing Advisory Council has noted 'an increase in the number of women sentenced to short terms of imprisonment (less than one month)'.⁴ This is particularly the case for Indigenous women, and Stathopoulos has observed that:

Indigenous women serve shorter sentences, meaning they are imprisoned for very minor offences—such as driving infringements and non-payment of fines—and that they are more likely than non-Indigenous women to be on remand.⁵

The Victorian Parliamentary Drugs and Crime Prevention Committee has argued that '[t]he impacts of short sentences for women are arguably disproportionate to the crimes committed; for example, they can lead to women's children entering state care, the loss of housing, income and all personal possessions, and the woman may leave prison with new debts'.⁶

The disproportionate disruption is particularly the case for the two-thirds of women in prison who are the primary caregivers for dependent children.⁷ These children have to be

² Victorian Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010) 60.

³ Mary Stathopoulos, 'Addressing Women's Victimization in Custodial Settings' (ACSSA Issues No 13, Australian Institute of Family Studies Australian Centre for the Study of Sexual Assault, 2012) 7.

⁴ Victorian Sentencing Advisory Council, above n 2, 56.

⁵ Mary Stathopoulos, above n 3, 3.

⁶ Parliament of Victoria, Drugs and Crime Prevention Committee, *Inquiry Into the Impact of Drug-Related Offending on Female Prisoner Numbers* (2010) 29.

⁷ Alannah Burgess and Catherine Flynn, 'Supporting Imprisoned Mothers and Their Children: A Call for Evidence' (2013) 60 *Probation Journal* 73, 74.

cared for by relatives during their incarceration, or are taken into state care. Research has found that 'when mothers are incarcerated it is typically maternal grandmothers and other kin, not children's fathers, who step up to care for them if they are not fostered out'.⁸

Vulnerability in the prison population

Women who are in prison are a particularly vulnerable segment of the population. Before outlining the features of this population, it is important to have an overview of the prison population more generally, so the following characteristics relate to the overall prison population:

- Indigenous people make up 28% of the national adult prison population despite only being 2% of the general adult population.⁹ That means that they are 14 times more likely to be imprisoned than non-Indigenous people;¹⁰
- 20% of the prison population have an intellectual disability;¹¹
- there are high rates of mental illness amongst the prison population compared to the general population. The precise rates vary depend on the definition of mental illness used and the time at which it is measured, but estimates range from 30% of the prison population being diagnosed with a mental illness¹² to 80% having a psychiatric illness over a 12 month period;¹³
- depending on the definition used, as many as 80% of imprisoned people have a history of brain trauma,¹⁴
- 70% of imprisoned people have used illicit drugs in the 12 months prior to their incarceration¹⁵ (this figure is highest in the ACT where it is 92%¹⁶);
- 46% of people in prison confess to having drunk alcohol to a level that put them at risk in the past 12 months;¹⁷ and

⁸ Dawn Cecil, James McHale, Anne Strozier and Joel Pietsch 'Female Inmates, Family Caregivers, and Young Children's Adjustment: A Research Agenda and Implications for Corrections Programming' (2008) 36 *Journal of Criminal Justice* 513, 514.

⁹ Australian Bureau of Statistics, *Corrective Services, Australia, March 2013* (13 June 2013) 6.

¹⁰ Lorena Bartels, 'Twenty Years On: Indigenous Deaths in Police Custody and Lessons From the Frontline' in Isabelle Bartkowiak-Théron and Nicole Asquith, *Policing Vulnerabilities* (The Federation Press, 2012) 181.

¹¹ Terese Henning, 'Vulnerable suspects and arrest and investigative processes' in Isabelle Bartkowiak-Théron and Nicole Asquith, *Policing Vulnerabilities* (The Federation Press, 2012) 218.

¹² Victoria Herrington and Katrina Clifford, 'Policing Mental Illness: Examining the Police Role in Addressing Mental Ill Health' in Isabelle Bartkowiak-Théron and Nicole Asquith, *Policing Vulnerabilities* (The Federation Press, 2012) 117.

¹³ Tony Butler, Gavin Andrews, Stephen Allnutt, Chika Sakashita, Nadine Smith and John Basson 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 272.

¹⁴ James Huntley 'Acquired Brain Injury and Vulnerability to the Criminal Justice System' in Victoria Herrington and Katrina Clifford 'Policing Mental Illness: Examining the Police Role in Addressing Mental Ill Health' in Isabelle Bartkowiak-Théron and Nicole Asquith, *Policing Vulnerabilities* (The Federation Press, 2012) 173.

¹⁵ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2012* (2013) 74.

¹⁶ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010* (2011), 60. (A State and Territory breakdown is not provided in the 2012 report).

¹⁷ Australian Institute of Health and Welfare, above n 15, 93.

- 35% of the prison population have Hepatitis C. The Indigenous rate is higher, at 43%, compared to the non-Indigenous rate of 33%.¹⁸

The vulnerability of the female prison population is more acute. To get a sense of the number of women in prison in Australia, women comprise 7% (2,201) of imprisoned people in Australia¹⁹ and this number is increasing rapidly. The Australian Bureau of Statistics reported that between 2002 and 2012 the number of women in prison increased by 48% while the number of men increased 29%.²⁰ The rate is higher amongst indigenous women, whose rate of imprisonment has increased by 58.6% in the last decade (compared to 22.4% for non-Indigenous women and 35.2% for Indigenous men).²¹

The ACT presents somewhat of an anomaly in this regard, as the female prison population has not been growing as fast as it is in other Australian jurisdictions. For example in 2010 there were 15 women imprisoned in the ACT, whereas during the March quarter of 2013 there were 13.²²

Women in prison display high rates of victimisation. For example, 87% of women in Victorian prisons have been victims of sexual, physical or emotional abuse.²³ It has been estimated that between 57% and 90% of women in prison have been victims of childhood sexual abuse.²⁴

Women in prison also exhibit high rates of mental illness. For example, a study of females in South Australian prisons, which had an 81% participation rate, found that all respondents had a psychiatric disorder.²⁵ Despite a lack of comprehensive data on this subject, it is generally agreed that Indigenous people in prisons display particularly complex mental health needs.²⁶ The largest study to date found that 6.6% of male indigenous imprisoned people and 20.3% of females screened positive to psychosis. A further 13.1% of males and 43.1% of females had mood disorders and 34.4% of males and 58.6% of females had anxiety disorders (the most common of which was posttraumatic stress disorder). Finally, the study

¹⁸ Jack Wallace et. al., *Regulating Hepatitis C: Rights and Duties. Preventing Hepatitis C Transmission in Australian Adult Correctional Settings* (2009) 9.

¹⁹ Australian Bureau of Statistics, *Prisoners in Australia* (2 April 2013) 8.

²⁰ *Ibid*, 9. It should be noted that this increased in more pronounced in other jurisdictions than others. For example, the Northern Territory rate rose from 61.1 per 100,000 in 2010 to 114 in March 2013. In contrast, the ACT rate actually reduced from 10.5 to 9 during the same period – Australian Bureau of Statistics, above n 9, 15.

²¹ Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 32.

²² Australian Bureau of Statistics, above n 9, 14.

²³ Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Australian Institute of Criminology Research and Public Policy Series No 63, 2004), xiv.

²⁴ Mary Stathopoulos, above n 3, 4.

²⁵ Claire O'Connor 'Victims or Offenders? Mental Health Issues in Women's Prisons' (2007) 81 *Precedent* 26, 27.

²⁶ Robin Jones and Andrew Day 'Mental Health, Criminal Justice and Culture: Some Ways Forward?' (2011) 19 *Australasian Psychiatry* 325.

found that '[n]early 50% of males and over 85% of Indigenous females reported medium or higher levels of psychological distress'.²⁷

The female prison population also includes a large proportion of people who are drug dependent. A study conducted for the Australian Institute of Criminology Drug Use Monitoring Program 'revealed that 71 percent of imprisoned women had used drugs in the month prior to their imprisonment and that the majority of this group were identified as "drug dependent"'.²⁸

Prison worsens people's mental health

The World Health Organisation has recognised that the nature of imprisonment is likely to worsen people's mental health if they have problems upon entry, or cause mental health problems in some people that are healthy upon entry. This is due to factors such as the disciplinary regime, lack of choice about activities and people they spend time with, and limited communication with family and friends. The result is high levels of violence, aggression, self-harm and suicide.²⁹

These factors are compounded for women, who have high rates of mental illness and victimisation, as discussed above. The rates of self-harm are particularly high amongst women in prison, with 28% of females entering prison reporting a history of self-harm, compared to 15% of males.³⁰

Prison as a last resort

All of this evidence points to the principle that prison should be used as a penalty of last resort, as it is causing a disproportionate harm compared to the danger posed by the offences committed by women. This includes harm to their dependent children. It is a requirement of ACT law that imprisonment be used as a penalty of last resort. Subsection 10(2) of the *Crimes (Sentencing) Act 2005* states that '[t]he court may, by order, sentence the offender to imprisonment, for all or part of the term of the sentence, if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate'.

²⁷ The study was conducted by Butler et. al. in 2001 and confirmed by Heffernan et. al. to be the largest study in 2009, although Heffernan et. al. argued there were some methodological problems with the study – see Edward Heffernan, Kimina Andersen and Stuart Kinner, 'The Insidious Problem Inside: Mental Health Problems of Aboriginal and Torres Strait Islander People in Custody' (2009) 17(17) *Australasian Psychiatry* S41, S42-3. A study of Aboriginal and Torres Strait Islanders in Queensland prisons referred to by the Senate Committee 'found that 72.8 per cent of men and 86.1 per cent of women has at least one mental health disorder', Senate Legal and Constitutional Affairs References Committee, above n 21, 35.

²⁸ Parliament of Victoria, above n 6, 24.

²⁹ World Health Organization, *Health in Prisons. A WHO Guide to the Essentials in Prison Health* (2007) 134.

³⁰ Australian Institute of Health and Welfare, above n 15, 47.

Justice reinvestment

Another option for the ACT is to consider the merits of justice reinvestment, which were recently examined by the Senate Legal and Constitutional Affairs References Committee.³¹ Justice reinvestment recognises that imprisonment is expensive, and that resources currently allocated to imprisonment could be more wisely invested in the communities from which the majority of imprisoned people come so that they are less likely to commit crime in the first place. This investment may include funding for drug and alcohol treatment programs, educational and employment programs and support for single mothers. Justice reinvestment has been argued to be:

[p]reventative financing, through which policymakers shift funds away from dealing with problems ‘downstream’ (policing, prisons) and towards tackling them ‘upstream’ (family breakdown, poverty, mental illness, drug and alcohol dependency).³²

There are a number of reasons why justice reinvestment would work well in the ACT. Firstly, the AMC is the most expensive prison in the country. The most recent Productivity Commission report found that it costs on average \$226.10 per day to imprison a person in Australia, whereas the cost is in the ACT is \$313.30.³³ Therefore the ACT has the most money to save by not imprisoning people. Secondly, the ACT is a small jurisdiction so it is less complicated to work out where the resources need to be allocated within the community (in other jurisdictions this would need to be worked out by what is known as ‘justice mapping’³⁴). Thirdly, the ACT has better coordinated service provision because it is a small jurisdiction and this makes justice reinvestment easier to implement.

Justice reinvestment is arguably of most benefit in addressing women’s imprisonment because it can prevent the disproportionate disruption to the lives of women and their children currently caused by short sentences, and redirect the resources currently spent on such sentences towards support programs that would most benefit this subset of the prison population eg. treatment for mental illness, domestic violence shelters and drug and alcohol treatment programs.

³¹ Senate Legal and Constitutional Affairs References Committee, above n 21. The inquiry received 131 submissions.

³² Lanning et al cited by David Brown, Melanie Schwartz and Laura Boseley ‘The Promise of Justice Reinvestment’ (2012) 37(2) *Alternative Law Journal* 96, 97.

³³ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2013. Volume 1: Child Care, Education and Training; Justice; Emergency Management* (2013) c41 (Table C9).

³⁴ Brown et al, above n 32, 97.

Conclusion

The points raised here about keeping prison as a last resort and justice reinvestment clearly relate to the criminal justice system as a whole, as opposed to the treatment of women in the AMC. However, to holistically address the human rights of women in the AMC it is necessary to recognise that:

- the vulnerability exhibited by women in prison is compounded by imprisonment itself;
- there is a disproportionate impact on women and their children by sentencing them to imprisonment; and
- the resources currently spent on imprisoning people would be better spent on community services (justice reinvestment).

2) Women in the AMC maintain all of their rights other than the right to liberty

It has to be recognised that in the foreseeable future, it is likely that women will continue to be detained in the AMC so the human rights of women in the AMC need to be considered. For these women the overarching human rights principle is that they have not lost any of their rights other than their right to liberty. This principle stems from Article 5 of the United Nations Basic Principles for the Treatment of Prisoners (1990), which states that:

[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

The UN Basic Principles do not have the status of a treaty, however this principle is reflected in paragraph 9(d) of the ACT *Corrections Management Act 2006* ('CMA'), which states that '[f]unctions under this Act in relation to a detainee must be exercised...to ensure the detainee is not subject to further punishment (in addition to deprivation of liberty) only because of the conditions of detention' which means this principle is part of ACT law.

The ACT *Human Rights Act 2004* ('HRA') and the CMA contain a number of rights that, if complied with on a daily basis, will ensure the treatment of women is as good as can be expected in a prison environment. This is because the ACT has the most comprehensive legislative framework for the protection of imprisoned people in Australia.³⁵

³⁵ Victoria is the only other jurisdiction with human rights legislation (the *Charter of Human Rights and Responsibilities Act 2006*), and whilst there are some rights contained in section 47 of the *Corrections Act 1986* (Vic), these are not as extensive as the provisions in the CMA.

It must be recognised that all the rights contained in the HRA may be limited in the circumstances outlined in section 28 of the HRA.³⁶ In a prison context managers often perceive that rights need to be curtailed for the purposes of maintaining security and good order. As Owers points out, the danger is that ‘security can come to have the quality of the parental ‘because I say so’; the trump card, the excuse rather than the reason’.³⁷ Correctional managers have to be vigilant in seeking to maintain a balance between security and protecting the human rights of imprisoned people.

The relevant legislative provisions include, but not limited to those in the following table. Their particular relevance for the treatment of women in the AMC is also outlined.

Legislative provision	Relevance for women in the AMC
The protection from torture and cruel, inhuman or degrading treatment contained in section 10 of the HRA, and the right to be treated with ‘humanity and with respect for the inherent dignity of the human person’ contained in section 19 of the HRA and paragraph 7(c) of the CMA.	This should prevent the use of strip searching in all but exceptional cases, as strip searching is traumatising for all women, particularly the high percentage of women in prison who have previously been victims of sexual abuse/assault. ³⁸ The provision of appropriate medical treatment has also been considered under the equivalent of section 10 in the Victorian <i>Charter of Human Rights and Responsibilities Act 2006</i> . ³⁹
The right to privacy contained in section 12 of the HRA and the right to ‘suitable accommodation and bedding for sleeping in reasonable privacy and comfort’ as provided for in the CMA. ⁴⁰	This is especially important given the need for prison to be a safe environment for all women, especially those who have a history of victimisation.

³⁶ Section 28 provides that ‘(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve’.

³⁷ Anne Owers, ‘Prison Inspection and the Protection of Human Rights’ (2004) 2 *European Human Rights Law Review* 107, 109.

³⁸ Strip searches have been found to violate Article 3 of the European Convention of Human Rights (which provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’) – see for example, *Van der Ven v The Netherlands* (2004) 38 Eur Court HR 46. See also Amanda George ‘Strip Searches. Sexual Assault by the State’ (1993) 18(1) *Alternative Law Journal* 31.

³⁹ Section 22.

⁴⁰ Paragraph 12(1)(d) of the CMA to be read in conjunction with section 43. Note that section 12 of the CMA provides for ‘minimum living conditions’ that are to be met ‘as far as practicable’ to protect the human rights of people detained in the AMC, so they are not rights in the same way as the rights provided in the HRA are.

Legislative provision	Relevance for women in the AMC
The right to equality and not to be discriminated against contained in section 8 of the HRA.	Policies that have an adverse impact on women may constitute discrimination. This will be discussed further below in relation to rehabilitation.
The right to access to medical treatment and health care as provided for in the CMA. ⁴¹	This is essential given the high percentage of women in prison with health problems, particularly mental health problems. The Victorian case of <i>Castles v Secretary to the Department of Justice & Ors</i> ⁴² is relevant here as it shows how similar legislative provisions have been interpreted. That case involved an application by woman who wished to undertake in vitro fertilisation ('IVF') treatment while in prison. She had been on IVF treatment before her imprisonment, and argued that she would be unable to re-commence treatment on release given her age. The Victorian Supreme Court upheld her application under paragraph 47(1)(f) of the <i>Corrections Act 1986</i> (Vic) which provides that all people in prison have a right to 'have access to reasonable medical care and treatment', read in the light of section 22 of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) (the right to humane treatment when deprived of liberty ⁴³).
The protection of the family provided for by section 11 of the HRA and the right to communicate with, and receive visits from, family members and friends as provided for in the CMA. ⁴⁴	This provision is particularly important for the large proportion of women who are primary caregivers to children and given that research has found that the availability of visits impacts on the quality of women's ongoing relationships with their children following their release. ⁴⁵
The right to communicate with lawyers and complaints handling bodies, such as, human rights commissions, Official Visitors and Ombudsmen as provided for in the CMA. ⁴⁶	This is important to facilitate the independent external monitoring function discussed below.

⁴¹ Paragraph 12(1)(j) of the CMA to be read in conjunction with section 53.

⁴² *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 (9 July 2010).

⁴³ This is the Victorian equivalent of section 19 of the HRA.

⁴⁴ Paragraphs 12(1)(f) and (g) of the CMA to be read in conjunction with sections 47 – 49.

⁴⁵ See for example, Mary Martin 'Connected Mothers. A Follow-Up Study of Incarcerated Women and Their Children' (1997) 8(4) *Women and Criminal Justice* 1, 20.

⁴⁶ Paragraphs 12(1)(g) and (h) of the CMA to be read in conjunction with sections 50 and 51.

Conclusion

The legislative protections for the human rights of women in the AMC are extensive. It is, of course, a separate question as to whether these provisions are being complied with during daily operations at the AMC and the extent to which maintenance of security is used as a justification for limiting rights. However, if they were to be complied with, the treatment of women in the AMC should be human rights compliant, which accords with the goal of establishing the AMC as the first 'human rights compliant' prison in Australia.⁴⁷

3) Rehabilitation and purposeful activity

Rehabilitation

According to international human rights law, the goal of imprisonment is rehabilitation. Article 10(3) of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. Whilst this provision has not been incorporated into either the HRA⁴⁸ or the CMA, the CMA does place a strong emphasis on rehabilitation.⁴⁹ A national review of prison-based rehabilitation programs found the ACT to be the only jurisdiction in Australia with legislation containing 'affirmations of rehabilitative purposes'.⁵⁰

The relevant provisions of the CMA include:

- paragraph 7(d) which sets out the objects of the CMA, which are stated to include both 'promoting the rehabilitation of offenders and their reintegration into society';
- section 9, which is about the treatment of detainees generally, and provides that '[f]unctions under this Act in relation to a detainee must be exercised as follows [.....] (f) if the detainee is an offender—to promote, as far as practicable, the detainee's rehabilitation and reintegration into society'; and

⁴⁷ Katy Gallagher, Chief Minister, Australian Capital Territory, 'New Alexander Maconochie Centre officially opened' (Media Release, 11 September 2008).

⁴⁸ The Explanatory Statement for the Human Rights Bill 2003 provides only the following statement justifying the omission of certain Articles of the ICCPR: 'In some instances a right has been omitted because it is not appropriate to the ACT as a territory under the authority of the Commonwealth' (page 3). However, given the ACT government has responsibility for corrections in the territory under section 37 and schedule 4 to the *Australian Capital Territory (Self-Government) Act 1988* (Cth), this does not provide an adequate explanation as to why Article 10(3) has been omitted from the HRA.

⁴⁹ For background see the discussion of the history that led to this position in 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.

⁵⁰ Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Australian Institute of Criminology Reports Research and Public Policy Series 112, 2011) 4.

- section 52 which provide that rehabilitation and reintegration into society is a relevant consideration when considering the type of education or vocational training to be included in a detainee's case management plan.

Subsection 27A(2) of the HRA also provides that '[e]veryone has the right to have access to further education and vocational and continuing training' which bolsters the requirements for rehabilitation in the CMA.

Purposeful activity

The AMC also adheres to the 'healthy prison policy'⁵¹ which was developed by Her Majesty's Inspectorate of Prisons in the United Kingdom (UK) as an assessment tool when carrying out prison inspections.⁵² The policy revolves around four tests, which relate to both conditions and treatment of people in prison. The tests are:

1. Safety: imprisoned people, even the most vulnerable, are held safely;
2. Respect: imprisoned people are treated with respect for their human dignity;
3. Purposeful activity: imprisoned people are able, and expected, to engage in activity that is likely to benefit them; and
4. Resettlement: imprisoned people are prepared for release into the community, and helped to reduce the likelihood of reoffending.⁵³

Significant for this discussion is the third point, which requires that people in prison are entitled to engage in purposeful activity.

Case law

The right to work while in the AMC was considered by the ACT Supreme Court in the case of *David Harold Eastman v Chief Executive Officer of the Department of Justice and Community Safety*.⁵⁴ Mr Eastman claimed that he should be provided with 'full-time meaningful employment' while detained in the AMC.⁵⁵ Mr Eastman had been engaged in cleaning work while in the AMC, but submitted that he wanted the opportunity to tutor other imprisoned people.⁵⁶ Following a review of the international case law, Justice Refshauge concluded that people in prison do not have

⁵¹ John Hargreaves, "'Beyond Rehab': Where Does the Prison Fit?" (2009) 21(1) *Current Issues in Criminal Justice* 148, 150.

⁵² Her Majesty's Inspectorate of Prisons, *Expectations. Criteria for assessing the treatment of prisoners and conditions in prisons*, Version 4, 2012. Available online at: <<http://www.justice.gov.uk/downloads/about/hmipris/adult-expectations-2012.pdf>>

⁵³ *Ibid.*

⁵⁴ *David Harold Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4 (12 January 2010).

⁵⁵ *Ibid.*, [1]-[2].

⁵⁶ *Ibid.*, [50] and [54].

a right to work in the ACT, although he noted that an opportunity to work may be required under section 19 of the HRA;⁵⁷ further, Justice Refshauge found that there is certainly no right for a prisoner to choose what work they do undertake if there is the opportunity to work.⁵⁸

Whilst this case did not definitively decide the issue because it was an interlocutory decision, it does suggest that having an opportunity to work may be required under the HRA. The opportunity for women to gain work experience while in the AMC is an important step in their rehabilitation and increasing the chances of them gaining employment following their release.

Non-discrimination

Section 8 of the HRA provides that:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

This is supported by the provisions in the *Discrimination Act 1991* (ACT) which prohibit sex discrimination on the ground of sex⁵⁹ in certain domains, including access to 'goods, services and facilities'.⁶⁰

It is not entirely clear how anti-discrimination legislation alone operates to preclude discrimination against women in the AMC. There have been some cases in other jurisdictions concerning discrimination in the provision of services by prison administrators. Two Victorian cases have held that prison services may fall within this concept, being the provision of visit facilities,⁶¹ and the standard of food and accommodation within a prison.⁶² In Queensland the Anti-Discrimination Tribunal found there had been indirect discrimination on the basis of religious belief or activity where fresh Halal meat was not provided to a Muslim prisoner upon his request.⁶³ On the other hand, transport between prisons and

⁵⁷ This was an interlocutory matter, so a final decision was not made on this point – Ibid, [99]. Note that there is no right to work provided for by the ICCPR. Article 8 precludes forced labour, but provides an exception for forced hard labour that is part of a sentence of imprisonment.

⁵⁸ Ibid, [85] – [91].

⁵⁹ Paragraph 7(1)(a).

⁶⁰ Section 20.

⁶¹ *Henderson v Victoria* (1984) EOC ¶192-027.

⁶² *Clarkson v Governor of the Metropolitan Reception Prison & Anor* (1986) EOC ¶192-153.

⁶³ *Mahommed v State of Queensland* [2006] QADT 21 (4 May 2006). The Queensland government's appeal of the decision was dismissed by the Supreme Court – see *State of Queensland v Mahommed* [2007] QSC 18 (19 February 2007).

prison cell accommodations were held in 2007, in an application brought under the Commonwealth *Disability Discrimination Act 1992*, not to be 'services' to people in prison, but basic and inherent aspects of incarceration.⁶⁴

However, it is arguable that the Discrimination Act provisions are bolstered by the HRA and therefore give the women in the AMC the right to take action if the provision of work, education and vocational training is not provided on an equal basis to that provided to men in the AMC.

Lack of resources does not justify rights infringement

Most jurisdictions find it difficult to provide programs to women in prison on an equal basis as men in prison because it is harder to offer the same range of programs to the small number of women. However, the European Court of Human Rights has held that 'a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for Article 3 to apply'.⁶⁵ Whilst this decision is not binding in Australia, it is illustrative of the approach courts may take to arguments governments may attempt to make about lack of resources justifying avoidance of human rights compliance.

Conclusion

Women in the AMC are entitled to engage in work, education and vocational training activities that foster their rehabilitation and constitute purposeful activity. A lack of resources is not a valid argument for failure to provide such opportunities. If such activities are provided to men in the AMC and not women, not only is this arguably a breach of the CMA, it is also discriminatory and may breach sections 8 and 27A(2) of the HRA as well as the provisions of the *Discrimination Act 1991*.

4) Independent external monitoring

The research conducted as part of the *Applying Human Rights in Closed Environments: A Strategic Framework for Compliance* project has led the authors to conclude that independent external monitoring is essential for protecting the human rights of people in closed environments.⁶⁶ Independent monitoring is necessary as a preventative mechanism to avoid the human rights of women in the AMC being impinged upon, and as a means of investigation when there has been human rights violations.

⁶⁴ *Rainsford v Victoria* (2007) EOC ¶193-468. On appeal the Full Court did not reconsider this interpretation but noted that there was 'some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility': *Rainsford v State of Victoria* [2008] FCAFC 31, [9].

⁶⁵ *Dybeku v Albania* (2007) [2007] Eur Court HR 41153/06, [50]. The quote refers to Article 3 of the European Convention on Human Rights which provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

⁶⁶ For commentary on the Canadian context see Debra Parkes and Kim Pate 'Time for Accountability: Effective Oversight of Women's Prisons' (2006) 48(2) *Canadian Journal of Criminology and Criminal Justice* 251.

The ACT has a number of such organisations with jurisdiction over women in the AMC, including:

- the Human Rights Commission;
- the Ombudsman;
- Two Official Visitors (at least one of whom is required to be Indigenous⁶⁷); and
- the Public Advocate of the ACT who represents people with a disability.

There are a number of criteria which external monitoring bodies should meet. These have been outlined by Catherine Branson, then President of the Australian Human Rights Commission, to be '[m]onitoring bodies should be independent. They should make regular visits and should be supported by adequate resources and have adequate functions and powers'.⁶⁸

There is a question as to whether all the ACT organisations meet these criteria. For example, it has been reported that ACT Human Rights Commission has not been provided with the resources to carry out an inspection of the AMC since it opened in 2009.⁶⁹

On a more positive note, it is understood that there are monthly Oversight Committee meetings between oversight agencies (including the Commission and the Ombudsman) and the Executive Director of ACT Corrective Services and the Superintendent of the AMC which allows matters to be discussed on a regular basis.⁷⁰

The research on the *Applying Human Rights in Closed Environments: A Strategic Framework for Compliance* project has examined independent external monitoring in Victoria and Western Australia and found the Western Australian model for prisons oversight to be preferable.

Western Australia has the Office for the Inspector of Custodial Services ('OICS'),⁷¹ which has legislative powers to inspect and report publicly on prison conditions. Inspections are conducted of each prison every three years,⁷² and such inspections may be announced or

⁶⁷ Paragraph 10(1)(b) of the *Official Visitor Act 2012* (ACT).

⁶⁸ Dr Ruth Vine in Dr Bronwyn Naylor, Dr Julie Debeljak, Dr Inez Dussuyer and Dr Stuart Thomas (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 38.

⁶⁹ ACT Human Rights Commission, *Annual Report 2011/12* (2012) 13. In contrast, the Victorian Ombudsman has conducted a number of inquiries into Victorian prisons – see for example Victorian Ombudsman, *The Death of Mr Carl Williams at HM Barwon Prison – Investigation into Corrections Victoria* (2012); Victorian Ombudsman, *Investigation into Prisoner Access to Health Care* (2011); Victorian Ombudsman and Victorian Office of Police Integrity, *Conditions for Persons in Custody* (2006).

⁷⁰ ACT Human Rights Commission, above n 69, 11; ACT Ombudsman, *Annual Report 2010-11* (2011) 35.

⁷¹ Established by the *Inspector of Custodial Services Act 2003* (WA). Modelled on Her Majesty's Inspectorate of Prisons in the United Kingdom. For a discussion of the UK approach see Anne Owers 'Independent Inspection of Prisons' in David Jones (ed), *Humane Prisons* (Radcliffe Publishing Ltd, 2006).

⁷² Section 19 of the *Inspector of Custodial Services Act 2003* (WA).

unannounced. Similar inspectorates are in the process of being established in New South Wales and Tasmania.⁷³

This is a useful model, especially when compared to the Victorian Office of Correctional Services Review, which is located within the Department of Justice and has consequently been criticised for the inevitable lack of independence, and because it does not report publicly on its inspections.⁷⁴

However, it is recognised that as a small jurisdiction, the ACT may not have the resources to establish a separate prisons inspectorate similar to the Western Australian OICS. The need for such an organisation can be minimised by properly resourcing existing organisations to carry out independent monitoring according to the criteria identified by Branson.

Conclusion

This submission provides a broad context for the ACT Human Rights Commission's consideration of the treatment of women in the AMC. It has been argued that due to the vulnerability of women in prison in Australia and the disproportionate impact of short sentences on them and their dependent children, that imprisonment should be used as a last resort. Some of the resources currently spent on imprisonment may then be allocated to community services (known as justice reinvestment).

For the few remaining women who are in the AMC, their treatment should accord with the principle that they have not lost any of their rights other than their right to liberty, as well as the more specific human rights protections set out in the HRA and CMA. This legislation provides very comprehensive protections if it is complied with in practice.

Women in the AMC should also be given the opportunity to engage in purposeful activity as this is necessary to meet the legislative requirements for rehabilitation. Education, vocational training and work must be provided to women in the AMC on an equal basis as men in accordance with the provisions of the HRA and the *Discrimination Act 1991*.

Finally, independent external monitoring mechanisms are required that are appropriately resourced, independent and visit regularly. This should ideally operate as a mechanism to prevent human rights violations from occurring or, alternatively, provide an avenue for redress where such violations have occurred.

⁷³ Inspector of Custodial Services Bill 2012 (NSW) (assented to 21/8/2012). There has been no legislation passed in Tasmania, but reports indicate that the government intends to introduce such a body. See for example Matt Smith, 'Call for Prison Watchdog', *The Mercury*, 4 April 2013.

⁷⁴ The work of the Office of Correctional Services Review (OCSR) is reported in summary in the Victorian Department of Justice, *Annual Report 2011-12 (2012)* 211-14 (Appendix K). The Victorian Ombudsman criticised the OCSR in his 2012 Report on the death of Carl Williams in Barwon Prison for its 'lack of separation from those who undertake correctional roles the OCSR is monitoring and reviewing; [and] limited transparency and accountability': Victorian Ombudsman, *The Death of Mr Carl Williams at HM Barwon Prison – Investigation into Corrections Victoria* (2012) 146.