

## INTERNATIONAL LAW AND AUSTRALIAN PRISONERS

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### I INTRODUCTION

The treatment of prisoners and the management of prisons in Australia is largely governed by the correctional legislation of the particular State or Territory in which a prisoner is detained.<sup>1</sup> While correctional legislation has been the subject of many judicial decisions, most arising from applications by prisoners for judicial review of administrative decisions of prison officials, particularly prison disciplinary adjudicators,<sup>2</sup> the international instruments concerning prisons and prisoners have received considerably less attention.<sup>3</sup> The purpose of this article is to examine the international instruments relevant to the treatment of prisoners, the legal effect of those instruments, and the extent to which international law may influence the treatment of prisoners and the management of prisons in Australia.

The article commences with an overview of the common law principles governing the rights of prisoners and the provisions within correctional legislation which expressly grant rights to prisoners (Parts II and III). The following sections then explain the various international instruments that deal specifically with the treatment of prisoners and the management of prisons (Part IV), and the relevant Australian guidelines, based on those instruments (Part V). The article then examines the role of the Human Rights and Equal Opportunity

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1 Other legislation important to the treatment of prisoners and the management of prisons includes the statutes creating the office of Ombudsman and Freedom of Information legislation. All Australian jurisdictions have Ombudsmen, who are granted jurisdiction to investigate complaints from persons, including prisoners, who are dissatisfied about the administrative acts and practices of public officials and agencies. Freedom of Information legislation, which exists in all Australian jurisdictions except the Northern Territory, has also proved useful for prisoners. The general right of access to information, though subject to many exemptions, often enables prisoners to gain access to much of the information related to decisions that affect them, which would otherwise be inaccessible.

2 See Matthew Groves, 'Proceedings for Prison Disciplinary Offences' (1998) 24 *Monash University Law Review* 338.

3 I use the term 'international instruments' rather than 'international law' because many model guidelines and international documents concerning prisoners do not have the force of law (see below Part IV).

Commission in monitoring the treatment of prisoners (Part VI), and the potential implications that Australia's accession to the *Optional Protocol to the International Covenant on Civil and Political Rights*<sup>4</sup> may have for prisoners (Part VII). The article concludes with a discussion of the possible influence of international instruments on the development of the common law of Australia and the interpretation of correctional legislation (Part VIII).

## II THE COMMON LAW AND PRISONERS

Before considering the international instruments relevant to the treatment of prisoners, it is useful to rehearse briefly some aspects of the common law, in order to understand the fragmented and unsatisfactory common law position of prisoners. The law of the United Kingdom ('UK'), from which the common law of Australia originates, contains little consideration of the status of prisoners. The absence of a coherent body of common law doctrine on the status and treatment of prisoners reflects the relatively rare use of imprisonment as a punishment for criminal offences.<sup>5</sup> Extended terms of imprisonment did not become a prominent form of punishment until the middle of the 18<sup>th</sup> century.<sup>6</sup> More common penalties included banishment, transportation, and corporal or capital punishment. These punishments had only two consequences: the imposition of a sudden and decisive physical reproach, or the permanent removal of an offender from society.

For those who were sentenced to imprisonment, the additional punishment of 'civil death' operated to strip a convicted felon of all of his or her civil rights.<sup>7</sup> While the importance of the doctrine of civil death began to decline steadily from the start of the 19<sup>th</sup> century,<sup>8</sup> prisoners remained unable to seek judicial

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4 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

5 There were, however, many local prisons used to hold debtors and petty criminals. On this aspect of penal history see generally Sean McConville, *A History of Prison Administration – Volume 1: 1750-1877* (1981) and *English Local Prisons 1860-900: Next Only to Death* (1995).

6 The widespread use of imprisonment marked a fundamental change in social order and punishment, see: Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1780-1850* (1978); Michel Foucault, *Discipline and Punish – The Birth of the Prison* (1979). For an excellent interdisciplinary history of prisons in Western society see Norval Morris and David Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (1998).

7 This feudal doctrine was subject to many complexities. For a detailed historical analysis see Jacob Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Wrongful Death and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly* 169. The High Court has held that the doctrine remains part of the law of Australia until expressly abolished: *Dugan v Mirror Newspapers* (1978) 142 CLR 583. Various aspects have, however, been removed by statute; see, eg, *Felons (Civil Proceedings) Act 1981* (NSW) and *Prisoners (Removal of Civil Disabilities) Act 1991* (Tas). Both Acts enable prisoners to commence legal proceedings in various circumstances, subject to specific requirements. On the NSW legislation, see George Zdenkowski, 'NSW Prisoners and Access to Courts: Disappointing Legislation' (1981) 6 *Legal Services Bulletin* 148.

8 While the doctrine of civil death may no longer prevail, prisoners still suffer many civil disabilities. For example, many prisoners are disenfranchised, and those eligible to vote face practical difficulties in exercising this right. See Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 *Federal Law Review* 55.

remedies against the decisions of prison officials and were effectively, therefore, devoid of practical rights concerning their treatment.<sup>9</sup> Importantly, prisoners could not expect to receive beneficial interpretations of correctional legislation. The principal obstacle for prisoners was the judicial rule that correctional statutes, regulations and administrative rules promulgated by prison officials, were neither intended to confer nor capable of conferring enforceable rights upon prisoners.<sup>10</sup> Thus, if prison officials failed to observe the requirements of statutory or other provisions for the control and treatment of prisoners, prisoners could not seek relief by way of judicial review.<sup>11</sup> The main rationale for this position was the fear that judicial intervention of any kind into prison administration would cause chaos by unduly interfering with the functions of prison managers. Sir Owen Dixon explained the principle that correctional legislation did not confer legally enforceable rights on prisoners in the following terms:

[I]f statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to courts by prisoners for legal remedies addressed either to the Crown or to the gaolers in whose custody they remain. Such a construction ... was plainly never intended by the legislature and should be avoided.<sup>12</sup>

In the period when this was the orthodox judicial approach to prison legislation, Sir William Wade concluded that all correctional legislation was directory only.<sup>13</sup> Any breach of correctional legislation by prison officials could not, therefore, provide a basis upon which prisoners could seek the grant of a judicial remedy or maintain an action for breach of statutory duty.<sup>14</sup>

However, the decision by the House of Lords in *Raymond v Honey*<sup>15</sup> appeared to signal an important change in judicial attitudes towards the status of prisoners and the interpretation of correctional legislation. In that case, the House of Lords upheld the conviction of a prison governor for contempt of court after the governor interfered with a prisoner's correspondence. The prisoner had previously sent a letter to his solicitors alleging theft against a deputy governor

9 Ironically, it has long been clear that courts have jurisdiction over prisons, and particularly over the behaviour of gaolers. In the 18<sup>th</sup> century, Lord Mansfield stated that he 'had no doubt of the power of the court over all prisons in the kingdom': *Re Rioters* [1774] Loft 436. That jurisdiction was simply never exercised.

10 The leading case on this point was *Arbon v Anderson* [1943] KB 252. Other frequently cited cases include: *Morris v Winter* [1930] 1 KB 243; *Flynn v R* (1949) 79 CLR 1; *Bromley v Dawes* (1983) 10 A Crim R 98, 113 (White J); *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317, 328-9 (Hutley JA).

11 Nor did prisoners have any remedy in private law. For example, provisions on the conferral of remissions were not regarded as mandatory. A prisoner had no right to remissions and, therefore, no right of action in false imprisonment if remissions were withheld and the prisoner detained beyond the earliest eligible release date: *Morris v Winter* [1930] 1 KB 243; 'Case and Comment: *Silverman v Prison Commissioners*' [1956] *Criminal Law Review* 56; 'Case and Comment: *D'Arcy v Prison Commissioners*' [1956] *Criminal Law Review* 56.

12 *Flynn v R* (1949) 79 CLR 1, 8.

13 H R W Wade, *Administrative Law* (5<sup>th</sup> ed, 1982) 219.

14 A principle strongly affirmed in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

15 [1983] 1 AC 1.

of the prison in which he was held. The governor invoked a statutory rule concerning prisoners' mail, and stopped the letter. In a subsequent letter, the prisoner made an application to the High Court which sought to cite the governor for contempt for stopping the first letter. The governor also halted this second letter.

The House of Lords affirmed the governor's conviction for contempt, holding that although the decision to stop the first letter was a lawful exercise of the governor's power to regulate prisoners' correspondence, the second letter, being a plea for judicial intervention, ought to be viewed differently. The Law Lords held that the specific rules governing prisoners' correspondence did not clearly empower the governor to halt a letter of this type.<sup>16</sup>

Furthermore, they did not accept that the general statutory power to imprison a person necessarily contained an implied power to curtail that person's right of access to the courts because, as a general rule, a prisoner 'retains all civil rights which are not taken away expressly or by necessary implication'.<sup>17</sup> The Law Lords held that the right of unimpeded access to the courts was such a right, and one so precious that it could be abrogated or limited only by very clear statutory authority. Importantly, the House of Lords rejected a submission that the regulation making power granted to the Home Secretary for the 'discipline and control' of prisoners provided a sufficient basis upon which a prisoner's right of access to the courts could be curtailed by way of subordinate legislation.

While the decision in *Raymond v Honey* indicates that legislation which seeks to remove or narrow the rights of prisoners will be interpreted strictly, the decision has had little practical effect.<sup>18</sup> More recent judicial decisions concerning the treatment of prisoners indicate that courts continue to pay great deference to prison officials.<sup>19</sup> For example, courts have concluded that policy

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16 On this issue, the House of Lords accepted that a more clearly worded regulation would have entitled the Governor to halt the letter. But subsequent European decisions have emphatically rejected the notion that prison rules could limit a prisoner's right of correspondence in such a way, even if the relevant rules simply require that a prisoner exhaust all potential administrative remedies before he or she commences legal action: *Silver v UK* (1983) 5 EHRR 347, 371-84; *McCallum v UK* (1991) 13 EHRR 597, 609-10. This principle has since been accepted by English courts in the interpretation of English prison regulations: *R v Secretary of State for the Home Department; Ex parte Leech* [1993] 4 All ER 539.

17 *Raymond v Honey* [1983] 1 AC 1, 10. This passage paraphrases, without citation, *Coffin v Reichard* 143 F2d 443, 445 (1944), in which it was stated that 'a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law'.

18 Although the decision has been cited with approval in several Australian cases, see, eg, *McEvoy v Lobban* (1988) 35 A Crim R 68, 71 (Carter J); *Kuczynski v R* (1994) 72 A Crim R 568, 583 (Wallwork J).

19 See, eg, the decision in *Binse v Williams* [1998] 1 VR 381. In that case (the facts of which are explained below in Part VIII), the Court of Appeal of Victoria held that an application for review of a decision of a prison governor (on the ground of unreasonableness) should be determined by reference to the views of 'the reasonable prison governor' rather than the reasonable person. This formulation of the test of unreasonableness is most unfavourable to prisoners. Justice Charles also suggested that decisions of prison governors 'must be treated as authorised if they are reasonably capable of being regarded as appropriate': 394. This favourable presumption renders the availability of review otiose. Other cases in which courts have shown a reluctance to query the decisions of prison officials include: *McEvoy v Lobban* [1990] 2 Qd R 235; *Gray v Hamburger* [1993] 1 Qd R 595; *Fricker v Dawes* (1992) 57 SASR 494.

decisions of the chief administrative officer of a correctional system, formed with the approval of the appropriate Minister, are not reviewable on the ground of unreasonableness.<sup>20</sup> These restrictive judicial attitudes render some areas of prison management, such as the placement of prisoners in administrative segregation (often known as 'protection'), subject to little effective scrutiny by the courts.<sup>21</sup>

### III STATUTORY CHARTERS OF PRISONERS' RIGHTS IN AUSTRALIA

In 1986, the Victorian Government included a charter of prisoners' rights in the *Corrections Act 1986* (Vic). The charter expressly grants prisoners a number of rights covering many aspects of their treatment, which are specified as being 'additional to ... any other rights which a prisoner has under an Act ... or at common law'.<sup>22</sup> The Victorian charter was the first statutory recognition of prisoners' rights within correctional legislation in Australia and, not surprisingly, has attracted much attention. The Royal Commission into Aboriginal Deaths in Custody, for example, recommended that all Ministers responsible for corrections should consider the introduction of legislation drawing upon the rights contained in the Victorian charter. Although several governments expressed support for this recommendation,<sup>23</sup> Tasmania is the only other Australian jurisdiction to have since introduced a statutory charter of prisoners' rights.<sup>24</sup>

Many of the provisions in the statutory charters of prisoners' rights in Victoria and Tasmania are identical or very similar. Both charters grant prisoners the

20 *Prisoners A to XX (inclusive) v NSW* (1994) 75 A Crim R 205; aff'd (1995) 38 NSWLR 622.

21 See, eg, Mathew Groves 'Administrative Segregation of Prisoners: Powers, Principles of Review and Remedies' (1996) 20 *Melbourne University Law Review* 639, where it is argued that prisoners have no real prospect of gaining relief against decisions by prison officials to place or retain a prisoner in administrative segregation due to the combined effect of the broad and unstructured powers granted to prison officials and the refusal of courts to apply principles of judicial review with any rigour.

22 *Corrections Act 1986* (Vic) s 47(2).

23 Commonwealth, *Aboriginal Deaths in Custody: Response by Government to the Royal Commission* (1992) vol 2, 1259-61. The Northern Territory stated that 'cognisance' would be given to the recommendation when prison legislation was amended or drafted. Queensland and South Australia noted that, if the recommendation was intended to provide the basis for the introduction of uniform legislative standards for the treatment of prisoners, it was unlikely that agreement could be reached between the various Australian jurisdictions. Western Australia did not accept that uniform standards should be adopted by legislation. The Commonwealth and the ACT gave unqualified support to the recommendation. However, at the time the Commission reported, s 20 of the *Remand Centres Act 1976* (ACT) granted a small number of 'entitlements' to remand prisoners. The section expressly provides that the entitlements do not extend to convicted prisoners. That exclusion has not been removed in the several years since the Commission reported.

24 See *Corrections Act 1997* (Tas) s 29. The Tasmanian charter is modelled very closely on the Victorian example, but contains no provision which expressly states that the rights granted to prisoners are in addition to any other rights enjoyed by prisoners. It could be argued, however, that if the Tasmanian charter was intended to somehow limit or remove other rights that prisoners may enjoy, such a result would require an express legislative statement to that effect.

right to be in open air for at least an hour each day, weather permitting, if the prisoner does not engage in outdoor work; the right to be provided with food that is adequate to maintain the prisoner's health and well-being; the right to be provided with clothing that is suitable for the climate and for any work which the prisoner is required to do; the right to have access to reasonable dental treatment necessary for the preservation of dental health; and the right to receive at least one visit, of at least half an hour in duration, per week.<sup>25</sup>

Unlike the various guidelines and model rules on the treatment and rights of prisoners (see below Part IV), these statutory charters clearly form part of the law of Victoria and Tasmania. Yet they retain many of the problems that attend guidelines and model rules. Most of the rights granted to prisoners are framed in very vague terms; in addition, both charters lack either a mechanism by which the rights granted to prisoners may be enforced, or some form of alternative remedy, such as an action in damages, by which prisoners may seek redress for a breach of their statutory rights.<sup>26</sup> Accordingly, the practical value of the various statutory rights granted to prisoners is doubtful. For example, Victorian prisoners are granted a right to take part in educational programmes within the prison in which they are confined.<sup>27</sup> Not only does the provision fail to provide guidance as to the nature or standard of such programmes, whether programmes must be run by accredited teaching staff, or whether prisoners' participation in courses may be subject to entry requirements devised by prison officials, but, in addition, the provision does not expressly oblige prison officials to ensure that educational courses are provided to prisoners at all.

It should also be noted that many of the rights granted to prisoners require the approval of prison officials before they may be fully enjoyed. For example, both charters grant prisoners the right to practice a religion of their choice. However, prisoners may only participate in religious services with other prisoners, or possess religious articles such as bibles, if such activities are deemed 'consistent with prison security and good prison management'.<sup>28</sup>

25 See *Corrections Act 1986* (Vic) ss 47(1)(a), (b), (d), (h) and (k); *Corrections Act 1997* (Tas) ss 29(1)(a), (b), (d), (h) and (j).

26 In the absence of an enforcement mechanism, it is highly unlikely that a court would accept that such a breach was intended to confer on prisoners a private right of action in the tort of breach of statutory duty. A legislative intention to confer such a right is an important element of that tort, which is determined by reference to the intention of the legislature and the construction of the relevant statute: *O'Connor v S P Bray Ltd* (1937) 56 CLR 464. In *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1991] 1 AC 58, the House of Lords rejected emphatically the suggestion that a breach of correctional legislation could give rise to a cause of action against prison officials. A court might, however, issue an injunction against gaolers who prevented prisoners from enjoying one or more rights contained in the charter, such as daily exercise. Mandamus could also be issued to require prison officials to provide, or allow prisoners to enjoy, the relevant statutory right. It is arguable that any prison official faced with the possibility of defending an application for such an order would be likely to adopt a pragmatic solution, and provide at least a minimum of whatever was required to satisfy the relevant right. In view of the vague language in which the rights are expressed, such a pragmatic solution would not be difficult to achieve.

27 *Corrections Act 1986* (Vic) s 47(1)(o). There is no equivalent provision in the Tasmanian charter.

28 *Corrections Act 1986* (Vic) s 47(1)(i); *Corrections Act 1997* (Tas) s 29(1)(i). The legislation of other jurisdictions concerning the possession of religious material and the participation in services, though not contained in a charter of 'rights', is very similar. See, eg, *Prisons (Correctional Services) Act 1980* (NT) ss 85-6.

A number of other rights contained in the charters merely reiterate the treatment that prisoners could expect to receive by the operation of other correctional provisions. For example, Victorian prisoners are granted the right 'to be classified under a classification system established in accordance with the regulations'.<sup>29</sup> (The provision does not, however, grant prisoners any procedural rights, such as the right to submit their views to a classification committee, or to receive a statement of reasons for any classification decision.) The Tasmanian charter grants prisoners the right to send and receive letters, without hindrance, to and from the Minister responsible for corrections, the Director of Corrective Services, Official Visitors and the Ombudsman.<sup>30</sup> Yet the correctional legislation of other jurisdictions effectively provides prisoners with the same benefits, even though such provisions are not drafted in the form of 'rights'.<sup>31</sup>

In my view, the imprecise nature of the rights contained in the Victorian and Tasmanian charters, coupled with the absence of any means by which those rights may be enforced, detracts significantly from the value of the rights purportedly granted to prisoners. More particularly, the creation of prisoners' rights, the enjoyment of which is conditional upon the approval of prison officials, represents no significant advance for prisoners. It is worth noting that the Victorian charter of prisoners' rights, which has been in operation for well over a decade, has not been invoked successfully in any legal action by a prisoner.<sup>32</sup>

#### IV INTERNATIONAL INSTRUMENTS

Many fundamental international human rights documents include general provisions relevant to prisons and prisoners. For example, the *International Covenant on Civil and Political Rights* ('ICCPR') provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the

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29 *Corrections Act 1986* (Vic) s 47(1)(l).

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

31 For example, in New South Wales, a prisoner may send mail, without interruption or censorship, to the following State bodies or office holders: the State Ombudsman, Judicial Commission, Crime Commission, Anti-Discrimination Board, Equal Opportunity Tribunal, Independent Commission Against Corruption, Privacy Committee, Legal Aid Commission, Legal Services Commissioner, Legal Services Tribunal, and the Inspector-General of Corrective Services. Similar rights attach to communications to the National Crime Authority and the Commonwealth Ombudsman: *Crimes (Administration of Sentences) (Correctional Centre Administration Routine) Regulations 1995* (NSW) reg 118.

32 However, it should be noted that a Victorian prisoner (Mr Minogue) has recently commenced several unsuccessful legal actions against prison officials, founded mostly on international instruments. The Full Court of the Federal Court unanimously dismissed an action seeking to invoke the original jurisdiction of the High Court for alleged violations of rights specified under international law, but the Court noted that a possible related action under s 47 of the *Corrections Act 1986* (Vic) remained unresolved: *Minogue v Williams* (2000) 60 ALD 366, 371. Minogue has demonstrated great tenacity in commencing and maintaining several actions, which were opposed by skilful and experienced counsel. This resolve may lead him to commence the first action based solely on s 47 (which would need to be commenced in the Supreme Court of Victoria).

inherent dignity of the human person'.<sup>33</sup> Both the United Nations promulgated *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>34</sup> and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*,<sup>35</sup> prohibit the use of torture and harsh physical punishments. Surprisingly, however, there is no international treaty that deals solely, or in great detail, with the rights or treatment of prisoners.<sup>36</sup> The leading documents concerning the management of prisons and the treatment of prisoners are not treaties, and are therefore not binding in international law. But these various model rules and guidelines provide the most detailed and influential source of international guidance on prisons and prisoners.

### A The United Nations *Standard Minimum Rules for the Treatment of Prisoners*

The most widely known international instrument concerning the treatment of prisoners is the United Nations ('UN') *Standard Minimum Rules for the Treatment of Prisoners* ('UNSMR').<sup>37</sup> The UNSMR were drafted primarily in order to provide standards that could be incorporated into the national penal codes of individual nations, with adaptations as required by the political, social and legal circumstances of individual nations.<sup>38</sup> The UNSMR prescribe the minimum standard of treatment for all categories of civil and criminal prisoners, including remand and special prisoners,<sup>39</sup> and require that prisoners be informed of their rights under the Rules.<sup>40</sup> The Rules include requirements for the provision of basic necessities, such as adequate and nutritional food, clean drinking water, and suitable basic clothing.<sup>41</sup> The UNSMR also require that

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33 Opened for signature 16 December 1966, 999 UNTS 171, art 10(1) (entered into force 23 March 1976). Aspects of the ICCPR are discussed below in Part VII.

34 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

35 Opened for signature 26 November 1987, ETS No 126 (entered into force 1 February 1989).

36 For example, the *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), is often thought to extend to all prisoners, yet applies only to prisoners of war: see Suzanne Bernard, 'An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners' (1994) 25 *Rutgers Law Journal* 759, 765-6.

37 ESC Res 663C, UN Doc E/3048 (1957). (The UNSMR were adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955, and two years later they were endorsed by the UN Economic and Social Council.) On the history of the UNSMR see William Clifford, 'The Standard Minimum Rules for the Treatment of Prisoners' (1972) 66 *American Journal of International Law* 232. Clifford notes that the history of the UNSMR has not been adequately documented but suggests that they were devised in order to 'spell out the conditions which are thought to be minimal to preserve human dignity, maintain contact with outside society, and encourage a form of classification that protects prisoners and reduces the risk of contamination for those younger and less addicted to crime': 233.

38 Daniel Stoker, 'World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners' (1975) 10 *Journal of International Law and Economics* 453.

39 UNSMR, above n 37, r 66. The same rule indicates that the UNSMR extend to prisoners who are subject to security or corrective measures upon order of a judge.

40 Ibid rr 35-6.

41 Ibid rr 17-20.



prisons be appropriately staffed with medical officers, whose duties should include inspecting and reporting on the standard of hygiene in areas such as food preparation, sanitation, and quality of heating and lighting.<sup>42</sup>

The *UNSMR* also provide guidance on the maintenance of prisoners' access to social and cultural information. The Rules direct that prisoners be allowed to correspond with, and receive regular visits from, family members and 'reputable friends'.<sup>43</sup> Prisoners should also be provided with access to a library that is 'adequately stocked' with educational and recreational material, and receive information about 'the more important items of news' that occur outside prison, through access to newspapers, radios and the like.<sup>44</sup> The relatively detailed rules concerning religion and religious services require that prisoners be able to attend services, possess religious books, and receive visits from an appropriately qualified representative of the prisoner's chosen religion. Prisoners are also entitled to refuse visits from religious representatives.<sup>45</sup> It is worth noting that many of the provisions governing religion, such as the possession of religious writings or the appointment of a pastoral representative, are not unqualified. Instead, prisoners may only enjoy the benefit of some rules subject to the approval of prison officials; alternatively, prison officials may only be required to meet the standards set by the Rules when (and to the extent that) it is possible to do so.

Several provisions of the *UNSMR* concern the discipline of prisoners. The Rules prohibit all cruel, inhuman and degrading treatment.<sup>46</sup> More specific provisions expressly prohibit various forms of harsh treatment such as corporal punishment, solitary confinement, and the use of instruments of restraint as a form of punishment.<sup>47</sup> The *UNSMR* do not, however, prohibit the use of modified or reduced diets as a form of punishment. Dietary restrictions may be imposed if a prison medical officer certifies that the prisoner is 'fit to sustain' the punishment.<sup>48</sup>

Since the *UNSMR* are not an international convention, they therefore have no legal effect or standing.<sup>49</sup> Rule 1 provides that the *UNSMR* 'seek only ... to set out what is generally accepted as being good principles and practice in the treatment of prisoners and the management of institutions'.

Earlier writings on the implementation of the Rules by UN Member States suggested that very few states had implemented substantial parts of the rules;

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42 Ibid rr 22-6.

43 Ibid r 37.

44 Ibid rr 39-40.

45 Ibid rr 41-2.

46 Ibid r 33. This provision is similar to art 10(1) of the *ICCPR*.

47 Ibid rr 31, 34. Restraints are not prohibited absolutely, only as a form of punishment. This qualification is important. In *Binse v Williams* [1998] 1 VR 381 (see below Part VIII), restraints were applied in order to prevent future escape attempts and violence, rather than to punish the prisoner for previous examples of such behaviour. The former is not prohibited under the *UNSMR*.

48 *UNSMR*, above n 37, r 32(1).

49 See Jiri Toman, 'Quasi-Legal Standards and Guidelines for Protecting Human Rights' in Hurst Hannum (ed), *Guide to International Human Rights Practice* (3<sup>rd</sup> ed, 1999) 203. It was accepted that the *UNSMR* have no legal force in *Collins v South Australia* (1999) 74 SASR 200, 208 (Millhouse J).

many states either failed to report, or did so after some delay.<sup>50</sup> In 1984, the UN Economic and Social Council ('ECOSOC') adopted *Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners*, which provided that 'States whose standards for the protection of all persons subjected to any form of detention or imprisonment fall short of the Standard Minimum Rules for the Treatment of Prisoners shall adopt the Rules'.<sup>51</sup> The UN conducted surveys of the implementation of the *UNSMR* between 1967 and 1994.<sup>52</sup> By 1998, a total of 99 states had responded to UN questionnaires on the status of the *UNSMR*. The responses suggested that almost all responding nations had incorporated the Rules in domestic legislation. There is, however, no means of verifying the accuracy of information provided by individual nations.<sup>53</sup> One commentator suggested that 'state responses to such surveys tend to be self-serving, and the Rules may be cited as having influenced laws of practice even where such influence is difficult to identify'.<sup>54</sup>

It has been said that 'the humanitarian principles enunciated in the Standard Minimum Rules are, in fact, embodied in the Universal Declaration [of Human Rights]'.<sup>55</sup> Support for this proposition may be drawn from some of the rules which adopt the humanitarian principles of important international treaties. Rule 6 of the *UNSMR*, for example, prohibits any discriminatory treatment of prisoners which is based on the grounds of race, colour, religion, gender, national or social origin, political or other opinion, property, birth or other status. This analysis suggests that the purpose of the *UNSMR* is to expand upon, rather than repeat, the fundamental human rights principles contained in other international documents, and to provide specialised guidance on issues of prison management and conditions for prisoners.

The UN Human Rights Committee has reminded the international community that the *UNSMR* and other such documents are relevant to the determination of the content of other international instruments, such as the *ICCPR*. The Committee has indicated that state parties reporting to the Committee on their compliance with the more general obligation found in art 10(1) of the *ICCPR* (which provides that all persons deprived of their liberty should be treated with

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50 Toman, above n 49, 205.

51 ESC Res 47, UN Doc E/Res/1984/47 (1984) Procedure 1.

52 The Secretary-General submitted reports on the implementation of the *UNSMR* every five years to the meetings of the UN Congress on the Prevention of Crime and the Treatment of Offenders (also held every five years). This practice ceased in 1990. Subsequent documentation on the *UNSMR* has drawn from the responses to annual surveys submitted by individual states. The most recent report on the *UNSMR* was in 1996: Secretary-General of the United Nations, *Addendum to the Report of the Secretary-General: Use and Application of the Standard Model Rules for the Treatment of Prisoners*, UN Doc E/CN.15/1996/16/Add.1 (1996).

53 For example, in 1975, Australia submitted a response to a UN survey stating that Australian prisons 'substantially complied' with the *UNSMR*: Australia, *Australian Report to the Secretary-General of the United Nations on Standard Minimum Rules for the Treatment of Prisoners* (1975), quoted in Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980) [233]. Yet the findings of the Royal Commission into New South Wales Prisons at the time suggest that this statement was fanciful: see George Zdenkowski and David Brown, *The Prison Struggle* (1982) 158-264.

54 Toman, above n 49, 203.

55 Ibid 202.

humanity and with respect for the inherent dignity of the human person), should 'indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' and other international instruments.<sup>56</sup> This comment suggests that the Human Rights Committee believes that compliance with the *UNSMR* would only partly discharge the obligation imposed by art 10(1) of the *ICCPR*.<sup>57</sup>

In the domestic arena, the *UNSMR* remain an important point of reference for inquiries and reform programs concerning prisons and prisoners.<sup>58</sup> The *UNSMR* exerted considerable influence in the final report and recommendations of the groundbreaking Royal Commission into New South Wales Prisons conducted by Nagle J in the late 1970s.<sup>59</sup> More recently, the response of the Commonwealth to the Royal Commission into Aboriginal Deaths in Custody explained that the *UNSMR*

are not binding in international law, but they nonetheless establish a set of minimum international guidelines. The Australian Government's international human rights policy, which is based on recognising the universality of internationally accepted human rights standards, requires that these standards be fully met in Australia. It is therefore of importance to Australia's international reputation in the area of human rights that action be taken to ensure that the guidelines are implemented in practice throughout Australia.<sup>60</sup>

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56 Human Rights Committee, 'General Comment 21' in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, [5], UN Doc HRI/GEN/1/REV.1 (1994); reproduced in (1994) 1(2) *IHR* 28.

57 The General Comment does not actually state this, but it does stress that the obligation created by art 10(1) of the *ICCPR* is 'a fundamental and universally applicable rule': *ibid* [4]. In my opinion, this point suggests that the Human Rights Committee does not view art 10(1) in a minimalist sense, according to which compliance with the *UNSMR* would itself be sufficient.

58 For example, the *UNSMR* influenced the work of the sentencing project of the Australian Law Reform Commission: see Australian Law Reform Commission, above n 53, [225]-[235]. The Commission stated that reports provided by Australia to the UN on the implementation of the *UNSMR*, which suggested a high level of compliance with the Rules, should be viewed cautiously. The Commission noted that responses were not collected scientifically, but instead were based on 'largely impressionistic' information supplied by State prison officials: [233]. It should be noted that a resolution of the American Correctional Association acknowledged the value of the *UNSMR* and called for American and Canadian delegates to the UN to press for the inclusion in the *UNSMR* of the experience gained in those countries in the implementation of model standards and codes of accreditation of prisons: American Correctional Association, *Proceedings of the 114<sup>th</sup> Annual Congress of the American Correctional Association* (1984) 211-12.

59 Royal Commission into New South Wales Prisons, *Report of the Royal Commission into New South Wales Prisons* (1978). Justice Nagle made many findings of systematic brutality and mistreatment of prisoners. The Report revealed such an extraordinary level of maladministration within the New South Wales prison system that it appeared as if the standards contained in model rules and guidelines were beyond reach. Nevertheless, in one of many references to the *UNSMR*, Nagle J noted that while 'circumstances may make it difficult to comply literally with every rule ... no one would suggest that a prison system is not bound in the containment of prisoners, by normal codes of proper conduct': 214. See also Recommendation 186, which stated that the *UNSMR* should be observed by prison officials so far as practicable.

60 Commonwealth, *Aboriginal Deaths in Custody: Response by Government to the Royal Commission* (1992) vol 3, 1256-7.

## B The United Nations '*Body of Principles*'

In 1998, the UN General Assembly adopted a *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* ('*Body of Principles*').<sup>61</sup> The *Body of Principles* took the form of a general set of principles annexed to a resolution of the General Assembly; accordingly, the document is not a treaty or convention, and has no binding force in international law. But the adoption of the *Body of Principles* by a Resolution of the General Assembly, which included a statement that Member States should attempt to make 'all efforts' to ensure that the principles become 'generally known and respected', does confer significant international prestige upon the *Body of Principles*.

The *Body of Principles* affirms the importance of the protection of the basic human rights of all detained persons.<sup>62</sup> The introductory provision explains that the scope of the *Body of Principles* extends to the protection of *all* persons held under *any* form of detention or imprisonment. Accordingly, most of the principles are phrased in very general terms (unlike the quite specific provisions of the *UNSMR*), so as to be applicable to the various forms of custody in existence, such as juvenile detention, secure custody on psychiatric grounds, arrest, detention on remand, or imprisonment after trial and conviction for a criminal offence.

Many of the principles are relevant to the treatment of prisoners under sentence for a criminal conviction. For example, prisoners must be provided with information on their rights and the means by which those rights may be enforced. Prison officials must make all efforts to accommodate a prisoner's request to remain as close as possible to his or her normal place of residence, and prisoners must be allowed regular contact with their family, friends, and legal counsel.<sup>63</sup> While a prisoner's contact with family and friends may be subject to reasonable restrictions that are specified by law,<sup>64</sup> contact with legal representatives may be restricted only in the most exceptional circumstances.<sup>65</sup> The type of conduct that may constitute a disciplinary offence, and the nature and duration of penalties that may be imposed upon conviction for disciplinary offences, must be prescribed by law and duly published. Prisoners must also be able to state their

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61 GA Res A43/173, UN Doc A/RES/43/173 (1988). For a brief account of the history of the *Body of Principles* see Tullio Treves, 'The UN Body of Principles for the Protection of Detained or Imprisoned Persons' (1990) 84 *American Journal of International Law* 578. See also Nigel Rodley, *The Treatment of Prisoners Under International Law* (2<sup>nd</sup> ed, 1999) 326-33; Amnesty International, *A Guide to the United Nations Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment* (AI Index IOR/52/04/89).

62 This point is highlighted by the final (and unnumbered) clause of the *Body of Principles*, which states that the principles are not to be construed as restricting or derogating from any right contained in the *ICCPR*.

63 *Body of Principles*, above n 61, nos 13, 20. In a large country such as Australia, this issue can be especially important to prisoners. The transfer of a prisoner from one part of a large State or Territory to another can effectively deprive the prisoner of all personal contact with his or her family and friends.

64 *Ibid* nos 15, 19.

65 *Ibid* no 18. Visits with lawyers must be conducted out of the hearing range of all prison officials: no 18.4.

case in any disciplinary proceedings, and seek review of any disciplinary decision.<sup>66</sup>

### C The European Prison Rules

The *European Prison Rules* ('EPR')<sup>67</sup> constitute the other important set of well-known international prison guidelines. Adopted by the Council of Europe's Committee of Ministers in 1987, the structure and content of the *EPR* are broadly similar to that of the *UNSMR*.<sup>68</sup> The *EPR* provide standards for the treatment of prisoners which are lacking in the major European human rights instruments.<sup>69</sup> The *EPR* display a strong humanitarian philosophy, which is emphasised by the inclusion of several rules which provide that prison systems should seek to enforce no punishment other than the deprivation of liberty, that prisoners should be treated in accordance with the respect for human dignity to which all persons are entitled, and that prisoners should also be provided with social and educational skills designed to assist their reintegration into society.<sup>70</sup>

The implementation of the *EPR* is monitored by the European Committee for Cooperation in Prison Affairs, which was established to monitor and report every five years on the extent to which the *EPR* have been implemented by Member States of the European Community ('EC').<sup>71</sup> However, only one such report has been published, and all later compliance reports by Member States were circulated only to prison administrators. Accordingly, there has been no informed public debate about attitudes of European governments to the *EPR*.<sup>72</sup> It could be suggested that, in the absence of any detailed public disclosure of surveys on compliance by states with the *EPR*, there is little reason for states to comply with the Rules.

66 Ibid n 30. There is no requirement that disciplinary proceedings be subject to judicial review. Accordingly, the availability of some form of administrative review or appeal would be sufficient. In some Australian jurisdictions, a prison disciplinary decision may be reviewed by a more senior prison official, see, eg, *Corrections Act 1997* (Tas) s 60, under which a prisoner has the right to appeal against disciplinary decisions to the Director of Corrective Services. Yet in other jurisdictions, there are no such rights, see, eg, *Corrections Act 1986* (Vic) s 50, which provides that all prison disciplinary proceedings are conducted by prison staff. The procedure includes a wide privative clause that seeks to exclude all forms of review and appeal: s 50(9).

67 Council of Europe, Committee of Ministers, *Recommendation No R(87)3 of the Committee of Ministers to Member States on the European Prison Rules* (1987).

68 The *EPR* were modelled on the *European Standard Minimum Rules*: Council of Europe, *Resolution (73)5 on the European Standard Minimum Rules* (1973), which were themselves based on the *UNSMR*.

69 Neither the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), nor the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, opened for signature 26 November 1987, ETS No 126 (entered into force 1 February 1989), contain detailed or systematic principles for the treatment of prisoners.

70 *EPR*, above n 67, rr 1-6.

71 Nancy Louckes (ed), *Prison Rules: A Working Guide* (1993) 96.

72 Ibid 11.

The *EPR* are not a treaty, and, again therefore, do not give rise to any binding obligation upon Member States of the EC.<sup>73</sup> It also appears that the *EPR* (let alone other international standards) are not accorded significant weight in European human rights litigation. For example, in *Eggs v Switzerland*,<sup>74</sup> the European Commission on Human Rights rejected a complaint from a prisoner which alleged that the conditions of his detention contravened art 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'),<sup>75</sup> despite evidence that the conditions of his detention did not in fact meet the standards prescribed by the more precise *EPR*. The Commission concluded that 'the conditions of detention which in certain aspects did not come up to the standard of the 'Minimum Rules' did not thereby alone amount to inhuman or degrading treatment' as prohibited by the *European Convention on Human Rights*.<sup>76</sup> Decisions like this suggest that European prisoners cannot commence any form of legal action simply on the basis that their conditions of confinement, or particular incidents of the behaviour of prison officials, violate the *EPR*.

Although there is no enforcement mechanism for the *EPR*, and European courts do not appear to accord significant weight to them, it has been suggested that the *EPR* nonetheless constitute a useful source of principles for those campaigning for changes to prison conditions, and the development of a code of minimum standards for prisons and prisoners.<sup>77</sup> The Prison Reform Trust of England, for example, has published a detailed comparative analysis of the *Prison Rules 1964* (Eng) and the *EPR*, which is designed to highlight the inadequacy of the English rules by reference to the more detailed and progressive *EPR*.<sup>78</sup> But despite a long running campaign, the Trust has failed to persuade successive English governments to undertake a substantial review of existing prison laws. Unlike the European Commission for Human Rights, the European Committee for the Prevention of Torture has made frequent reference

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73 The Preamble to the earlier version of the *EPR* noted that the promulgation of the Rules 'invites governments of member States to report every five years to the Secretary of the Council of Europe, informing him of the action they have taken on this resolution' (emphasis added).

74 [1977] 6 *European Commission of Human Rights Decisions and Reports* 170. This case concerned the *European Standard Minimum Rules* (see above n 68), the predecessor of the *EPR*.

75 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

76 *Eggs v Switzerland* [1977] 6 *European Commission of Human Rights Decisions and Reports* 170, 181. The Commission considered a similar complaint in *Koskinen v Finland* (1994) 18 EHRR CD 146. In that case, a prisoner alleged he had been held in isolation for long periods and that many aspects of the condition of his detention, such as sanitation facilities and medical treatment, were harsh or inadequate. The Commission referred to an investigation conducted by the European Committee for the Prevention of Torture ('CPT') into conditions for prisoners held in solitary confinement in the same prison (see (1994) 18 EHRR CD 146, 161). The CPT extensively criticised the relevant prison but declined to find that the conditions amounted to a breach of art 3 of the *European Convention on Human Rights*. Neither the Commission nor the CPT made significant reference to the *EPR*. Neither body considered whether it might have been more appropriate to determine whether the conditions in question amounted to inhuman or degrading treatment by examining the standards established by the *EPR*. The Commission dismissed the complaint as manifestly ill-founded.

77 Stephen Livingstone and Tim Owen, *Prison Law* (2<sup>nd</sup> ed, 1999) 120-1.

78 See Louckes, above n 71. The English Rules have since been revised and remade. The Prison Reform Trust has not issued a similar comparative analysis with the new Rules.

to the *EPR* in its reports and resulting recommendations,<sup>79</sup> and the Committee of Ministers of the Council of Europe has also taken account of the *EPR* in various recommendations concerning prisoners. The Committee of Ministers recently recommended that policies governing prison overcrowding take account of the principles for the treatment of prisoners and the management of prisons embodied in the *EPR*.<sup>80</sup>

## V THE AUSTRALIAN GUIDELINES ON PRISON MANAGEMENT

The governments of Australia and New Zealand have formulated a set of model rules – the *Standard Guidelines for Corrections in Australia* ('*Australian Guidelines*')<sup>81</sup> – which are modelled closely on the *UNSMR* and the *EPR* but include a number of new and modified rules.<sup>82</sup> The *Australian Guidelines* have been approved and adopted by Australian prison administrators but have not been incorporated into legislation and clearly do not have the force of law.<sup>83</sup> In fact, the Preface to the *Australian Guidelines* draws attention to this point, by an express statement that the Guidelines are 'not intended to be law or to be treated as absolute'. Accordingly, the term 'guidelines' is used in substitution for 'rules', and the first clause explains that the *Australian Guidelines* are 'intended to show the spirit in which correctional programs should be administered and the goals towards which administrators should aim'.<sup>84</sup> In keeping with this sentiment, the *Australian Guidelines* contain no provision addressing the consequences of any breach or failure to meet any of the specific guidelines.

The substantive guidelines contain principles for the management of prisons, including the training and responsibility of staff, and the classification, transfer and discipline of prisoners. They also include many provisions on the nature of the accommodation, work, food and medical services that should be provided to

79 See Roy Morgan and Michael Evans, *Protecting Prisoners – The Standards of the European Committee for the Prevention of Torture in Context* (1999) 59, 106-10.

80 Council of Europe, Committee of Ministers, *Recommendation R(99)22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation* (1999). See Hans-Jürgen Bartsch, 'Council of Europe: Legal Co-operation in 1988-9' in P Eeckhout and T Tridimas (eds) (1999-2000) *19 Yearbook of European Law* 533, 544.

81 Australia, The Corrective Services Ministers' Conference, *Standard Guidelines for Corrections in Australia* (2<sup>nd</sup> ed, 1994). The first draft of the *Guidelines* was prepared by Colin Bean. This draft version was circulated to various interest groups and all correctional departments of Australia and New Zealand. A revised version was then approved by the correctional Ministers of Australia and New Zealand. The history of the *Australian Guidelines* is explained briefly in Australian Law Reform Commission, above n 53, [229]. A review of the Guidelines has recently been commissioned by the Ministers.

82 The influence of the *UNSMR* and the *EPR* is expressly acknowledged in the Preface to the *Australian Guidelines*.

83 This point was acknowledged by Millhouse J in *Collins v South Australia* (1999) 70 SASR 200, 208.

84 *Australian Guidelines*, above n 81, no 1.1. In keeping with this view, the Guidelines address aspects of prison administration other than the treatment of prisoners, such as the selection and training of prison staff, and non-custodial sentences: nos 3.4-3.13, pt 4.

prisoners.<sup>85</sup> Many of the guidelines are expressed in a very imprecise fashion. For example, one guideline provides that 'all parts of a prison should be properly maintained and kept clean at all times'.<sup>86</sup> The wording of this provision gives no clear indication of the general standard, or particular aspects, of cleanliness required by the provision. However, the use of very general language may be desirable in other instances. For example, there is a wide-ranging prohibition on the use of collective punishment,<sup>87</sup> and a requirement that where a disciplinary proceeding may entail the imposition of further imprisonment, the prisoner has a right to representation in the relevant proceeding.<sup>88</sup> The *Australian Guidelines* also prohibit the application of instruments of restraint (such as chains, straight-jackets and irons), chemicals (such as tear gas), and, unlike the *UNSMR*, the imposition of dietary restrictions as forms of punishments.<sup>89</sup> But the Guidelines do not *completely* prohibit the use of instruments of restraints and chemicals. Prison managers may order the use of such devices to control prisoners when other methods of control have failed in order to prevent prisoners from injuring themselves or other persons, or damaging property.<sup>90</sup>

It should also be noted that several of the specific guidelines are relevant to the treatment of female prisoners; for example, prison medical authorities are required to ensure that the special needs of female prisoners are accommodated.<sup>91</sup> Prisoners must be provided with pre-natal and post-natal care, and, wherever practicable, prison officers must arrange for pregnant prisoners to give birth in a hospital outside the prison. A number of guidelines also provide instruction on the possible accommodation of children with their parents in prison; prisoners' children may be permitted to live with an imprisoned parent if the prisoner so requests, and if such an arrangement is deemed to be in the best interests of the child and also presents no threat to the management, good order and security of the prison.<sup>92</sup>

These and most other provisions in the *Australian Guidelines* are largely devoid of detailed requirements. What is the effect of this absence of detail? It is arguable that the *Australian Guidelines* are not significantly hampered by the lack of detail, provided that the general thrust of the Guidelines is observed. In my view, there is considerable force in that suggestion. However, it must be conceded that the lack of significant detail in the majority of the *Australian Guidelines*, and the inclusion of provisions which state unambiguously that the

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85 Ibid nos 5.66-79 (dealing with general health services) and nos 5.80-4 (dealing with psychiatrically disturbed and intellectually disabled prisoners). This section of the *Australian Guidelines* is easily the most detailed.

86 Ibid no 5.29.

87 Ibid no 5.31.

88 Ibid no 5.39.

89 Ibid nos 5.33, 5.43.

90 Ibid no 5.44.

91 Ibid no 5.71a. This guideline imposes a similar obligation in relation to Aboriginal and Torres Strait Islander prisoners.

92 Ibid nos 5.85-9. While these guidelines are not gender specific, in practice, children are accommodated with female prisoners (and normally only in exceptional circumstances). For a detailed assessment of this area, see Ann Farrell, 'Policies for Incarcerated Mothers and their Families in Australian Corrections' (1998) 31 *Australian and New Zealand Journal of Criminology* 101.



Guidelines are not intended to have any legal force, derogate from the practical value of the *Australian Guidelines* to prisoners, prison administrators, and those who may be required to scrutinise the management of prisoners, such as Ombudsmen and courts hearing applications for judicial review. In particular, the absence of any means by which prisoners may enforce general principles of particular standards contained in the Guidelines, or seek a remedy for a failure by prison officials to adhere to the Guidelines, renders the *Australian Guidelines* of little practical relevance to prisoners.

## VI THE ROLE OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION IN REVIEWING THE TREATMENT OF PRISONERS

The Human Rights and Equal Opportunity Commission ('HREOC') plays a pre-eminent role in the promotion and administration of human rights in Australia.<sup>93</sup> The Commission performs general functions in relation to the protection of human rights, such as monitoring and investigating whether enactments, actions and practices of the Commonwealth are consistent with Australia's human rights obligations, and, more generally, fostering public discussion, understanding and acceptance of human rights in Australia.<sup>94</sup> HREOC regularly provides submissions to public inquiries and parliamentary committees, and liaises with domestic and foreign governments and international organisations, to ensure that Australia meets its obligations under the international instruments to which it is committed.<sup>95</sup> HREOC is also granted particular functions to monitor and assist in the implementation of several statutes concerning human rights, such as anti-discrimination and privacy legislation.<sup>96</sup>

The decision in *X & Y v State of Western Australia* ('*X and Y*')<sup>97</sup> demonstrates how important this aspect of HREOC's work may be to prisoners. In that case, several West Australian prisoners who were HIV positive complained to the State Equal Opportunity Commission, alleging that the very restrictive regime under which they were held contravened State anti-discrimination legislation. The prisoners were denied access to a wide range of facilities and activities, such

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93 HREOC is established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

94 See *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 11(1)(e), (f), (g); HREOC, *Annual Report 1996/7* (1997) 15. On the meaning of 'acts' and 'practices' see *Secretary, Department of Defence v HREOC* (1997) 149 ALR 309.

95 Human Rights and Equal Opportunity Commission, *Annual Report 1994/5* (1995) 10. The Human Rights Commissioner appeared before the House of Representatives Standing Committee on Legal and Constitutional Affairs to give evidence in support of the International Transfer of Prisoners Bill 1996 (Cth), which was subsequently enacted: Human Rights and Equal Opportunity Commission, *Annual Report 1996/7* (1997) 106.

96 For example, HREOC is granted powers under s 20(1) of the *Racial Discrimination Act 1975* (Cth), s 48(1) of the *Sex Discrimination Act 1984* (Cth) and s 67(1) of the *Disability Discrimination Act 1992* (Cth).

97 [1996] HREOCA 32 (Unreported, The Hon Robert Nettlefold, 26 November 1996).

as libraries, sport, recreation, meaningful work and religious services. The complaint succeeded, but the State Government introduced regulations to effectively stay the decision for six months.<sup>98</sup> The State was also granted an exemption by HREOC from federal discrimination legislation for the same period.<sup>99</sup> During this time, prison officials made only a few changes to the treatment of HIV prisoners. A second complaint was then lodged by several prisoners, pursuant to the *Disability Discrimination Act 1992* (Cth), and was upheld by HREOC.<sup>100</sup> At the hearing of the second complaint, the Government of Western Australia submitted that the federal Act should be interpreted narrowly, at least in respect of prisoners.<sup>101</sup> But the Commission rejected the Government's arguments, stating that:

Persons with disabilities are to be found in prison, as they are to be found in other public institutions and other places. To draw an Act aimed at ... ensuring as far as practicable, [that] persons with disabilities have the same rights to equality before the law as the rest of the community, and then so draw it as to leave the range of it ending at the outer perimeter of a prison, would be to deny protection in one of the places where there may be strong need for it.<sup>102</sup>

The decision by HREOC in this case provided the impetus for important changes to the treatment of HIV positive prisoners in Western Australia. In my view, such changes might never have been possible by operation of State law alone. The Government of Western Australia had adopted the view that the changes made to the treatment of prisoners at the time of the second hearing were sufficient, and that any remaining differential treatment was appropriate and justified. Even if the prisoners had applied to the State Equal Opportunity Commission and the Commission had rejected this view, the Government could simply have extended, perhaps indefinitely, regulations exempting the treatment of prisoners from State discrimination legislation.

However, the jurisdiction of HREOC is subject to some important limitations. First and most importantly, HREOC may not make binding decisions as to any

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98 The *Equal Opportunity (Infectious Diseases) Regulations 1994* (WA), which were made pursuant to s 66U of the *Equal Opportunity Act 1984* (WA), and which exempted the prison management regime from the Act for six months. The exemption was designed to provide the Ministry of Justice with sufficient time to plan and implement a regime of treatment for HIV positive prisoners which did not contravene anti-discrimination legislation.

99 HREOC may grant exemptions from pts 1 and 2 of the *Disability Discrimination Act 1992* (Cth).

100 Under s 76(1)(b) of the *Disability Discrimination Act 1992* (Cth), the Disability Discrimination Commissioner may refer complaints to HREOC for investigation. On the history and scope of the Act see Melissa Tyler, 'The *Disability Discrimination Act 1992*: Genesis, Drafting, and Prospects' (1993) 19 *Melbourne University Law Review* 211.

101 This argument was based upon two submissions. First, that facilities provided to prisoners were not 'services' for the purposes of disability legislation. Second, the managerial directives, upon which the treatment of HIV positive prisoners were based, were not 'law' within the meaning of s 47(3) of the *Disability Discrimination Act 1992* (Cth), which provides that nothing in pt 2 of the Act (which contains the provisions against discrimination) renders unlawful anything done in pursuance of another law. Had this submission been accepted, the operation of the federal Act could have effectively been precluded by the promulgation of administrative rules by prison officials. Had the first submission been accepted, the treatment of prisoners would have been effectively removed from the scope of the Act.

102 *X and Y* [1996] HREOCA 32 (Unreported, The Hon Robert Nettlefold, 26 November 1996) [5.3].

issue between the parties to a complaint.<sup>103</sup> This lack of a determinative power limits the practical effectiveness of much of HREOC's work. In *Cabal v United Mexican States*,<sup>104</sup> Gray J declined to accord any weight to the preliminary findings of HREOC, which were formulated during an inquiry into the conditions under which Cabal was held, in determining whether harsh prison conditions and prolonged detention constituted 'special circumstances' for the grant of bail.<sup>105</sup>

The jurisdiction of HREOC in relation to the treatment of prisoners is subject to a second important limitation. In respect of alleged human rights violations, HREOC has jurisdiction to investigate only the acts or practices of Commonwealth agencies.<sup>106</sup> The vast majority of prisoners are held pursuant to sentences for offences committed under State and Territory law, and therefore remain beyond the jurisdiction of HREOC.<sup>107</sup> Commonwealth prisoners are amenable to the jurisdiction of HREOC because they are imprisoned under federal authority. Although federal prisoners are held in State prisons, which are administered by State prison authorities pursuant to State correctional legislation, the authority to imprison federal offenders in State prisons flows from s 120 of the *Australian Constitution*, which provides that:

Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make Laws to give effect to this provision.

Section 120 creates a relationship whereby the Commonwealth is able, and the States are obliged, to house federal prisoners in State prisons. Whilst federal prisoners are not physically held by federal authorities, by the operation of s 120 they are held ultimately by federal authority. In *Leeth v Commonwealth* ('*Leeth*'),<sup>108</sup> the High Court accepted that s 120 envisaged that federal prisoners

103 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, in which the High Court held that legislation that allowed the determinations of HREOC to be registered in the Federal Court and enforced as orders of that Court was unconstitutional because it involved the exercise of the judicial power of the Commonwealth by a body which was not a court within the meaning of s 71 of the *Australian Constitution*.

104 [2000] FCA 1892 (Unreported, Gray J, 20 December 2000).

105 Justice Gray described the views expressed by HREOC as 'simply opinions': *ibid* [53].

106 This limitation does not extend to all aspects of HREOC's work. For example, the employment discrimination and equal opportunity provisions of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) extend to both the States and Territories as well as the Commonwealth. While employment discrimination would not normally be relevant to prisoners, the decision in *X and Y* demonstrates that disability discrimination may be a useful area of jurisdiction for prisoners.

107 HREOC may be granted jurisdiction over State matters by arrangement between the Commonwealth and a State: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 11(1)(c), 16. No such arrangements concerning prisons have been made. The jurisdiction of the Commission in *X and Y* arose by operation of s 13 of the *Disability Discrimination Act 1992* (Cth) under which State and federal laws concerning disability discrimination may operate concurrently.

108 (1992) 107 ALR 672, 679 (Mason CJ, Dawson and McHugh JJ), 688 (Brennan J), 697 (Deane and Toohey JJ). The Court divided on whether the *Australian Constitution* contained a general requirement that the laws of the Commonwealth should have a uniform operation throughout the Commonwealth. The case at hand raised this issue in the context of the differences in eligibility for parole and release that

could be subject to the differing regimes of the various State and Territory prison systems in which they might be housed. Some members of the Court implied that this was an inevitable consequence of the Commonwealth's use of State prisons according to s 120. This reasoning appeared to be influenced by the potential disruption that could arise if federal prisoners were accorded different treatment to State or Territory prisoners, who normally comprise the great majority of prisoners in any prison.<sup>109</sup> In my view, these considerations could support the proposition that, so long as the Commonwealth utilises State prisons under s 120, it must take those prisons 'as it finds them'.<sup>110</sup> This reasoning does not preclude the Commonwealth from rendering prisoners subject to separate standards by other means. For example, it could create a federal prison system and introduce model standards for federal prisoners,<sup>111</sup> or introduce a far-reaching Bill of Rights.<sup>112</sup>

Support for this proposition may be drawn from *Cabal v United Mexican States*. Cabal was detained according to s 53 of the *Extradition Act 1988* (Cth), which provides that a detainee is subject to the 'laws of a State or Territory with respect to imprisonment [in that jurisdiction] ... so far as they are capable of application, in relation to persons who have been committed to prison ... under this Act'. Justice Gray concluded that by reason of s 53 it was 'at least doubtful' that the Commonwealth was responsible for providing humane conditions for any person detained under the Act.<sup>113</sup> His Honour also held that this provision left 'no scope for the Australian Government to direct the Government of a State or Territory to do something otherwise than in accordance with the law of that State or Territory'.<sup>114</sup>

If the Commonwealth must take State prisons as it finds them, the effect of that requirement may also override any provisions of the *Human Rights and*

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federal prisoners might face in differing jurisdictions, and whether the *Commonwealth Prisoners Act 1968* (Cth) and associated legislation that addressed these problems was invalid because it invested federal courts with non-judicial powers.

109 Ibid 678 (Mason CJ, Dawson and McHugh JJ), 704 (Gaudron J).

110 The issue in *Leeth* can be distinguished as the Court only examined mechanisms that ultimately determined the length of time served by federal prisoners, as opposed to examining the conditions under which sentences are served.

111 In *Leeth*, no member of the Court suggested this could not be done. In my opinion, the power to do so could clearly be drawn from the executive and incidental powers: *Australian Constitution*, ss 51(xxxix), 61. Power could also be drawn from the inherent powers that arise by virtue of the Commonwealth's status as a mature and sovereign nation: see generally Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) chh 3, 12. The creation of a federal prison system was considered, and rejected, by a majority of the Australian Law Reform Commission in their report, Australian Law Reform Commission, above n 53, [153].

112 For example, by using the external affairs power to directly incorporate the *ICCPR* and other relevant instruments into Australian law. This step would of course affect all prisoners.

113 *Cabal v United Mexican States* [2000] FCA 1892 (Unreported, Gray J, 20 December 2000) [37].

114 Ibid [51].

*Equal Opportunities Commission Act 1986* (Cth) ('HREOC Act') which could be seen to provide a jurisdictional basis over federal prisoners.<sup>115</sup>

However, the effect of the constitutional arrangements concerning prisoners on the jurisdiction of HREOC at least was clarified in *Minogue v HREOC* ('*Minogue*').<sup>116</sup> Minogue was a Victorian prisoner attempting to prepare a petition of mercy in respect of his sentence of life imprisonment for the murder of a police officer. He complained to HREOC that prison administrators had interfered with his access to legal research materials and computer facilities, which were necessary to prepare the petition.<sup>117</sup> Minogue alleged that these actions contravened various articles of the *ICCPR*. HREOC refused to investigate the complaint; Minogue was informed that, as he was a State prisoner held in a State prison, HREOC lacked jurisdiction to consider his complaint.<sup>118</sup>

Minogue commenced an application for judicial review, seeking a writ of mandamus to compel HREOC to investigate his complaint. He submitted that s 6(1) of the *HREOC Act*, which provides that the Act does not bind the States, was unconstitutional because it was inconsistent with art 50 of the *ICCPR*. Article 50 provides that the *ICCPR* shall extend in full to all parts of federal states, subject to no limitations. Justice Marshall flatly rejected the submission, holding that the clear weight of judicial authority enabled the Commonwealth to enact legislation purporting to implement only part of an international convention, even though the relevant convention contained one or more provisions prohibiting partial implementation.<sup>119</sup> His Honour did not address the apparent tension between this principle of Australian law and the terms of art 50 of the *ICCPR*, noting that it was well settled that any suggestion that Australia had breached its international obligations was 'not a matter justiciable at the suit of a private citizen'.<sup>120</sup>

Counsel for the International Commission of Jurists, which was granted leave to intervene as an *amicus curiae*, submitted that HREOC had erred in law in failing to consider whether it could investigate the complaint pursuant to its wide powers to investigate matters relating to human rights generally and, more particularly, relating to any action necessary to be taken by Australia in order to

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115 HREOC has jurisdiction over federal 'acts' or 'practices'. An 'act' is defined as an act done by or on behalf of the Commonwealth: *HREOC Act 1986* (Cth) s 3(1). If the Commonwealth is obliged to take State prisons as it finds them, and the States must accept federal prisoners, it is arguable that the notion of agency that is implied by the definition of 'act' cannot operate because the States manage and administer federal prisoners in their own right.

116 (1998) 54 ALD 389.

117 On the very limited rights of prisoners to possess and use legal material see Matthew Groves, 'Case and Comment: *Rich v Van Groningen, Williams and Spandano*' (1997) 21 *Criminal Law Journal* 355.

118 A similar restriction applies to the Territories. The definition of Commonwealth enactments, which HREOC may investigate, expressly excludes enactments of the Northern Territory and the Australian Capital Territory: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1).

119 Authorities cited included: *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, 233-4 (Brennan J), 268 (Deane J); *Victoria v Commonwealth* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey Gaudron, McHugh and Gummow JJ).

120 See *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason J). See also *Dietrich v R* (1992) 177 CLR 292, 305-6 (Mason CJ and McHugh J), 321 (Brennan J), 348 (Dawson J), 359-60 (Toohey J).

comply with the provisions of the *ICCPR*.<sup>121</sup> This submission suggested that HREOC could investigate matters of State administration that fell within the scope of these provisions. Justice Marshall did not confront this matter, instead accepting that, as HREOC was granted the power to conduct such investigations *of its own motion or at the request of a Minister*, the function was not one for which mandamus could issue (at the suit of a complainant) to compel HREOC to act.<sup>122</sup>

On appeal, the Full Court of the Federal Court was similarly untroubled by the exclusion of State acts and practices from the jurisdiction of HREOC.<sup>123</sup> The Full Court accepted that the clear weight of authority enabled the Commonwealth to legislate to give only partial effect to the *ICCPR*. Accordingly, the apparent conflict between art 50 of the *ICCPR* and the jurisdiction of HREOC did not affect the validity of the *HREOC Act*.<sup>124</sup>

The decision in *Minogue* invites several comments. First, while Marshall J emphatically rejected a suggestion that HREOC could be compelled to conduct an investigation pursuant to powers which plainly granted it a discretion to act on its own motion, his Honour did not suggest that such provisions empowered HREOC to investigate the treatment of State (as well as federal) prisoners of its own motion. In my opinion, the extent of HREOC's power to conduct 'own motion' investigations must logically be subject to the general limitations upon HREOC's jurisdiction, which generally preclude the investigation of State and Territory enactments or practices.<sup>125</sup>

Second, the basis upon which HREOC refused to investigate the complaint (that *Minogue* was a State prisoner held in a State prison) seems to suggest that HREOC might, however, possess jurisdiction to investigate the general treatment of *federal* prisoners in State prisons. Statements to this effect have been included

121 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 11(1), (j) and (k).

122 Support for this proposition was drawn from *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 579-80 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J). On the purpose and scope of mandamus see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (1999) 582-610.

123 *Minogue v HREOC* (1999) 166 ALR 129. The main ground of appeal was that Marshall J had not provided adequate assistance and guidance to the unrepresented applicant. The Full Court rejected this argument, holding that whilst *Minogue* was not legally qualified, he was able to make intelligent and reasoned arguments. The Court also noted that the clear and detailed submissions provided by other parties assisted *Minogue* by clarifying the nature of the proceedings and the issues in dispute.

124 The apparent tension between art 50 and the jurisdiction of HREOC would be more problematic if the *ICCPR* was incorporated into Australian law. A finding to this effect was made in *Collins v South Australia* (1999) 70 SASR 200, 209-10, in which Millhouse J held that the inclusion of the *ICCPR* in a schedule to the *HREOC Act* had the effect of enacting the *ICCPR* in Australian domestic law. However, this conclusion was flatly rejected by the Full Court of the Federal Court in a subsequent application brought by *Minogue*: *Minogue v Williams* (2000) 60 ALD 366, 371.

125 This reasoning would only apply to investigations conducted under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(f), which enables HREOC to inquire into any 'act or practice', defined in s 3(1) by reference to the behaviour of the Commonwealth. Other aspects of HREOC's powers are not constrained by use of the terms 'acts' or 'practices', for example, s 11(1)(g) (empowering HREOC to 'promote an understanding and acceptance, and the public discussion, of human rights in Australia'), and s 11(1)(j) (enabling HREOC 'on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights').

in recent annual reports of HREOC, accompanied by the important qualification that the Commission believes that it does not have the power to examine complaints from other categories of prisoners (for example, State prisoners).<sup>126</sup> I believe that this view is not correct. It was explained previously that the legal arrangements whereby the States are constitutionally obliged to hold federal prisoners renders those prisoners subject to the legislative regimes that apply in the State or Territory in which the prisoner is held. In my view, the management of federal prisoners pursuant to State correctional legislation does not fall within the jurisdiction of HREOC because no act or practice of a Commonwealth agency is involved. The Commonwealth could enact correctional legislation and create separate federal prisons, the operation of which would clearly fall within the scope of HREOC's general jurisdiction over federal activities, but it has not done so.<sup>127</sup>

Finally, the failure of the Commonwealth legislation to extend the jurisdiction of HREOC to the States may be permissible according to the principles of Australian constitutional law but it plainly conflicts with the terms of art 50 of the *ICCPR*.<sup>128</sup> It is arguable that if an individual complains to HREOC that his or her treatment by a State authority contravenes a provision of the *ICCPR*, and HREOC declines to investigate the complaint on grounds similar to those adopted in *Minogue*, that individual may lodge a complaint with the UN Human Rights Committee – pursuant to the *Optional Protocol to the International Covenant on Civil and Political Rights* – concerning the apparent conflict between the jurisdictional limits of HREOC and the requirements of art 50 of the *ICCPR*.<sup>129</sup> The commencement of such a complaint might prompt the

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126 See, eg, Human Rights and Equal Opportunity Commission, above n 94, 61.

127 It is fair to assume that the Commonwealth has failed to do so partly due to the high cost of establishing such facilities. There would also be significant practical problems with a separate federal prisons system. There are relatively few federal offenders, so it would not be realistic for the Commonwealth to locate prisons in all major centres. Accordingly, many offenders would be located very far from their normal place of residence. Furthermore, the Commonwealth gains a practical political advantage from the use of State prisons. At present, the Commonwealth is widely perceived as not holding any political responsibility for the management of prisons despite the presence of federal offenders in most prisons. As a result, federal politicians are not troubled by the intense publicity when escapes or riots occur. It is doubtful whether any federal Minister would willingly assume this aspect of Ministerial responsibility that would accompany the establishment of a federal prison system.

128 This point was not pursued by Minogue on appeal: *Minogue v Williams* (1999) ALR 129, 136.

129 A suggestion to this effect was made by an Australian member of the Human Rights Committee: Elizabeth Evatt, 'Reflecting on the Role of International Communications in Implementing Human Rights' (1995) 5 *Australian Journal of Human Rights* 20, 25. Evatt commented that the applicant in *Toonen v Australia* (1994) 1(3) IHRR 97 (see below n 130) was unable to effectively pursue his case in the Australian courts, and that the absence of such a remedy could have been added as a further ground to his complaint to the Human Rights Committee. While Evatt was commenting more generally about the absence of effective domestic remedies available for Australians, there is no reason why a complaint could not simply address the jurisdictional limitations of HREOC. Such an application would bring the federalist tensions involved in any expansion to the jurisdiction of HREOC (over actions of the Australian States and Territories) into sharp focus.

Commonwealth to reconsider the jurisdictional limits of HREOC.<sup>130</sup> Currently, however, I would argue that HREOC lacks jurisdiction over federal prisoners in State prisons and State prisoners alike.

## VII THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

### A Australia's Accession to the *Optional Protocol*

In 1991, Australia acceded to the *Optional Protocol to the International Covenant on Civil and Political Rights* ('*Optional Protocol*').<sup>131</sup> Accession to the *Optional Protocol* represents a potentially important practical advance towards the recognition of the rights contained in the *ICCPR* because it enables individuals, including prisoners, to lodge complaints concerning alleged infringements of the *ICCPR* with the United Nations Human Rights Committee ('HRC').<sup>132</sup> Importantly, however, Australia's accession to the *Optional Protocol* was not accompanied by legislation granting Australian courts jurisdiction to consider issues that might fall within the scope of the Protocol. The failure of the Commonwealth to pass such legislation was criticised extra-judicially by Sir Anthony Mason: 'by not providing a mechanism for the Australian legal system to consider and adjudicate such issues before an international body does so, it seems that the government of Australia is in fact abrogating its sovereignty

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130 This suggestion is speculative. The analysis of the *Optional Protocol to the International Covenant on Civil and Political Rights* in Part VII explains that a complainant must exhaust all domestic avenues of redress. That requirement could constitute a significant obstacle to such a complaint. The most well-known complaint by an Australian to the HRC, concerning the now repealed laws of Tasmania which outlawed homosexual activity between consenting adults, proceeded to the HRC in the absence of any opposition from the Commonwealth: *Toonen v Australia* (1994) 1(3) IHRR 97 ('*Toonen*'). See Alexandra Purvis and Joseph Castellino, 'A History of Homosexual Law Reform in Tasmania' (1997) 16 *University of Tasmania Law Review* 12. The case involved an exceptional coalescence of events, and thus the change of law following *Toonen* may prove an anomaly. *Toonen* can be contrasted with another successful petition to the HRC: *A v Australia* (1998) 5 IHRR 78 (see below n 183 and accompanying text). Despite the adverse findings of the HRC in that case, the Commonwealth has not changed the relevant laws for the better, and continues to respond to suggestions that it should do so with hostility. It is fair to suggest that any application to the HRC which could lead to a finding that the Commonwealth should subject the States to the jurisdiction of HREOC would be strongly opposed by the States, and possibly also the Commonwealth (see above n 126). It is doubtful that a prisoner could mount a successful complaint to the HRC in the face of sustained government opposition, and even if they did, whether any legislative change would result.

131 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia's accession occurred on 25 September 1991 and, by virtue of art 9(2) of the *Optional Protocol*, took effect three months later. See generally Hilary Charlesworth, 'Australia's Accession to the First Optional Protocol of the International Covenant on Civil and Political Rights' (1991) 19 *Melbourne University Law Review* 428; Christopher Caleo, 'Implications of Australia's Accession to the First Optional Protocol on Civil and Political Rights' (1993) 4 *Public Law Review* 175.

132 Article 1 of the *Optional Protocol* provides that a state which is a party to the *ICCPR* and then ratifies the *Optional Protocol* thereby accepts the competence of the HRC to receive and consider complaints from individuals (who are subject to the jurisdiction of that state) alleging that the state has violated any of the rights embodied in the *ICCPR*.



rather than exercising it'.<sup>133</sup> Nevertheless, it is clear that accession to the *Optional Protocol* may itself have a significant impact on the law of Australia. In *Mabo v Queensland [No 2]*, Brennan J explained that:

The opening up of international remedies to individuals pursuant to Australia's accession to the *Optional Protocol* to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.<sup>134</sup>

The provisions for the lodgement of complaints to the HRC are relatively straightforward. Article 2 of the *Optional Protocol* enables individual complaints to submit a written complaint to the HRC.<sup>135</sup> The relevant state is notified of the complaint, and may submit written material in support of its actions. (The Australian Government does not publicly release the full text of submissions provided to the Committee but instead issues a summary of the main arguments contained in the submission.)<sup>136</sup> The decision of the HRC is then communicated to the parties.<sup>137</sup> Importantly, however, the decisions of the HRC are not legally binding on the parties to an application or otherwise enforceable in the manner of a judicial decision.<sup>138</sup>

## B The ICCPR and Prisoners

Several provisions of the *ICCPR* are clearly relevant to prisoners. Article 10(3) provides that prison systems 'shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. The rehabilitative focus of the Covenant is strengthened by a requirement that remand and convicted prisoners be separated where possible, that remand prisoners receive treatment appropriate to their status as unconvicted persons,

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133 Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20, 28. A similar comment was made in *Dietrich v R* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J). An Australian representative on the HRC has noted that because many states fail to provide effective domestic remedies to persons whose rights are violated under the *ICCPR*, the HRC spends a great deal of time acting as a primary fact-finder, which slows the work of the HRC significantly: Elizabeth Evatt, above n 129, 23-4.

134 (1992) 175 CLR 1, 42.

135 Complaints must be anonymous, and the subject matter of a complaint must not be incompatible with the provisions of the *ICCPR*.

136 This policy was confirmed recently in relation to a communication forwarded to the HRC on the mandatory sentencing laws of Western Australia and the Northern Territory: see Commonwealth Attorney-General, *Response to UN Human Rights Committee*, Press Release, No 932 (6 March 2001) <[http://www.law.gov.au/aghome/2001newsag/932\\_01.htm](http://www.law.gov.au/aghome/2001newsag/932_01.htm)> at 26 May 2001.

137 Articles 4 and 5. The practice of the HRC is explained in Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (1991).

138 It should be noted that the procedures for the resolution of individual complaints are additional to the general monitoring function of the HRC established in art 40 of the *ICCPR*, whereby states are required to submit periodic reports on the implementation of the guarantees contained in the Covenant. On this aspect of the work of the HRC see Sarah Joseph, 'New Procedures Concerning the Human Rights Committee's Examination of State Reports' (1995) 13 *Netherlands Human Rights Quarterly* 5; Ineke Boerefijn, 'Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming Report Procedure under Article 40 of the Covenant on Civil and Political Rights' (1995) 17 *Human Rights Quarterly* 766.

and that juvenile prisoners be separated from adults.<sup>139</sup> Article 7 expressly prohibits torture and cruel, inhuman or degrading treatment, and art 10(1) states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

The *ICCPR* does not include detailed definitions or otherwise indicate what standard of treatment for prisoners may satisfy these broadly expressed principles. The prohibition on torture, for example, does not include a definition or any guidance as to what may constitute torture or 'cruel, inhuman or degrading treatment'.<sup>140</sup> The precise meaning of the requirement in art 10(1) that prisoners be treated with humanity and respect for their inherent dignity also remains unclear,<sup>141</sup> although the HRC has explained that this requirement

imposes on State parties a positive obligation ... [which] complements ... the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.<sup>142</sup>

Guidance on the concepts embodied in arts 7 and 10 of the *ICCPR*, and the manner in which they have been applied to prisoners, can be drawn from a range of international law sources. The HRC has found on a number of occasions that grossly inadequate or harsh prison conditions contravene art 7. In one case, the HRC found such a violation where a prisoner was kept in a small, cramped cell (in which around 35 prisoners were held in a space of 20 square metres), and saw no natural light.<sup>143</sup> The prisoner was then moved to an even more crowded facility, where she was subjected to hard labour, poor food and constant interrogation, harassment and severe punishment. In another case, the HRC found a violation of art 7 where a prisoner was subjected to harsh and often degrading conditions, inadequate medical care and repeated periods of solitary confinement.<sup>144</sup> He was also kept in the coldest part of the prison (the prison

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<sup>139</sup> Article 10(a).

<sup>140</sup> Article 1(1) of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 8 (entered into force 26 June 1987), prohibits torture by reference to an extended and precise definition. Article 16(1) of the Convention also requires parties to 'undertake to prevent ... cruel, inhuman, and degrading treatment', but this latter phrase is not defined. It has been argued that the failure to include such a definition greatly reduces the scope of the definition of torture: Bernard, above n 36, 767-9.

<sup>141</sup> Bernard, above n 36, 768. Bernard notes that the concept of human dignity often accompanies international standards prohibiting torture and cruel, inhuman or degrading treatment.

<sup>142</sup> Human Rights Committee, above n 56.

<sup>143</sup> *Amendola and Baritussio v Uruguay*, HRC Communication No R.6/25 (25 January 1978); see Human Rights Committee, *Report of the Human Rights Committee*, 37 UN GAOR (Supp No 40), 187, UN Doc A/37/40 (1982).

<sup>144</sup> *Conteris v Uruguay*, HRC Communication No 139/1983 (17 July 1985); see Human Rights Committee, *Report of the Human Rights Committee*, 40 UN GAOR (Supp No 40), 196, UN Doc A/40/40 (1985). See also Human Rights Committee, *Report of the Human Rights Committee*, 38 UN GAOR (Supp No 40), Annex Item XV, UN Doc A/38/40 (1983).

itself was located in a cold climate area), aggravating his rheumatism and rendering him unable to leave his cell for even brief periods of exercise.

The HRC has also found contraventions of art 10 in several cases in which prisoners were subject to atrocious and demeaning conditions. The common theme in such cases is the dehumanising effect of the conditions to which prisoners were subject. In a series of decisions concerning prisoners from Uruguay, the HRC found a violation of art 10 where prisoners endured constant harassment and persecution by guards, the use of constant and oppressive observation alternating with periods of solitary confinement, malnutrition, and inadequate exercise and fresh air.<sup>145</sup>

In many cases, prisoners have recourse to both arts 7 and 10 as the precise interaction between the two remains unresolved. The UN Special Rapporteur on Torture has commented that while violations of art 7 of the *ICCPR* usually entail violations of art 10(1), the reverse is not always true. This might be taken to suggest that art 7 provides a stricter standard, though it is more likely that a somewhat uncertain borderline exists between the two. The Rapporteur has suggested (in the leading work in this area) that while there may be a number of practical reasons for the often hazy distinction, the HRC has yet to provide a reasoned analysis of the situation.<sup>146</sup>

Reference to equivalent concepts in European human rights instruments is instructive. The European Commission on Human Rights has held that 'inhuman treatment' is treatment that 'deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable'.<sup>147</sup> The Commission has also held that if a punishment is to be found 'degrading' for the purposes of art 3 of the *European Convention on Human Rights* it must attain a certain level of humiliation or debasement, which must be something other than the 'normal' element of humiliation that flows from a criminal conviction and imprisonment.<sup>148</sup> While any examination of prison conditions according to this test depends on all the circumstances at hand, particularly the nature and context of the punishment and the manner in which it is executed,<sup>149</sup> the ill-treatment must attain a certain level of severity in order to breach art 3.<sup>150</sup> As a result, the separation of a prisoner from others in administrative segregation for security, disciplinary or protective reasons does not, of itself, amount to a breach of art 3.<sup>151</sup> This reasoning has enabled the Commission to hold that some apparently

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145 See the discussion in Nigel Rodley, *The Treatment of Prisoners Under International Law* (2<sup>nd</sup> ed, 1999) 289-90. See also *Griffin v Spain*, HRC Communication No 493/1992 (5 April 1995) UN Doc CCPR/C.57/WP/1 (1995).

146 Rodley, above n 145, 289-92.

147 *The 'Greek Case'* (1969) 12 *Yearbook of the European Convention on Human Rights: Report of the European Commission of Human Rights on the 'Greek Case'* 186. This case was commenced by Denmark, Norway, Sweden and the Netherlands against Greece after the 1967 military coup in Greece and the subsequent imprisonment and mistreatment of many people.

148 *Koskinen v Finland* (1994) 18 EHRR CD 146, 158; see also above n 76.

149 *Tyrer v United Kingdom* (1979-80) 2 EHRR 1.

150 The circumstances to be taken into account may, in some cases, include the sex, age and state of health of the victim: *Ireland v United Kingdom* (1979-80) 2 EHRR 1, 25.

151 *Dhoest v Belgium* (1987) 55 D and R 5, 20-1; *Koskinen v Finland* (1994) 18 EHRR CD 146, 158.

harsh examples of separate confinement do not violate art 3.<sup>152</sup> The authors of the leading English work on prisoners' rights have concluded that such decisions suggest that 'too frequently the balance between the perceived requirements of security and basic individual rights will be determined in favour of the former'.<sup>153</sup>

By contrast, the European Committee on Torture adopts a far more holistic approach to prison conditions and determines whether they amount to inhuman and degrading treatment by reference to the overall effect of conditions. On its first visit to the United Kingdom, the Committee undertook a detailed and wide-ranging inspection of prison conditions in several English prisons. The Committee expressed grave concern about the cumulative effect of overcrowding, lack of integrated sanitation (which required prisoners to store bodily waste in buckets kept in their cells, pending a periodic communal 'slopping out' of waste), and other examples of poor treatment at several prisons. The Committee concluded that such conditions amounted to inhuman and degrading treatment.<sup>154</sup>

### C Limitations on the Potential Value of the ICCPR and the *Optional Protocol*

#### 1 *The Status of the ICCPR in Australian Law*

There is no doubt that while important human rights documents such as the ICCPR and the *Optional Protocol* are not part of the municipal law of Australia,<sup>155</sup> they provide a legitimate and important influence on the development of the common law of Australia.<sup>156</sup> Some commentators have sought to further advance the status of such treaties by suggesting that the inclusion of various international human rights treaties (which have been ratified by Australia) in a schedule to the *HREOC Act* may provide Australia with a de facto declaration or bill of rights, at least to the extent that the Commonwealth

152 See, eg, *Hilton v United Kingdom* (1981) 3 EHRR 104. In that case, a prisoner was held in administrative segregation, which included 23 hours of solitary confinement per day. In addition he was subject to harsh treatment: he suffered impersonal treatment by staff, disciplinary provisions were applied in a very strict manner, and he received little attention because other parts of the prison were overcrowded and understaffed. In *Treholt v Norway* (1991) 71 D and R 168, a prisoner undergoing a long sentence for crimes of espionage was subjected to long periods of solitary confinement, sometimes including sensory deprivation. In both cases, no violation of art 3 was found.

153 Livingstone and Owen, above n 77, 317.

154 *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment from 29 July to 10 August 1990*, quoted in Livingstone and Owen, above n 77, 150.

155 This point was recently confirmed in *Minogue v Williams* (1999) 54 ALD 389; aff'd *Minogue v Williams* (2000) 60 ALD 366. See also *Cabal* [2000] FCA 1892, [48]-[52] (doubting the value of art 10 of the ICCPR as an interpretative aid to courts).

156 See, eg, *Dietrich v R* (1992) 177 CLR 292, 321, where Brennan J made this point by specific reference to the ICCPR. For an acute example of the influence of the *European Convention on Human Rights* on English law, see *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [1998] 4 All ER 993, 1003-4; aff'd [2000] 3 WLR 843, 866.

Government has undertaken to give effect to the rights and obligations set out in the treaties included in the schedule.<sup>157</sup>

However, Professor Charlesworth has noted three main obstacles to the adoption of this view.<sup>158</sup> First, the international documents included in the schedule to the *HREOC Act* are not constitutionally entrenched, as are the formal bill of rights documents of countries such as Canada and the United States.<sup>159</sup> Second, the strict rules for the admissibility of complaints, and the cautious jurisprudence of the HRC, suggest that the rights embodied in the *ICCPR* are not currently protected strongly. Third, if a decision of the HRC included a finding that an Australian State had violated the human rights of a complainant, the Commonwealth would face many political difficulties in any attempt to force an unwilling State to take the remedial action required to address the findings of the HRC. There are many areas of State responsibility under the *Australian Constitution*, such as the administration of prisons, in relation to which the States would almost certainly greet any legislative intrusion by the Commonwealth with great hostility.<sup>160</sup>

## 2 Australia's Reservation to Article 10 of the ICCPR

Australia has lodged a reservation to art 10 which is directly relevant to the treatment of prisoners. The reservation noted that while the Government of Australia accepted the principles espoused in art 10, 'these and other provisions of the Covenant are without prejudice to laws and unlawful arrangements, of the type now in force in Australia, for the preservation of custodial discipline in penal establishments'.<sup>161</sup> In my view, the nature of laws and arrangements that may be regarded as operating 'for the preservation of custodial discipline' is potentially quite wide. Accordingly, Australia's reservation to art 10 may extend beyond the formal arrangements governing prison disciplinary proceedings,<sup>162</sup> to many other facets of prison administration associated with the control and management of prisoners. Examples include the imposition of restraints,<sup>163</sup> and the placement of prisoners in administrative segregation, or very high security

157 See Peter Bailey, *Human Rights: Australia in an International Context* (1990) 113. A similar suggestion was made in *Collins v South Australia* (1999) 70 SASR 200, see above n 124.

158 Charlesworth, above n 131.

159 This point was affirmed by the Full Court of the Federal Court in *Minogue v Williams* (2000) 60 ALD 366, 363. Strictly speaking, however, the complete incorporation of an international human rights document in domestic law is not required to protect the rights embodied in that instrument. For example, the *Human Rights Act 1998* (UK) renders provisions of the *European Convention on Human Rights* enforceable in English courts, even though the Convention has not been incorporated into English Law.

160 This statement is not intended to suggest that the Commonwealth is not competent to pass legislation forcing compliance with a decision of the HRC in an area of State responsibility. See the discussion of *Toonen v Australia* (1994) 1(3) IHRR 97, above n 130.

161 ATS 1980 No 23, *Reservations and Declarations*, art 10. The *ICCPR* and Australia's reservations to the Convention are reproduced at <<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>> at 28 June 2001.

162 On the legal arrangements governing prison discipline see Matthew Groves, 'Proceedings for Prison Disciplinary Offences: The Conduct of Hearings and Principles of Review' (1998) 24 *Monash University Law Review* 339.

163 On this issue see the discussion of *Binse v Williams* [1998] 1 VR 381, below Part VIII.

classifications, where they may undergo extremely austere regimes of treatment. Such decisions are currently amenable to little effective scrutiny by domestic courts.<sup>164</sup> Arguably, the broad phrasing of Australia's reservation to art 10 can be interpreted as enabling Australia to treat prisoners in a manner contrary to the ICCPR, if such treatment is conducted in accordance with relevant prison laws and regulations.

A further reservation has been lodged by Australia against the requirement in art 10 of the ICCPR that remand and convicted prisoners should be segregated which states that this is an objective to be 'achieved progressively'.<sup>165</sup> The effect of this reservation was considered in *Cabal v Secretary, Department of Justice (Victoria)*.<sup>166</sup> Cabal was detained pending an extradition hearing. He was held in a high security prison, under the same restrictive conditions that applied to serious criminal prisoners held in the highest security classification. Cabal applied for bail,<sup>167</sup> arguing that those provisions of the *Extradition Act 1988* (Cth) allowing persons subject to extradition proceedings to be detained in 'prison' should be interpreted as allowing the detention of unconvicted persons only in a 'prison' designed for remand and other such prisoners, rather than in one intended for 'corrections' (that is, the holding of convicted persons imprisoned under court sentence). Counsel for Cabal submitted that this apparently strained interpretation of 'prison' should be accepted for the purposes of the *Extradition Act 1988* (Cth) because it was consistent with art 10 of the ICCPR, which requires that remand and convicted prisoners be kept separate. However, Gray J concluded that the effect of the reservation was that 'Australia did not have an absolute international obligation to ensure the segregation of unconvicted prisoners from convicted prisoners. Because of its expressed reservation, at all relevant times, Australia has not had such an absolute obligation'.<sup>168</sup> This decision was affirmed by the Full Court of the Federal Court.<sup>169</sup> In a subsequent decision also concerning Cabal, Gray J commented that 'it must therefore be assumed that it has been established that the failure to

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164 See, eg, *Maybury v Osborne* [1984] 1 NSWLR 579, 589; *McEvoy v Lobban* [1990] 2 Qd R 235; *Re Walker* [1993] 2 Qd R 325; *Bromley v McGowan* (Unreported, Supreme Court of South Australia, Perry J, 4 August 1994).

165 ATS 1980 No 23, *Reservations and Declarations*, art 10. The ICCPR and Australia's reservations to the Convention are reproduced at <<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>> at 28 June 2001.

166 (2000) 177 ALR 306.

167 Bail may be granted to persons held in custody pending the determination of extradition proceedings if the court is satisfied that 'special circumstances' exist: *Extradition Act 1988* (Cth) s 21(6)(f)(iv). On the exercise of the discretion to grant bail by virtue of this provision see *Holt v Hogan (No 1)* (1993) 44 FCR 572, 570; *Bertran v Minister for Justice* (1999) 165 ALR 155, 163; *Cabal v United Mexican States (No 5)* [2000] FCA 525 (Unreported, Goldberg J, 20 April 2000).

168 *Cabal v Secretary, Department of Justice (Victoria)* (2000) 177 ALR 306, 315.

169 *Cabal v Secretary, Department of Justice* [2000] FCA 1227 (Unreported, Drummond, North and Gyles JJ, 30 August 2000) [4]. An application for special leave to appeal to the High Court was refused on 28 November 2000.

segregate the applicants from convicted prisoners is not a breach of Australia's international obligations under the *ICCPR*.<sup>170</sup>

The reasoning adopted in the cases concerning Cabal suggests that Australian courts accept that the reservations lodged by Australia to the *ICCPR* curtail Australia's obligations under the *ICCPR* to the extent of the relevant reservation. It was suggested above that Australia's first reservation to the *ICCPR* (which states that art 10 and other Covenants are without prejudice to laws and lawful arrangements in force in Australia for the preservation of custodial discipline in penal establishments) can be interpreted widely. If so, it could be argued that the effect of the reservation is to render it incompatible with the *ICCPR*. What is the possible effect of such incompatibility? While states may make reservations to a treaty, including the *ICCPR*, the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*') provides that a reservation cannot be incompatible with the object and purpose of the treaty in question.<sup>171</sup> The *Vienna Convention* does not, however, include any provision for determining the incompatibility of reservations. While the International Court of Justice ('ICJ') has held that a state that has lodged an incompatible reservation to a treaty is considered not to be a party to that treaty,<sup>172</sup> the HRC, in contrast, has stated that incompatible reservations are severable (ie a state remains a party to the relevant treaty but loses the benefit of the reservation).<sup>173</sup> According to the view of the ICJ, if Australia's reservation were given the broad reading previously mentioned, Australia would, in theory, not be a party to the *ICCPR*. But according to the reasoning of the HRC, the reservation could be severed, with the result that Australia would remain a party to the *ICCPR* without the benefit of the reservation. The obvious conflict between these competing views on the status of incompatible reservations, and their potential effect on a state's obligations under international law, remains unresolved.<sup>174</sup> The International Law

170 *Cabal v United Mexican States* [2000] FCA 1892 (Unreported, Gray J, 20 December 2000) [43]. In that case, Gray J strongly criticised the preliminary findings of HREOC which suggested that Cabal's conditions of confinement contravened the *ICCPR*. His Honour noted, with some exasperation, that HREOC appeared unaware of Australia's reservation to art 10: [48].

171 Opened for signature 23 May 1969, 1155 UNTS 331, art 19(3) (entered into force 27 January 1980). The customary law concerning reservations also prevents states from making incompatible reservations: *Case Concerning Reservations to the Geneva Convention (Advisory Opinion)* [1951] ICJ Rep 15.

172 *Case Concerning Reservations to the Geneva Convention (Advisory Opinion)* [1951] ICJ Rep 15, 29.

173 See Human Rights Committee, *General Comment 24(52): General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994); reproduced at (1995) 2 IHRR 10. On the General Comment and reservations to the *ICCPR* generally see Catherine Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No 24(52)' (1997) 46 *International and Comparative Law Quarterly* 390.

174 Many of the uncertainties are highlighted in the observations made by the United Kingdom and the United States about the Human Rights Committee's General Comment 24(25), reproduced at (1996) 3(2) IHRR 261 and 265. See also Sarah Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights' (1999) 5 *Journal of International Legal Studies* 57, 86-91. Joseph concludes that the uncertainty surrounding the status of incompatible reservations 'evinces a clear tension between the classical view of treaties creating bilateral and multilateral relations between States, which informs the customary law of reservations, and the modern view that human rights treaties essentially create bilateral relations between "State parties" and individuals': 91.

Commission is currently reviewing the issue of reservations, including reservations to human rights treaties,<sup>175</sup> but that review may only be one step in a much longer process of resolving the status of reservations.

### 3 *Complaints Under the Optional Protocol: Aspects of the Human Rights Committee's Procedure*

The procedures for the resolution of complaints made to the HRC have been criticised on several grounds. First, the strict rules for the admission of complaints to the HRC render the ultimate fate of proceedings commenced under the *Optional Protocol* uncertain. The most significant rule of admissibility is the requirement that a complaint may only be lodged with the HRC after the complainant has exhausted all of his or her available domestic remedies. Such a requirement, commonly included in human rights treaties, obliges a complainant to demonstrate that he or she has attempted to utilise 'all legal remedies available under local law which are in principle capable of providing an effective and sufficient means of redressing wrongs'.<sup>176</sup> This test has been adopted by the HRC to determine whether a complainant has exhausted domestic remedies for the purposes of the *Optional Protocol*.<sup>177</sup> Whether any given remedy must be utilised before a complaint based on the same facts may be admitted by the HRC will depend largely on the character of the remedy in issue. However, the requirement that the remedy be 'effective and sufficient' suggests that it must be capable of providing a viable and enforceable solution to the complainant's problem.<sup>178</sup> According to this view, there is much force in the suggestion that a complainant may not be obliged to seek redress through HREOC because that body may be unable to provide a viable and enforceable means of redress.<sup>179</sup>

A second criticism of the complaints process is that much of the work of the HRC is relatively obscure. Recent amendments to the rules of the Committee have significantly altered many of the more restrictive aspects of its procedure.<sup>180</sup> For example, decisions of the Committee are now published, and applicants are no longer prohibited from publicising the fact that a communication has been

175 Joseph, above n 174, 91.

176 *Neilsen v Denmark*, cited in Antonio Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983) 59.

177 But the HRC has also held that where the issue is unclear the respondent state bears the onus of proof in satisfying the HRC that the complainant has not exhausted all relevant domestic remedies: *Ramirez v Uruguay*, HRC Communication No 4/1977, cited in Christopher Caleo, 'Implications of Australia's Accession to the First Optional Protocol on Civil and Political Rights' (1993) 4 *Public Law Review* 175, fn 26; see also Human Rights Committee, *Selected decisions under the Optional Protocol, 2nd to 16th sessions*, UN Doc CCPR/C/OP/1, 4 (1985).

178 On the procedures for the admissibility of complaints to the HRC see Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (1991) 134-41.

179 See above Part VI. This statement is not intended to suggest that a potential complainant to the HRC should not seek the assistance of HREOC. While HREOC may lack the power to enforce its recommendations against an unwilling respondent, enforcement in the strict sense may not always be necessary. A HREOC investigation, and any consequential recommendations, may be received favourably and may provide the foundation upon which a person's complaint can be resolved by consent.

180 Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, UN Doc CCPR/C/3/Rev.5 (1997).



lodged, or from publicly discussing the details of the case. However, some aspects of the adjudication process remain closed, and the Committee does not conduct oral hearings.<sup>181</sup> It is also apparent that proceedings of the HRC receive relatively little publicity, and may therefore receive less public scrutiny than judicial hearings. There is, however, little doubt that many decisions of the HRC receive significant diplomatic, political and scholarly scrutiny, and that governments may be subject to pressure from the international community to ensure compliance with a decision of the HRC. But it should also be remembered that decisions of the HRC are not legally binding on UN Member States and cannot, therefore, be enforced.<sup>182</sup>

In the absence of an effective means of enforcement, an otherwise successful claim can be frustrated. An example is the case of *A v Australia*.<sup>183</sup> In that case, the complainant, who had been held in migration detention in Australia, lodged a petition with the HRC. He argued that the length of his period of detention (four years), the lack of avenues by which he could effectively challenge his detention, delays and other restrictions related to the provision of legal assistance, and statutory restrictions on possible compensation for periods during which his detention was unlawful, violated several articles of the *ICCPR*. The HRC upheld the first two of these four complaints. The response of the Australian Government was less than satisfactory. Not only did it fail to pay compensation to the complainant, it failed to change its practice: people still face significant disadvantages in gaining access to legal assistance.<sup>184</sup>

## VIII THE INFLUENCE OF THE INTERNATIONAL INSTRUMENTS IN THE DEVELOPMENT AND INTERPRETATION OF AUSTRALIAN LAW

In the absence of a binding international convention on prisoners' rights, or any incorporation of the *UNSMR* or the *Australian Guidelines* into Australian legislation, the general principles concerning the status of international instruments in Australian law apply in determining the effect, if any, that various international conventions may have on the interpretation of correctional legislation and the treatment of prisoners. While an international convention that

181 The discussions of an application by Committee members (along with associated working documents prepared for the Committee) are not public documents. Article 5(3) of the *Optional Protocol* provides that 'The Commission shall hold closed meetings when examining communications'. In relation to oral hearings, Evatt has noted that while the *Optional Protocol* does not expressly provide for the conduct of an oral hearing, it does not necessarily exclude one, see Evatt, above n 129, 40-1.

182 Caleo, above n 177, 179. Caleo notes that decisions of the HRC are normally couched in terms suggesting that the decision must be enforced, and advising of the action required to ensure compliance with the decision. However, such language is of little effect.

183 (1993) 5 *IHRR* 78. For an analysis of the decision see Jane Hearn and Kate Eastman, 'Human Rights Issues for Australia at the United Nations' (1998) 5 *Australian Journal of Human Rights* 194, 196-204.

184 These arrangements have been accepted by Australian courts. The High Court has confirmed the constitutional validity of pt 8 of the *Migration Act 1958* (Cth), which contains many draconian provisions that underpinned the conditions in which 'A' was held: *Abebe v Commonwealth* (1999) 162 ALR 1.

has been signed and ratified by the Australian Government does not form part of the domestic law of Australia, and therefore cannot 'operate as a direct source of individual rights and obligations' in domestic law,<sup>185</sup> there are many judicial statements acknowledging that international law can provide a legitimate and useful influence on the development of Australian law. More particularly, where uncertainty exists in the common law, or in the interpretation of a legislative provision, it is now well settled that judges can and should have recourse to international law to assist in formulating and clarifying domestic law.<sup>186</sup> These principles are especially important when basic or fundamental rights are in issue. In *Mabo*, Brennan J explained that 'the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.<sup>187</sup>

The decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* ('*Teoh*')<sup>188</sup> appeared to extend the situations in which international documents might be relevant. In that case, a majority of the Court held that the ratification of an international convention may create a legitimate expectation that a decision-maker who is granted an administrative discretion, and proposes to make a decision in the exercise of the discretion that is inconsistent with the convention, should provide a person who may be affected by that action with notice of the intended action, and an opportunity to state his or her views against the adoption of such a course. It has been suggested that while a majority of the High Court ostensibly analysed the possible effect of the ratification of a treaty in terms of a legitimate expectation, any requirement that decision-makers must take account of international instruments would introduce an element into administrative decision-making that would exert considerably more influence than the doctrine of legitimate expectation has in the past.<sup>189</sup>

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185 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). A similar view was adopted by the House of Lords in *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696.

186 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J), 321 (Brennan J), 360 (Toohey J); *ACT Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 140-1 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29 (Mason CJ), 48-50 (Brennan J), 74-5 (Deane and Toohey JJ); *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 274-6 (Kirby P); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297-8 (Mason CJ), 323-4 (Brennan J), 388 (Gaudron J); Sir Anthony Mason, above n 133, 28; Michael Kirby, 'The New World Order and Human Rights' (1991) 18 *Melbourne University Law Review* 209; Michael Kirby 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 525.

187 (1992) 175 CLR 1, 42.

188 (1995) 183 CLR 273.

189 The treaty in question was the UN *Convention on the Rights of the Child*, opened for signature 20 November 1989, UN Doc A/RES/44/25 (1989) (entered into force 2 September 1990). Australia ratified the Convention in 1990. Article 3(1) of the Convention provides that: 'In all actions concerning children ... the best interests of the child shall be a primary consideration'. Despite the very serious criminal convictions (multiple counts of importing and supplying heroin) that led to the deportation order which was the subject of the challenge, there was little doubt that it was appropriate for art 3(1) to have an overwhelming influence on the decision-making. In such a case, the difference between a legitimate

The decision received a hostile political response, and successive federal Ministers have issued public statements that purport to mitigate the effect of the decision.<sup>190</sup> Legislative efforts to reverse the decision have so far been unsuccessful.<sup>191</sup> Professor Allars has commented that the decision 'dramatically' increased the 'internationalisation of Australian law',<sup>192</sup> but the precise effect of the *Teoh* case remains uncertain.

The decision in *Collins v South Australia* ('*Collins*')<sup>193</sup> suggests that *Teoh* has not caused a radical change in the status of international instruments in Australian law. In that case, a prisoner (Collins) sought the issue of a declaration that aspects of the treatment of prisoners in the Adelaide Remand Centre contravened various international instruments and were therefore unlawful.<sup>194</sup> Collins argued that the Remand Centre had been significantly overcrowded for several years, and that this overcrowding had given rise to many undesirable management practices. Two prisoners were often housed in a cell designed for only one (which led to cramped and degrading living conditions for long periods), and convicted and remand prisoners were often placed in the same cell. Collins argued that as these problems had existed for many years, and continued to worsen, they could not be dismissed as temporary. Prison officials effectively conceded that most of these submissions were correct.

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expectation of an interest that could have an overpowering influence and a substantive legal right is blurred. The reasoning of the majority in *Teoh* on the doctrine of legitimate expectation was criticised by some. See, eg, Michael Taggart, 'Legitimate Expectation and Treaties in the High Court of Australia' (1996) 112 *Law Quarterly Review* 51, 53; Elizabeth Handsley, 'Legal Fictions and Confusion as Strategies for Protecting Human Rights: A Dissenting View on *Teoh's* Case' (1997) 2 *Newcastle Law Review* 56. The dissenting judgment of McHugh J relied on a more conventional view of legitimate expectation: *Teoh* (1995) 183 CLR 273, 312-14.

190 There have been two joint Ministerial statements by the Commonwealth Attorney-General and Minister for Foreign Affairs, issued on 10 May 1995 and 25 February 1997, available at <<http://www.dfat.gov.au/media/releases/foreign/1995m44.html>>

and <<http://law.gov.au/aghomes/agnews/1997newsag/attachjs.html>> respectively, at 21 June 2001. Each statement explained that the signing of treaties by the Executive is not, and never has been, intended to raise an expectation that government decision-makers would act in accordance with a treaty in the absence of domestic legislation that gave effect to that treaty. The statements purported to apply to both existing treaties and future treaties that Australia might sign. The effectiveness of the statements was doubted in *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALD 517, 522-3 (Hill J).

191 Cf *Administrative Decisions (Effect of International Instruments) Act 1995* (SA), which purports to reverse the effect of the *Teoh* decision. The Administrative Decisions (Effect of International Instruments) Bill 1998 (Cth) lapsed upon the calling of the 1999 federal election. A third Bill was introduced into the House of Representatives on 3 October 1999. The Federal Government has also introduced administrative changes to increase parliamentary involvement in the treaty process: H Coonan, 'Signing International Treaties' (1998) 16 *Australian Institute of Administrative Law Forum* 15.

192 Margaret Allars, 'One Small Step for Legal Doctrine, One Giant Leap for Integrity in Government' (1995) 17 *Sydney Law Review* 204. A similar view on the probable effect of the case is adopted in Handsley, above n 189. Handsley mounts a cogent attack on the reasoning adopted by the High Court, but endorses the result reached in the case.

193 (1999) 74 SASR 200.

194 There was some doubt about the nature of the relief sought by Collins. Justice Millhouse concluded that parts of the summons effectively sought a mandatory injunction against the Crown to prevent the further use of double bunking and other practices. His Honour concluded that the issue of such relief would breach the prohibition on mandatory injunctions against the Crown in s 7 of the *Crown Proceedings Act 1992* (SA).

Justice Millhouse accepted that conditions in the prison had caused great tension, violence and several sexual assaults among the prison's inhabitants. He expressed strong disapproval of many features of the prison regime, and also accepted that these conditions plainly contravened both the *UNSMR* and the *Australian Guidelines*. However, his Honour declined to grant the relief sought because the instruments upon which the action was based had no force at law, and any grant of relief would effectively require the Court to ignore this point. Justice Millhouse also identified another difficulty with granting relief: he suggested that any declaration that the practice of 'doubling up' in single cells was unlawful would require the Government of South Australia to build at least one new prison, and concluded that it was neither practical nor appropriate for the Court to effectively direct substantial government expenditure through the grant of relief in a case. Justice Millhouse acknowledged the difficulty faced by the Court, stating:

Unfortunately successive Governments, perhaps sensing that public opinion would be to spend ... money on other things have not been prepared to build sufficient new prisons. It has been said that there are no votes in building gaols. The Courts cannot tell the government how it should spend its money.<sup>195</sup>

While this statement may accord with established principles of administrative law,<sup>196</sup> it also suggests that the content of international instruments concerning the treatment of prisoners, or the fact that the behaviour of prison administrators appears to contravene those instruments, may have very little real impact on judicial decision-making.

Does this approach render *Teoh's* case of no practical relevance to prisons and prisoners? Professor Taggart is of the opinion that the decision in *Teoh* may 'provide a wobbly stepping stone to a position where unincorporated treaty obligations are treated as mandatory relevant considerations in appropriate circumstances'.<sup>197</sup> On this view, it could be argued that the *Teoh* decision has increased the impetus for Australian courts to draw upon the principles embodied in sources of international law. The decision in *Collins* suggests, however, that courts have difficulty in moving from a discussion of the content of international instruments to placing significant weight on those instruments.

If courts placed more weight on international instruments, the effects of such a move could be substantial. The development of the law of England illustrates

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195 *Collins* (1999) 74 SASR 200, 214-15. Justice Millhouse drew support for this conclusion from *Re Citizen Limbo* (1989) 92 ALR 81, 82-3, where Brennan J cautioned strongly against any suggestion that the courts should usurp the functions of the political arm of government in order to give effect to the enforcement of human rights.

196 There is a significant body of administrative law suggesting that decisions of a political character, or those which include significant policy issues, are not amenable to review in the same manner as other decisions. For example, the rules of procedural fairness may operate in a modified manner for such decisions: Aronson and Dyer, above n 122, 344-8.

197 Michael Taggart, 'Legitimate Expectations and Treaties in the High Court of Australia' (1996) 112 *Law Quarterly Review* 50, 52. But Taggart does not explain what might be 'appropriate' circumstances. For an illustration of how this view might operate see *Premelal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117, in which Einfeld J held that the ground of review of unreasonableness could extend to the recognition of a fundamental human right by a decision-maker. See also *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 216, 232 (Burchett J).

that international human rights documents, particularly those which include a mechanism enabling aggrieved prisoners to lodge complaints in an international forum, may provide a significant stimulus for change in the domestic law of a country.<sup>198</sup> Decisions of both the European Commission on Human Rights and the European Court of Human Rights have considered complaints from prisoners concerning prison administration, covering issues such as rules regulating access to the courts, correspondence with legal advisers, and the procedural rights of prisoners facing disciplinary proceedings.<sup>199</sup> Professor Loughlin has argued convincingly that many English decisions of the last two decades, in which the scope of supervisory review over prison-related matters has been expanded, have been influenced significantly by European decisions.<sup>200</sup> Support for this proposition may be drawn, in particular, from the decision in the English case *R v Secretary of State for the Home Department; Ex parte Leech (No 2)* ('*Leech*').<sup>201</sup>

In *Leech*, a prisoner commenced an application for judicial review, seeking a declaration that a rule empowering prison officials to halt letters deemed to be 'objectionable or of inordinate length' was ultra vires. Counsel for the prison governor submitted that a power to make regulations for the 'regulation and management' of prisons, and also the 'classification, treatment, employment, discipline and control of prisoners and control of persons required to be detained therein', provided sufficient authority to make the rule.<sup>202</sup> The English Court of Appeal held that the provision was insufficiently clear to support regulations empowering prison officials to halt prisoners' letters to lawyers and the courts. The Court was strongly influenced by the effect that such a rule might have on a prisoner's right to communicate with his or her lawyers or the courts,<sup>203</sup> citing

198 The passage of the *Human Rights Act 1998* (UK) will render the future development of English law less instructive. That Act requires public authorities, including courts, to act in accordance with the *European Convention on Human Rights*, and a failure to do so gives rise to a new cause of action. Sir William Wade has argued that the inclusion of the courts within the scope of the Act will inevitably lead to the development of new forms of action between private citizens: Sir William Wade, 'Human Rights and the Judiciary' [1998] *European Human Rights Law Review* 520.

199 See, eg, *Golder v UK* (1975) 1 EHRR 524, in which a complaint alleging that gaolers had frustrated a prisoner's efforts to commence a defamation action against an officer was declared admissible. See also *Silver v UK* (1983) 5 EHRR 347, in which several complaints from prisoners concerning alleged interference with their correspondence led to a friendly settlement, which included publication of the relevant prison rules, with copies being placed in prison libraries.

200 Martin Loughlin, 'The Underside of the Law: Judicial Review and the Prison Disciplinary System' (1993) 46(2) *Current Legal Problems* 52; Martin Loughlin and Peter Quinn, 'Prisons, Rules and Courts: A Study in Administrative Law' (1993) 56 *Modern Law Review* 497.

201 [1993] 4 All ER 539. It should be noted that this decision was delivered shortly after the publication of Loughlin's most influential writings on this area.

202 The power is located in s 47(1) of the *Prison Act 1952* (Eng).

203 This principle was asserted strongly by the House of Lords in *Raymond v Honey* [1983] 1 AC 1. In many ways *Raymond v Honey* is the forerunner of *Leech*, in part because the decision emphasised prisoners' right of access to the courts, but also because it was one of the earliest decisions in which the House of Lords openly drew support from European decisions. The principle (of a prisoner's right of access) was recently affirmed in *R v Secretary of State for the Home Dept; Ex parte Simms* [1999] 3 All ER 400, where it was held that rules restricting prisoners' access to journalists and the conditions of visits could not be made in the absence of a clear power to do so. It is notable that the Court of Appeal, while reaching a different conclusion, also made detailed reference to European law: [1998] 2 All ER 491.

European decisions which had emphasised the important nature of such rights.<sup>204</sup> The Court accepted that while such decisions were not binding, it was relevant to note that such a law 'reinforces a conclusion that we have arrived at in the light of the principles of our domestic jurisprudence'.<sup>205</sup>

This case may be contrasted with the Victorian decision of *Binse v Williams*.<sup>206</sup> Binse was a prisoner with a long history of serious offences (including violence and escape attempts). He and another prisoner were caught attempting to escape from the State's most secure prison. Both prisoners were placed on a special regime designed to prevent any further escape attempts, and also to minimise the risk to staff and other prisoners posed by the execution of any such plan. They were each confined to their cells for 23 hours per day, and allowed outside for only one hour of exercise in a completely enclosed exercise yard. During this hour they were physically restrained by the use of handcuffs, which were attached to a body belt for extra security, and leg shackles.

Binse issued an originating motion seeking a declaration that the governor's decision to permit the use of restraints was ultra vires. Counsel for Binse submitted that prison officials could apply instruments of restraint to prisoners only in the particular instances permitted by the relevant regulations and administrative rules, such as to prevent self injury by a prisoner or an escape during his or her transfer. Repeated escape attempts or persistent bad behaviour, like that of Binse, did not constitute grounds for placing a prisoner in chains. Counsel for the governor sought to rely upon the general managerial powers granted by ss 20-1 of the *Corrections Act 1986* (Vic). Section 20 requires the officer in charge of a prison, usually the prison governor, to 'take all reasonable steps' to ensure both 'the security of the prison or part of the prison' and the 'safe custody and good of the prison and the safe custody and welfare of the prisoners'.

At first instance, Byrne J accepted that the managerial powers granted to prison governors were expressed in broad language to enable prison officials – as much as possible – to deal with the myriad of issues that arise in the management of a prison.<sup>207</sup> In this difficult and unpredictable environment, his Honour concluded that the general powers granted to prison managers to

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204 Most notably *Campbell v UK* (1992) 15 EHRR 137. In that case, the European Court of Human Rights upheld a complaint by a prisoner alleging that the routine examination of his correspondence with lawyers violated art 8 of the *European Convention on Human Rights*, which provides that: 'There shall be no interference by a public authority with the exercise of [the right of correspondence] except such as [is] in accordance with the law and is necessary in a democratic society in the interests of ... public safety ... the prevention of disorder or crime [or] the protection of the rights and freedoms of others'.

205 *Leech* [1993] 4 All ER 539, 555. Much of the language of the Court of Appeal, which referred to the requirement of an 'objective' or 'demonstrable need' to read the power in the manner suggested by counsel for the prison governor, reflects the European principle of proportionality: 551. For a more recent decision, see *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622. In that case, parts of a Home Office policy manual which allowed guards to search prisoners' cells in their absence were declared unlawful, because they allowed material that might be privileged to be searched while a prisoner was absent. The Law Lords were strongly influenced by European law, particularly the doctrine of proportionality: 1635.

206 [1998] 1 VR 381.

207 (1995) 8 VAR 508. Justice Byrne did not consider the possible application of international instruments.

discharge their duties should be given a very expansive interpretation, including enabling the governor in the case to apply restraints to Binse. In other words, the various regulations and administrative rules governing the use of restraints were not an exhaustive statement of the situations in which restraints could be used.

On appeal, counsel for Binse submitted that the correct scope of the wide administrative powers granted to the governor should be determined by reference to the fundamental rights embodied in international instruments. Reference was made in particular to the prohibition against torture and cruel, inhuman or degrading treatment or punishment in art 7 of the ICCPR. The Court of Appeal was also referred to art 1 of the *UN Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prohibits 'any act by which severe pain or suffering ... is intentionally inflicted by ... a public official' to punish a person.<sup>208</sup> The article expressly excludes any pain or suffering that is inflicted as a result of a lawful sanction, that is, sanctions administered according to the *UNSMR*, (which permit the use of restraints in similar circumstances to the *Corrections Regulations 1988* (Vic)).<sup>209</sup> Further support for the argument that the Court should refer to international law to clarify the scope and purpose of the governor's administrative powers was drawn from the second reading speech of the Minister introducing the *Corrections Act 1986* (Vic). The Minister expressly noted that the Act included a statutory charter of prisoners' rights, which was consistent with various aspects of the *UNSMR*.<sup>210</sup> But the statutory charter of prisoners' rights makes no reference to either forms of punishment (in a more general sense) or the use of restraints for administrative purposes.

While the Court of Appeal accepted that where uncertainty exists either in the common law or in the correct interpretation to be given to a statutory provision, it is desirable for courts to refer to international law documents, especially those that concern fundamental human rights, the Court concluded that there was in fact no ambiguity or uncertainty about the scope of the governor's administrative powers to apply restraints to prisoners and, therefore, no need to draw upon international instruments concerning the treatment of prisoners.<sup>211</sup>

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208 GA Res 3452 (XXX), GAOR (Supp No 34), Annex Item 30, 91, UN Doc A/10034 (1976).

209 New regulations have since been issued in Victoria, but the provisions concerning the use of restraints are effectively unchanged: see *Corrections Regulations 1998* (Vic) regs 14-16.

210 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1986, 634 (Mr R C Fordham, Minister for Industry, Technology and Resources, on behalf of the Minister for Police and Emergency Services).

211 *Binse v Williams* [1998] 1 VR 381, 391-4. A similar conclusion was reached in *Re Mathieson and Department of Employment, Education and Training* (1990) 20 ALD 253 and in *Knight and Secretary to the Department of Employment, Education and Training* (Unreported, No V92/326 AAT No 8228, 7 September 1992). Both decisions concerned applications from prisoners seeking review of decisions by the Commonwealth Department of Employment, Education and Training, denying them student assistance allowances to pay for study expenses. In each case, the Administrative Appeals Tribunal held that the various provisions of the *Austudy Regulations 1990* (Cth), which preclude Austudy payments to any person held in custody, were mandatory and absolute. In view of the absence of discretion, international instruments concerning the treatment of prisoners were held to be not relevant to the interpretation of the regulations.

This aspect of the decision in *Binse* is of general importance. All Australian correctional statutes contain provisions which grant very wide managerial powers to either or both prison governors and administrative heads of correctional services organisations.<sup>212</sup> Justice Byrne's judgment suggests that where prison officials cannot point to one or more provisions that may expressly authorise a decision affecting a prisoner, support may be drawn from the residual discretion (for want of a better description) inherent in the managerial powers granted to prison officials. While the precise scope of that residual discretion remains undecided, it is arguable that it may be relied upon by prison officials where a decision is explicable by reference to the 'general administration' of a prison and does not directly contradict any other applicable provision.<sup>213</sup> The decision of the Court of Appeal indicates that these principles, as opposed to the provisions contained in international instruments, may determine questions on the scope of the power of prison officials.<sup>214</sup>

If *Binse* is considered in conjunction with the decision in *Cabal v United Mexican States*, it seems clear that judges remain unwilling to draw assistance from international instruments. In his many applications for bail pending the determination of an application for extradition, Cabal submitted that the increasing length of his detention, and the severe conditions of the maximum security prison in which he was held, constituted 'special circumstances' for the purposes of the grant of bail.<sup>215</sup> In one application, he drew support from the preliminary findings of an investigation by HREOC, which suggested that the conditions of his detention contravened art 10(1) of the *ICCPR*. Justice Gray rejected the application, and suggested that the *ICCPR* was of little potential value to the Court. His Honour stated:

It would seem to be an odd proposition that breaches of human rights would not amount to 'special circumstances' for the purposes of an application for bail. The question for the Court in a proceeding such as this, however, is not whether breaches of human rights have occurred, but whether 'special circumstances' exist ... This Court would not ordinarily undertake the task of determining whether breaches of human rights has [sic] occurred in the context of an application for bail under the Extradition Act. At best, it might take account of the standards laid down

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212 *Correctional Centres Act 1952* (NSW) s 6(3); *Remand Centres Act 1976* (ACT) ss 7-9; *Prisons (Correctional Centres) Act 1980* (NT) s 60; *Prisons Act 1981* (WA) s 7(1); *Correctional Services Act 1982* (SA) s 24(2); *Corrective Services Act 1988* (Qld) ss 13(1), 14; *Corrections Act 1997* (Tas) s 6.

213 This explanation of the decision is similar to that adopted in the leading American decision of *Turner v Safley*, 482 US 78, 89 (1987), in which the Supreme Court held that a prison regulation which infringed a prisoner's rights in a manner that would normally be unconstitutional could nonetheless be valid if it was reasonably related to legitimate penological interests.

214 It is also worth noting that the Court could have gained assistance from Australian cases. Justice Charles cited *Coco v R* (1994) 179 CLR 427, 436-7, where a majority of the High Court held that the presence of general words in a statutory provision is normally insufficient to authorise interference with the basic immunities upon which freedoms are based. Yet Charles JA apparently failed to consider the effect or relevance of the High Court's reasoning on 'implied rights': *Binse v Williams* [1998] 1 VR 381, 394. With respect, the failure of the Court of Appeal to articulate a coherent basis for failing or refusing to consider an apparently relevant High Court case presents the least satisfactory approach possible.

215 Section 21(6)(iv) of the *Extradition Act 1988* (Cth) provides that bail may be granted 'if there are special circumstances justifying such a course'.



in human rights instruments, as they apply to Australia, as a guide to what are 'broad community standards', in determining whether there are 'special circumstances'. In many respects, the provisions of the ICCPR are expressed in terms so general that any attempt to apply them would likely distract the Court from its primary task.<sup>216</sup>

Given the very wide and unstructured nature of the governor's discretion in *Binse*, it would not have been difficult for the Court of Appeal to adopt the view that the precise scope of the power was uncertain, and to then draw upon international law material as an aid to clarify, and perhaps even limit, the scope of the power. Justice Gray could have adopted a similar course to determine the meaning, and possible presence of, 'special circumstances' for the purposes of a grant of bail in *Cabal v United Mexican States*. It could be suggested that if Australian courts steadfastly refuse to acknowledge the existence of any uncertainty when faced with an almost open-ended statutory power, international instruments may have little, if any, role to play in the interpretation of Australian correctional legislation.

It is also worth noting that (not surprisingly) Australian courts have been unsympathetic to applications which have sought to draw support from international instruments for more radical propositions. There is, for example, no Australian judicial decision to support the proposition that if the conditions under which a prisoner will be held contravene principles of international law, the sentence of imprisonment is therefore rendered inappropriate or even unlawful. A submission of the latter kind was advanced in *R v Hollingshed and Rodgers*.<sup>217</sup> The two prisoners in that case had been convicted of violent offences in the Australian Capital Territory, and faced transfer to New South Wales upon sentence of imprisonment.<sup>218</sup> Expert evidence suggested that Rodgers, who had a long history as both the victim and perpetrator of violence, would be difficult to manage. Accordingly, it was likely that he would be imprisoned in an isolated protective custody unit, under a very harsh regime.<sup>219</sup> Chief Justice Miles was of the opinion that the submission invited the Court not simply to take account of international instruments on the treatment of prisoners but also to make a 'judicial finding that the control and management of prisons in New South Wales amounts to a breach of the ICCPR'.<sup>220</sup> His Honour accepted that Rodgers

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216 *Cabal v United Mexican States* [2000] FCA 1892 (Unreported, Gray J, 20 December 2000) [52].

217 (1993) 112 FLR 109.

218 Australian Capital Territory prisoners are transferred under the *Removal of Prisoners (Australian Capital Territory) Act 1968* (Cth). Aspects of the transfer process are explained in *Subritzky v Circosta* (1997) 127 ACTR 1.

219 Rodgers was extremely attractive. He had endured sexual attention from men during his life as a homeless youth, but had also committed many acts of violence and robbery against gay men. Expert evidence described him as a 'classic case of the victim becoming the perpetrator'. It is worth noting that Miles CJ did not exhibit the surprise that many judges express at the suggestion that an attractive young prisoner would be the victim of sexual assault in prison. A recent study confirmed the point, apparently well known to all persons concerned with the administration of criminal justice but not to judicial officers and politicians, that sexual violence against young or vulnerable prisoners is widespread in New South Wales prisons: David Heilpurn, *Without Fear of Favour: Sexual Assault of Young Prisoners* (1998).

220 *R v Hollingshed and Rodgers* (1993) 112 FLR 109, 116.

would experience great hardship if held in protective custody but declined to accept that such detention, however harsh, was unlawful.<sup>221</sup>

## IX CONCLUSIONS

Despite the decline of restrictive common law doctrines governing the status of prisoners, Australian law on the rights and treatment of prisoners has advanced less than might be expected. Judicial decisions on the interpretation of correctional legislation have not yielded principles by which the decisions of prison officials may be subjected to rigorous scrutiny by courts in applications for judicial review. Legislative attempts to grant rights to prisoners have also provided few clear benefits to prisoners. Importantly, the statutory charters of prisoners' rights in Victoria and Tasmania do not contain any mechanism by which prisoners may enforce those rights. Furthermore, I have argued that the limited jurisdiction of HREOC prevents that body from operating as an effective grievance mechanism for prisoners.

In my opinion, it is arguable that judicial attitudes present an equally significant obstacle. The judicial decisions examined in this article demonstrate that Australian courts are extremely reluctant to draw on international instruments in the interpretation of correctional legislation. As long as Australian courts remain reluctant to accord significant weight to core human rights treaties in cases concerning prisoners, it is unlikely that they will draw guidance from the methods and principles developed by international human rights fora. This is unfortunate because the decisions of international bodies (such as the HRC and the European Commission for Human Rights) examined in this article suggest that significant and useful guidance may be gained from international instruments.

The most extensive international instruments relating to prisons and prisoners are not treaties but non-binding model rules and guidelines, such as the *UNSMR* and the *UN Body of Principles*. While these instruments contain useful pronouncements on the treatment and status of prisoners, they lack the status and influence accorded to treaties. The reluctance of Australian courts to place significant weight on international instruments may be more pronounced for these forms of 'soft' or quasi-international law. In addition, even instruments such as these, which are specifically concerned with prisons and prisoners, contain relatively little detail or clear standards for the management of prisons and the treatment of prisoners. The *Australian Guidelines* suffer from the same

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221 A similar conclusion was reached in *R v Smith* (Unreported, Supreme Court of South Australia, Bleby J, 16 April 1998). In that case, Bleby J flatly rejected an appeal against a sentence that was based, in part, on a submission that the conditions under which the prisoner was to be confined did not conform to the *UNSMR*. His Honour held that, as the treatment of prisoners was regulated by the *Correctional Services Act 1982* (SA), and no evidence was led suggesting that the Act had been contravened, the content of any international instruments dealing with the treatment of prisoners was not relevant. Such reasoning accords with the common law rule that intolerable conditions of detention cannot render imprisonment unlawful. The legality of detention is determined by reference to the validity of the order under which a prisoner is sentenced: *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

deficiencies. However, these criticisms should not obscure the important value of the very existence of model rules, guidelines and statutory charters of prisoners' rights to indicate broadly the philosophies and standards to which those involved in corrections may aspire. Such criticisms should instead draw attention to the failure of Australian prison administrators, governments and courts to actually rely on the existing array of model rules and guidelines as relevant and meaningful statements of principle.