Psychiatry, Psychology and Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/tppl20

Towards Human Rights Compliance in Australian Prisons

by Anita Mackay, Canberra: ANU Press, November 2020, 368pp, AU$60 or Free Download, ISBN 9781760464004 (print), ISBN 9781760464011 (online)

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To cite this article: Kris Gledhill (2023) Towards Human Rights Compliance in Australian Prisons, Psychiatry, Psychology and Law, 30:5, 737-744, DOI: 10.1080/13218719.2023.2242441

To link to this article: https://doi.org/10.1080/13218719.2023.2242441

Psychiatry, Psychology and Law, 2023
Vol. 30, No. 5, 737–744, https://doi.org/10.1080/13218719.2023.2242441

Routledge
Taylor & Francis Group

BOOK REVIEW

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 it raises important issues and has useful discussion and analysis. In the Foreword, Sir Malcolm Evans, a former Chair of the UN Subcommittee on the Prevention of Torture, refers to the book's 'careful and thoughtful presentation and analysis', together with its practical suggestions. The decision of Australia to ratify the Optional Protocol to the Convention against Torture (OPCAT), for which the Subcommittee is the relevant expert body, was the catalyst for the book, and so it is worth noting that the aim of OPCAT, as reflected in its preamble, is to have better protective measures against torture and other cruel, inhuman and degrading conduct in the context of detention.

It is well known that prisons can be difficult and dangerous places for those who work there, and also for those detained there, whether they have been convicted or still benefit from the presumption of innocence, and, indeed, whether their detention arises through the criminal justice system or is based on other grounds. Those detained are in the inevitably disempowered and vulnerable state of dependence on those who operate the prison. As such, prisons have to protect detainees from other detainees and occasionally from officers. Moreover, prisons are places where people may self-harm to a higher degree than in the general population, and so prisons have to protect people from themselves. These obligations arise in the context of governmental allocations of funding that may rest on the view that prisons are places to be funded at minimum levels because there are limited votes from proper funding.

All this can be fertile ground for breaches of the right to which there are no exceptions, namely not to be subject to torture or to cruel, inhuman or degrading treatment or punishment. This can be found in Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR), which Australia ratified in 1980 and New Zealand in 1978. Ratification brings with it an obligation to take such steps as are necessary to guarantee rights in practice. As such, protecting detainees from violence from others or from self-harm are existing obligations because failures in that regard might well breach the state duty to protect people's Article 7 rights.

The ICCPR is supplemented in this regard by the Convention Against Torture 1984, which Australia ratified in 1989, as did New Zealand. This provides extra guidance on what protections are required. OPCAT, drafted in 2002, goes further by recognising that places of detention come with an enhanced risk of breaches of the relevant standards, such that a preventive regime of inspections is necessary. New Zealand ratified this in 2007 and Australia in 2017. The Turnbull Government was the one that took the step for Australia, and did so for diplomatic reasons: ratification implemented a pledge made as part of the successful campaign for Australia to take a seat on the UN Human Rights Council.

The discrimination context

Another feature of prisons is that those detained tend not to be fully representative of

society. Instead, there is likely to be an over-representation of marginalised groups. Sensibly, Mackay's book opens with an analysis of the Australian prison population, based on official statistics from the middle of 2019. The picture then was a prison population of 43,000. Figures from the Australian Bureau of Statistics show that the population then dropped to 41,000 in 2020 but then climbed back to 43,000 in 2021 (with a 16% increase in the number of remand prisoners, detained with the presumption of innocence to keep them company).

This puts Australia in the moderately high category on international comparisons: the World Prison Brief, produced by the Institute for Crime and Justice Policy Research at Birkbeck, University of London, records that the range as at the time of writing is from 18 per 100,000 in the Faroe Islands to 629 per 100,000 in the USA: the USA is a significant outlier in its faith in imprisonment. Using figures from September 2021, Australia was the 97th highest user of imprisonment out of 223 jurisdictions, with a rate of 165 per 100,000. If one does a comparison with some English-speaking jurisdictions, the rate given for Scotland is 136 per 100,000, for England and Wales is 134, for Canada 104, Northern Ireland 89 and the Republic of Ireland 83. For most of recent history, New Zealand has been a heavier user of imprisonment than Australia, but the Ardern governments have worked to reduce the prison population, and the rate quoted on the World Prison Brief, from March 2022, is 149 per 100,000.

The value of statistics in this context is to raise the question: why should there be such variations? Is there, for example, such a difference in crime rates as between the two jurisdictions on the island of Ireland and Australia to justify double the rate of incarceration in Australia? The statistics raise further questions when interrogated at a more discrete level, as Mackay sets out: variations between different parts of Australia are marked, with the figures for the Northern Territory showing a rate of 942 per 100,000 of the population and 1708 per 100,000 of the male population. That is 1.7% of the males resident in the Northern Territory are incarcerated there. The figures for indigenous Australians are even more stark: for Australia as a whole it is 2349 per 100,000, with the highest rate being 4105 per 100,000 in Western Australia.

In *DH v Czech Republic*, App No 57325/00, 13 November 2007, the Grand Chamber of the European Court of Human Rights decided that such stark statistics (which on the facts of that case related to the significant over-representation of Roma children in separate special education schools) amounted to prima facie evidence of discrimination so as to place the burden of proving the absence of discrimination on the government. In short, unless there are good reasons put forward by the state to show objective, non-discriminatory factors that explain the statistics, discrimination is demonstrated. The figures for indigenous Australians seem to reach that level of reversing the burden of proof: the same is true for New Zealand, with Māori making up over 50% of the prison population but around 16% of the general population.

The other features arising from the figures set out by Mackay are the high rates of mental ill health and cognitive impairments arising from intellectual disability and traumatic brain injury, of the disproportionate incarceration of people from certain post-codes, and the growth of older people in prison and of women. The net effect is that the prison population 'is comprised of the most vulnerable and marginalised members of the community' (p. 29). The rest of Chapter 1 sets out an account of what happens to them: not just a loss of liberty and autonomy, but powerlessness and a loss of security because of what occurs in prisons, exacerbated by overcrowding.

International frameworks

This enhances the value of other frameworks: indeed, given the politics of funding criminal justice, other frameworks provide an essential

safeguard. In Chapter 2, Mackay provides a brief account of the obligations arising through international human rights law, including relevant human rights treaties and standards set in soft law documents such as the Mandela Rules (the UN Standard Minimum Rules for the Treatment of Prisoners) and the Bangkok Rules (relating to women prisoners). She also notes that Australia tends to reject findings made against it by international human rights bodies, but a glass half-full approach leads her to suggest that the 'recent ratification of the OPCAT may represent a renewed commitment to international human rights law compliance in Australian prisons' (p. 75).

Mackay then turns to an account of what OPCAT will require, and in particular (a) the establishment of a domestic process for monitoring prisons and other places of detention and (b) allowing visits by the international monitoring process established under the OPCAT and conducted by the Subcommittee on the Prevention of Torture. She notes that this will have three significant effects: international scrutiny, shifting the focus of existing mechanisms to preventive processes and also requiring the existing mechanisms to be upgraded so as to comply with what OPCAT requires of what is termed a National Preventive Mechanism (or Mechanisms).

Mackay concludes, after a detailed review of what already exists and what will have to change, that the multitude of existing oversight mechanisms (courts, coroners, Ombudsmen, human rights and anti-discrimination commissions, Royal Commissions and parliamentary bodies) 'have not, despite numerous sensible recommendations, been able to rectify violations of rights, much less prevent them from occurring in the first place' (p. 134). There is, therefore, a problem. The changes she outlines, which will require National Preventive Mechanisms (or Mechanisms) with adequate resources, powers and expertise, might 'revolutionise the prison monitoring landscape' (p. 135). The difficulties in such expansive change might explain why the UN Committee Against Torture, the expert body sitting under the Convention Against Torture, allowed an extension to January 2023 to establish a body that is compliant with the relevant standards: but that deadline was missed, and, problematically, the Subcommittee on the Prevention of Torture, the international monitoring body established under OPCAT to supplement the National Preventive Mechanism, suspended its visit to Australia in 2022 because its members were denied access to some places of detention (see, generally, https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat, and, more specifically, https://www.ombudsman.gov.au/__data/assets/pdf_file/0016/290131/NPM-Network-Joint-Statement-For-publication.pdf, accessed 19 May 2023).

Chapters 4–8 in the book represent its main scholarly contribution and chime nicely with one of the main themes in Chapter 3, namely that there is a need to change from responding to violations of rights to preventing them happening in the first place (the fence at the top of the cliff being preferable to the ambulance at the bottom). This is split into two parts, macro-level changes (described in Chapters 4 to 6) and micro-level changes (Chapters 7 and 8). The macro-level changes, which require different approaches to be taken in society as a whole, are (a) reduced imprisonment, in part to reduce overcrowding, (b) putting international human rights obligations into domestic law to secure compliance with them and (c) moving the focus of prisons to rehabilitation. The micro-level changes needed within prisons are (a) supporting prison staff to follow human rights standards and (b) providing decent physical conditions in prisons.

Mackay provides a very readable guide to each of these important topics. For example, in Chapter 4, relating to the need to reduce imprisonment levels, she sets out how a prison population that rises more quickly than the physical capacity of prisons leads to overcrowding and additional breaches of rights; discusses the idea of abolishing prisons and of

transferring investment to preventive measures (largely investing in the communities from which detainees tend to come); and also outlines what is needed in terms of changing public opinion to support a reduction in the use of imprisonment (which she concludes is more realistic than abolition); then she sets out some practical changes that might assist in this regard (such as sentencing law reform). It is a practical manifesto for sustainable improvement.

Taking full account of human rights is the key to much of what is suggested. Accordingly, moving prisons towards a focus on rehabilitation is already an obligation grounded in human rights standards: it is something that must happen to comply with the overarching ICCPR, Article 10(3) of which requires that the purpose of imprisonment shall be rehabilitation. Similarly, the chapter on supporting prison staff to act in a human rights-compliant manner rests on the absolute prohibition in international human rights law of torture or other forms of cruel, inhuman or degrading treatment and the various other standards that exist to try to secure that aim. Mackay discusses such matters as the need to limit solitary confinement, the obligation to improve prison medical care and the need to reduce strip searching (particularly for women). But she also notes the importance of training staff and of making sure that staff feel that their good work is valued (in contrast to a focus on when things go wrong).

This provides an important reminder that securing compliance with the relevant standards is not just a matter of emphasising that prisoners have rights; those who interact with prisoners are essential partners in the project. They need to be adequately resourced and trained. Another example of this need to think broadly is that the chapter on prison conditions notes that there is a basis in human rights law for having decent conditions but also discusses such matters as the importance of architecture in prison construction.

Politics and dogma

None of the changes suggested by Mackay are surprising; nor do they undermine what is often the focus of those calling for harsher prison use and regimes, namely better public safety. Historical Australian experience is that the best route to public benefit is a humane and rehabilitative prison regime. Mackay sets out a reminder of the experiment of Captain Alexander Maconochie on Norfolk Island in the 1840s to run a penal establishment that focused on training and rehabilitation, with incentives to responsible behaviour. He rejected the approach that people sent to prison should be subject to additional punishments. The recidivism rate he secured was a third of that from the more traditional approach: but it was the latter that was more popular in society. This perhaps illustrates that those who favour reform have an uphill battle to persuade those who make decisions in society that govern the lives of those who pass through the criminal justice system. Calls for reform rest on evidence-based collations of relevant material and arguments, and Mackay provides a very useful compilation of materials and analysis.

Mackay does take the optimist route, but that is perhaps inherent in those who favour using human rights-based solutions. As the book was being written, Queensland was confirming the value of overarching human rights standards by introducing its *Human Rights Act 2019* (Qld), supplementing the existing examples of such legislation in Victoria and the Australian Capital Territory (ACT). These are all shoots on which optimism can feed. This has happened before. After all, if the modern era of human rights is traced back to the Universal Declaration of Human Rights 1948, a key member of Eleanor Roosevelt's Drafting Committee was William Hodgson, the Australian soldier and then diplomat, who was keen for there to be binding human rights standards. But there are clearly voices the other way, and they are often important in setting the political agenda.

Indeed, there are conservative judicial voices who do not favour legally binding rights in this context. Former High Court Justice Dyson Heydon exemplifies this, warning in strong terms that binding human rights standards were problematic:

> The odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose. (*Momcilovic v R* [2011] HCA 34, para 453)

He preferred the 'dreary and mundane' job of judges protecting the rule of law (para 455), which led him to wish to strike down the Victorian Charter of Rights and Responsibilities because it required unjudicial tasks to be carried out. This is but one part of the challenge in relation to a rights-based approach to prisoners. As Maconochie found in the nineteenth century, popular opinion may present a barrier.

At present, and for some time, political culture has reflected 'penal populism' and its belief that prison works, providing a deterrent to crime and protecting the public by removing people from society. Naturally, one can run the argument that deterrence is a theory based on people controlling their behaviour through a cost-benefit analysis, which is not overly realistic when applied to the majority of people in prison. In short, few of them sit down and take into account the risk of a certain level of imprisonment before deciding whether to commit a particular crime. Similarly, the idea of protecting the public by sending people to institutions that do not have much success in preventing future offending is open to question as a long-term solution. But that did not get traction in the past.

From dogma to evidence-based policy?

A new approach may be a focus on the cost of it all. In New Zealand, the centre-right Finance Minister Bill English noted in 2011 that a high incarceration rate was a moral and fiscal failure; it rose significantly thereafter as a result of policies implemented by his party – which perhaps illustrates how political realities and the need to secure votes may require politicians to ignore evidence. At the same time, some politicians do come back to issues. When English became Prime Minister, he commissioned the Chief Science Advisor to collate the evidence, leading to P. Gluckman 'Using evidence to build a better justice system: The challenge of rising prison costs' (2018, available at https://dpmc.govt.nz/sites/default/files/2021-10/pmcsa-Using-evidence-to-build-a-better-justice-system.pdf). In this, Professor Sir Peter Gluckman noted that 'dogma not data' was behind the situation whereby prison costs exceeded what was needed to imprison the 'subset' of detainees who needed to be there; and that prisons were 'extremely expensive training grounds for further offending' from 'teaching . . . criminal skills', promoting prospects of gang membership and hurting prospects of integration into society. He noted that data had been used by some countries to drive prison populations lower and focus on policies with better chances of success. In her Chapter 4, Mackay cites briefly the limited evidence of public support for the view that reducing crime is a better way to use public funds (pp. 170–172): it would have been interesting to hear her views on how this could be done, and to have had this as a repeated theme through the book.

Another significant contribution to the evidence-based approach is worth noting. The Bugmy Bar Book Committee are doing significant work in collating the social science evidence relating to the factors that are repeatedly evident in people before the criminal courts, including factors such as foetal alcohol spectrum disorders and acquired brain injury, which may mean that management of behaviour through a medical approach rather than a criminal justice approach is fairer and more likely to secure public safety (see https://www.publicdefenders.nsw.gov.au/barbook for

access to the Bugmy Bar Book, named after *Bugmy v R* [2013] HCA, (2013) 249 CLR 571, the High Court case that confirmed it was possible to secure mitigation from circumstances of deprivation in an offender's background).

This material helps to explain why those interested in the intersection of the law, psychiatry and psychology might find Mackay's book worthwhile to read. Of course, as it is aimed at those interested in prison law in general rather than specifically its overlap with mental health, it will be a starting point. But there is a significant overlap between mental health matters and the prison population. For example, Gluckman noted that one of the effects of a focus on retribution and over-incarceration was that mental health issues were compounded rather than treated. The extent of the problem in New Zealand is staggering. The research quoted by Gluckman was to the effect that 91% of prisoners have a mental illness or addiction disorder in their lifetimes, 62% being diagnosed in the previous 12 months, such that it is a current issue for them. The rate of substance-abuse disorder is seven times higher than in the general population. But only 47% of those with a mental health diagnosis were currently being treated, and only 42% of those with a substance-use disorder were being treated.

Mackay does cite some relevant statistics for Australian prisons, with significant figures for intellectual disabilities, histories of brain trauma and of mental illness, and large numbers involved in self-harm (pp. 18–20). She also makes a variety of references to the Convention on the Rights of Persons with Disabilities 2006 (CRPD), which both Australia and New Zealand ratified in 2008. She notes that this 'has particular relevance to Australia given the high proportion of the Australian prison population with mental illness and disabilities' (p. 48). She also records that challenges brought to international human rights mechanisms about prison conditions have included one to the Human Rights Committee of the UN (sitting under the ICCPR, which the CRPD replicates for persons with disabilities) involving a man with an intellectual disability and three to the Committee on the Rights of Persons with Disabilities (pp. 66–70).

These figures and cases demonstrate that there is a very clear prison and mental disorder overlap. Article 15 of the CRPD, which features in various references by Mackay, requires that persons with disabilities be given equal protection against torture and cruel, inhuman or degrading treatment or punishment. Also relevant is Article 13, the provision that sets out the need for equal access to justice for persons with disabilities, one aspect of which is training for those involved in the administration of justice, including prison staff. The Committee on the Rights of Persons with Disabilities has reviewed Australia twice, leading to recommendations in the form of 'Concluding Observations'. In 2013, these recommendations included training on working with persons with disabilities for prison staff and others; in 2019, this was repeated, along with a range of other recommendations. For New Zealand, the Concluding Observations from 2014 recommended judicial training; recently, Concluding Observations issued in September 2022 following a further review noted that people with disabilities were overrepresented in custodial settings, such that staff training was required.

The CRPD provides fertile ground for the development of standards at the intersection between the mental health and criminal justice systems. This includes those in relation to the well-established settings of the overlap between the criminal law and psychiatry, namely the special verdict of not guilty by reason of insanity and the processes surrounding unfitness to stand trial. The special verdict is an acquittal, which thereby precludes a punitive response, but it invariably allows coercive action to be taken against the acquitted person, resting on a preventive rationale: as such, it amounts to different treatment on the basis of disability, given that an otherwise acquitted

defendant walks free. Similarly, a finding of unfitness to stand trial, meaning that a determination of criminality cannot be made, can lead to detention, often in prison, for those who are not found guilty because, by definition, they cannot stand trial. This equally is differential treatment based on a disability.

The core idea behind the CPRD is that it is a non-discrimination treaty, and so its requirement for equal protection against torture and other problematic treatment can be rephrased as a need to avoid discrimination on the basis of disability in the prison setting. The CRPD has the explanation in its Article 2 that disability discrimination includes where the effect of something is to reduce rights on account of a person's impairment, and also that this includes where there is a failure to provide reasonable accommodation. The latter is defined as those additional steps needed to secure equal treatment when they are not unduly burdensome.

In other words, in the context of what happens in prison, a failure to have a disability perspective and provide additional measures or protections where such additional steps are needed to secure equality of outcome is discrimination on the basis of disability. This may include situations where there is problematic treatment of persons with disabilities. For example, the September 2022 Concluding Observations from the CRPD Committee to New Zealand raised concerns about the seclusion and restraining of persons with psychosocial or intellectual impairments in detention settings; the comments from 2019 to Australia raised similar concerns about such practices being used for 'behaviour modification', and also raised particular concerns about persons with psychosocial or intellectual impairments being abused by other prisoners and staff and being held in solitary confinement.

Disability discrimination may also be made out where additional steps are not taken. For example, a person whose intellectual disability means that they cannot attend a particular offending behaviour programme without modification or additional support has a right to that modification or support if it is not unduly burdensome. Such programmes may often be run by psychology staff, who must be given the necessary resources. The same will apply to those whose mental illness precludes effective participation unless and until they have the needed treatment.

Importantly, recent case law from the European Court of Human Rights suggests that preventive detention that is not accompanied by a therapeutic setting and the offering of treatment is problematic. A run of cases from Germany led ultimately to a case against Belgium brought by a Belgian citizen who could only speak German, who was sentenced to preventive detention but had no significant therapeutic input for many years because the authorities did not arrange for him to access a German-speaking professional team. The Grand Chamber of the Court in *Rooman v Belgium* App no 18052/11, 31 January 2019, [2020] MHLR 1, determined that as the basis for preventive detention was mental disorder, it was necessary for there to be detention accompanied by treatment. If there was not treatment, there was inhuman and degrading treatment because there was no work towards and therefore no hope of release; moreover, there was a breach of the right to liberty because detention without treatment was merely warehousing.

The international human rights standards relevant for Australia and New Zealand, replicating what was argued in *Rooman* under the European Convention on Human Rights, are in the already-mentioned Article 7 of the ICCPR and its Article 9, which provides a right against arbitrary detention. Indeed, preventive detention and Australia have already featured: *Fardon v Australia*, communication no 1629/2007, 18 March 2010, is a decision of the Human Rights Committee of the UN that preventive detention under Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), a criminal penalty applied retrospectively, was therefore necessarily arbitrary

and so in breach of Article 9. The author had served a 14-year term for serious sexual offending: but legislation introduced shortly before he was released allowed his ongoing detention on the basis of preventing further offending. It is additional reasoning by the Human Rights Committee that may be important in light of *Rooman*. At paragraph 7.4 of their decision, the Committee notes that 'feared or predicted dangerousness to the community . . . is inherently problematic' as it is opinion evidence that is 'not an exact science', meaning that avoiding arbitrariness in detention requires a state to demonstrate that 'rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison'.

If one turns to the specifics of what is required by OPCAT, including its monitoring mechanisms, the overlap with the CRPD will require that the new monitoring processes are designed so that they can be accessible to and protective of prisoners with disabilities, including those impairments that require psychiatric or psychological input. It is not a criticism of Mackay that she does not explore the details of the CRPD, given that the focus of her book is prisons and prisoners in general rather than those with an impairment that amounts to an intellectual or psycho-social disability – although they may be in the majority in prison. Rather, she should be congratulated for making clear that the human rights framework should be placed at the centre of the search for solutions: once that is accepted, these other elements of the human rights framework come into play.

Article 10(3) of the ICCPR requires that the purpose of imprisonment shall be 'reformation and social rehabilitation' of prisoners. Since the evidence is that many prisoners have impairments, this has to be informed by the CRPD and its standards of reasonable accommodation to avoid disability discrimination; and the need to avoid mistreatment – including from not treating – should be assisted by the implementation of the OPCAT mechanisms. This is why Mackay's analysis of the potential implications of Australia's belated ratification of OPCAT is worth reading. OPCAT sets out a mechanism that has a preventive impact in relation to situations that might otherwise breach rights. Those who want to secure practical and positive change should be aware of its existence in case its standards and mechanisms become useful for that change. And, if you need a refresher for your optimism, the decision of Australia to ratify OPCAT can be joined with domestic milestones such as Queensland's legislation to suggest that the direction of travel is forward despite the contrary voices. Captain Maconochie might well be pleased.

Ethical standards

Declaration of conflicts of interest

Kris Gledhill has declared no conflicts of interest.

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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