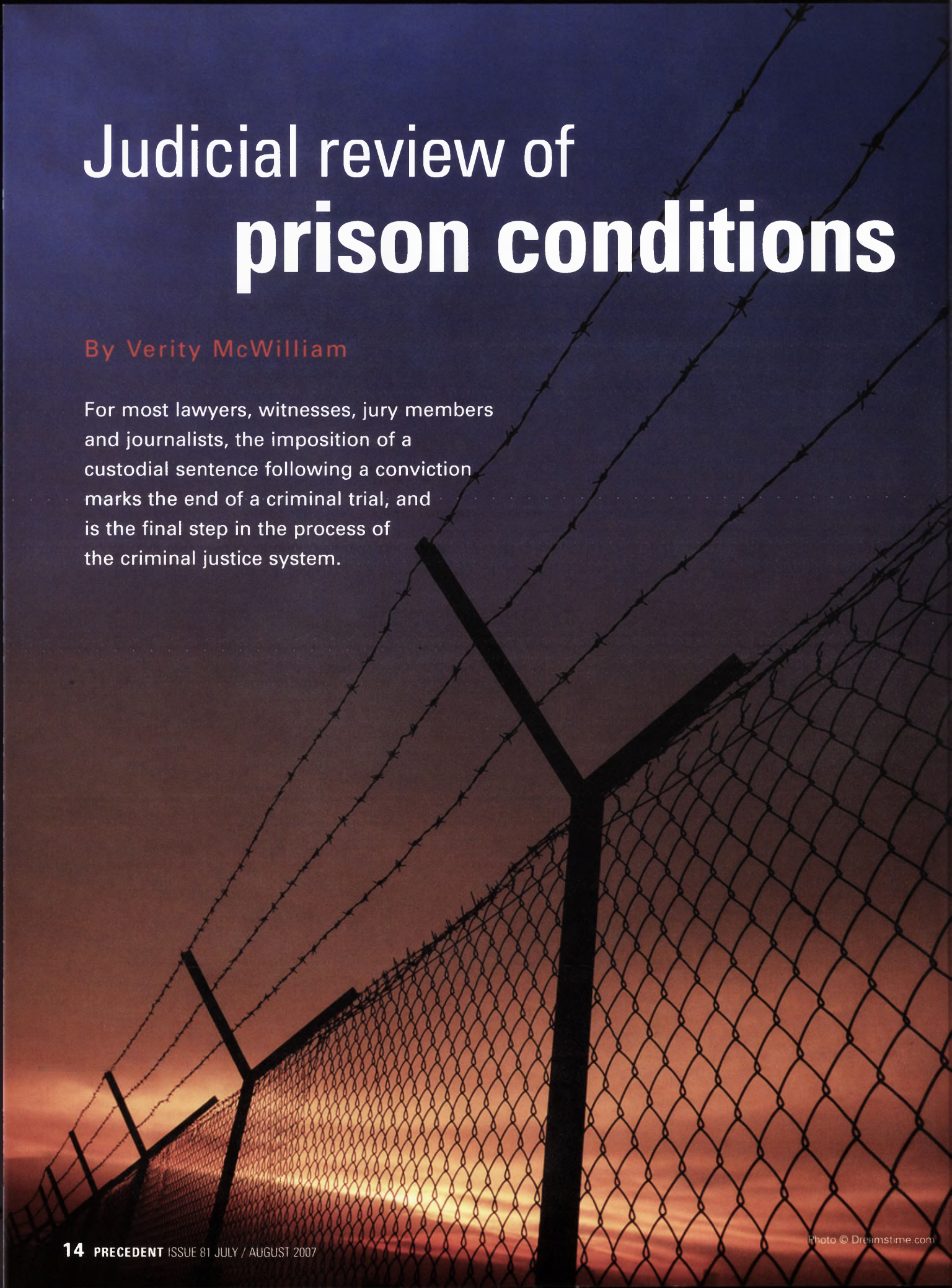
Judicial review of **prison conditions**

By Verity McWilliam

For most lawyers, witnesses, jury members and journalists, the imposition of a custodial sentence following a conviction marks the end of a criminal trial, and is the final step in the process of the criminal justice system.



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For those convicted, however, the sentence marks the beginning of a series of further decisions, administrative in character, which affect every aspect of their living conditions, including where they may live, the people with whom they may communicate, and the tasks they may undertake.

Who scrutinises these decisions, to ensure that prisoners' basic rights are preserved? Can prisoners be guaranteed any 'rights' in the first place? What scope is there to alter decisions if they are unduly harsh, or improperly made?

This article considers four categories of decisions concerning prisoner conditions that are subject to judicial review. The first relates to a prisoner's day-to-day conditions. The second concerns decisions that relate directly to a prisoner's classification, which inherently affects conditions, such as level of supervision and opportunities for work release. The third category may be described as disciplinary decisions, following a prisoner's misconduct. The fourth category of decisions, briefly considered, determine the conditions on which a prisoner may be released on parole. Judicial review of the parole decision itself is outside the present scope of this article, as such decisions are clearly subject to judicial review on the basis of error of law.[1]

LEGISLATIVE FRAMEWORK

Each state and territory in Australia has legislation to manage its prison system and the prisoners within it,[2] although there are subtle differences. Those relevant here are the statutory provision of certain rights, the levels of classification and the review mechanisms provided.

Rights

In Victoria and Tasmania,[3] prisoners have a number of rights guaranteed by law. These include the right to be in the open air for at least one hour each day; the right to be provided with food that is adequate to maintain their health and well-being; the right to be provided with special dietary food if necessary for medical reasons, for religious reasons or because the prisoner is a vegetarian; and the right to have access to reasonable medical care and treatment necessary to preserve health.

In NSW, by comparison, there is no express recognition of 'rights' as such. However, provision is made, among other things, for a varied diet, and the diet of an inmate with special dietary needs must be planned with regard to those needs.[4] Similarly, inmates are to be allowed at least one hour of exercise in the open air, subject to practical limitations.

But at a national level, recent amendments to s93(8AA) of the *Commonwealth Electoral Act* 1918 (Cth)[5] have removed the right of prisoners to vote in elections. While not strictly relevant in the context of judicial review, removing this right is a significant 'condition' that arguably trespasses on notions of democracy, and raises the question of where the boundaries in restricting prisoner's rights lie, or whether, indeed, there are any boundaries at all. The validity of the section is currently before the High Court.[6]

Classification

The classification levels for prisoners between states also vary. In NSW, the seven categories for classifying inmates[7] – identified as AA, A1, A2, B, C1, C2 and C3 – are arranged in diminishing order of the need to restrain the prisoner. Category AA inmates are those who, in the opinion of the Commissioner of Corrective Services, represent a special risk to national security and are automatically considered serious offenders. At the other end of the range, category C3 inmates need not be confined by a physical barrier at all times and need not be supervised. In other states, such as Queensland, Tasmania and Western Australia, there are only three categories: maximum, high/medium and low/minimum.[8]

Review mechanisms

The mechanisms for reviewing decisions regarding prisoner classification and conditions vary. Judicial review of >>

classification decisions is expressly excluded in Queensland,[9] even if they are affected by jurisdictional error.[10] Western Australia also excludes judicial review, by providing the right of 'one appeal' against a security rating decision, among other decisions, which must be made to the Superintendent or the Assistant Director of Sentence Management.[11] In NSW and South Australia, judicial review of classification decisions is not expressly excluded, but nor is it expressly included, so that the position appears to be the same.

DAY-TO-DAY PRISON CONDITIONS

It has been said that individuals are sent to prison as a punishment, not for punishment.[12] That may be so, but the right of an individual to challenge his or her day-to-day conditions through judicial review is non-existent in Australia.[13] That position has been consistently confirmed by the courts,[14] simply for the reason that it is not for the courts to interfere with the management, discipline and control of prisoners.[15]

Thus, in *Prisoners A-XX Inclusive v State of New South Wales,*[16] the Court of Appeal rejected, among other things, an argument that the conditions of confinement were so intolerable as to make the very fact of the prisoners' confinement unlawful. The case concerned an application for the supply of condoms to prisoners, on the basis that they were at risk of contracting HIV or hepatitis. The application was rejected by the Commissioner of Corrective Services. In the course of a discussion, which concluded that no compelling authority supported the 'intolerable conditions' submission, Shellar JA referred[17] to *R v Deputy Governor of Parkhurst Prison; Ex parte Hague,*[18] in which Lord Bridge of Harwich said:

> 'I sympathise entirely with the view that the person lawfully held in custody who is subjected to intolerable conditions ought not to be left without a remedy against his custodian. ...
>
> [However], the logical solution ... is that if the conditions of an otherwise lawful detention are truly intolerable, the law ought to be capable of providing a remedy directly related to those conditions without characterising the fact of the detention itself as unlawful.'

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The NSW Regulations have now overtaken the facts of that decision, providing for condoms to be made available to male inmates free of charge.[19]

More recently, in *Garland,*[20] the Queensland Court of Appeal confirmed that it did not matter whether the treatment of a prisoner who was subject to a maximum security order was humane or not. The Court stated that the result is not as bleak as may appear from this statement of the law,[21] because if the prisoner's treatment became inhumane – if he were physically mistreated, assaulted or tortured – that fact 'could not be concealed and the perpetrator would be prosecuted for an offence against the Criminal Code. If the [prisoner] were neglected and came to harm he could sue for and recover damages.'[22]

The position is similar for those held in detention centres.[23] In *Behrooz v Secretary, Dept of Immigration & Multicultural & Indigenous Affairs,*[24] the High Court addressed the issue of whether, by reason of their conditions of detention, detainees may lawfully escape. The appellant sought to argue that the detention contemplated by the *Migration Act* 1958 was not punitive in nature, so if conditions of detention were harsh or inhumane, and thus punitive, the detention would be unlawful. The majority of the High Court held that the conditions of immigration detention do not affect the legality of that detention.[25] Gleeson CJ noted that any officer who assaults a detainee in a detention centre would be liable to prosecution or damages. Similarly, if those who manage a detention centre fail to comply with their duty of care, they may be liable in tort. However, the assault or the negligence does not alter the legality of the detention.[26]

The result is that the courts will not intervene by way of judicial review in decisions relating to daily prison conditions, which are considered to be of a purely managerial character, although prisoners may pursue other avenues of redress for decisions relating to their daily conditions.

The question arises as to what impact the enactment of 'prisoner's rights' in some jurisdictions has on the scope of judicial review. Previously, it has been held that prisoners do not have a legitimate expectation either to the existence or continuance of certain conditions[27] or, if they do, the proper exercise of any discretion given to the department or commissioner overrides any such expectation.[28] However, the position is yet to be tested under the new provisions and there is scope for the argument that such legislation creates, at the very least, a legitimate expectation that those conditions will be met. Furthermore, from an enforcement perspective, the subtle distinction in the way that NSW has expressed its minimum conditions may be significant. As an example, vegetarian prisoners in Victoria and Tasmania may find it easier to enforce a dietary 'right', than their NSW counterparts, simply because NSW does not describe the condition as a right. It should be noted, however, that even the enforceability of the rights set out in the Victorian and Tasmanian legislation has been doubted.[29]

Although a detailed comparison of the law in England is outside the scope of this article, it is worth noting that the UK position is moving in a slightly different direction from that taken in Australia so far. This is due to the accommodation of the European Court of Human Rights, where it is

well-established that prisoners have a right to complain that their rights, guaranteed under the European Convention of Human Rights, have been violated while in prison.[30]

PRISONER CLASSIFICATION DECISIONS

Classification decisions are of great significance to prisoner conditions, with only the decision to release the prisoner having more impact. They affect such things as where prisoners will be imprisoned, whether they will have work release privileges, and their prospects of early release.

The decision is discretionary, although the range of factors taken into account across the jurisdictions is broadly the same.[31] The Tasmanian factors provide a succinct example: age and character; length of sentence; nature and notoriety of offence; behaviour during current and any previous period of imprisonment; escape history; and any other relevant factor.[32]

The breadth of matters that can be considered was discussed in *McCallum*,[33] where a prisoner sought review of a classification decision in NSW, on the basis that the Commissioner had taken into account sexual offences, which it was alleged were unrelated to his sentences for armed robbery and armed assault. The court held that the Commissioner could take into account any matter relevant to the question of supervision, including matters that may be unrelated to the offence of which the prisoner currently stands convicted, when determining his classification.

As already mentioned above, judicial review of prisoner classification decisions is extremely limited, because of the discretionary and managerial nature of the decision. It has been held that the courts should intervene only where bad faith can be shown,[34] and that provisions dealing with the security classification of prisoners do not give rise to private rights enforceable in the ordinary courts.[35]

However, a recent decision in Queensland suggests that the scope for judicial review is not limited to decisions made in bad faith. In *Griffiths*,[36] a prisoner sought reclassification under the legislation,[37] enabling him to be transferred to a prison farm. His real purpose in seeking reclassification was to advance his prospects of early release once his non-parole period had expired. The general manager of the relevant correctional centre decided not to reclassify the prisoner, taking into account a number of factors, including the risk he posed to the community and his need to undertake a high-intensity violence intervention program – despite a panel's recommendation that the prisoner did not need to participate in any further programs. McMurdo J found that, although the general manager was not obliged to accept the panel's recommendation, he had taken into account an irrelevant consideration by misunderstanding the panel's recommendation, and the decision was set aside.

Shortly after that decision, the present legislation came into force, which removed the right to judicial review of any prisoner classification decision. In the explanatory memorandum to the Bill, the rationale was stated as being that 'decisions relating to the supervision, security and placement of prisoners are fundamental to the operation of a safe and secure correctional environment and prisoners should not be able to challenge or influence security requirements'. This is a clear indication from the Queensland Parliament that classification decisions are management or policy decisions with which the courts should not interfere in any circumstance.

DISCIPLINARY DECISIONS

Disciplinary decisions are also considered management decisions,[38] so the same principles apply; namely, that they are not subject to judicial review unless made in bad faith.[39] Thus, Douglas J, in the Queensland decision of *Masters*,[40] held that there was no obligation to allow the prisoner to be heard before a disciplinary decision was made to revoke a leave of absence,[41] or to provide a statement of reasons for that decision.[42] Douglas J also stated that, even if there was an >>

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obligation to provide a statement of reasons, the failure to do so would not lead, by itself, to the setting aside of the decision.[43]

Similarly, in *Stewart*,[44] the court held by majority that there was no obligation to provide the prisoner with an opportunity to argue against an order before the decision was made. In that case, the decision restricted prison visits to those of a non-contact character for four weeks, following what was described as 'unacceptable behaviour in a public place'.

However, there is an important difference between disciplinary and classification decisions, in that there is an internal, independent means of review – albeit not judicial – in respect of disciplinary decisions, ensuring their proper scrutiny.

In South Australia, prisoners may appeal to a visiting tribunal,[45] the decision of which may itself be appealed, on the ground that the proceedings were not conducted in accordance with the provisions of the Act.[46] Similar provisions apply in NSW and Queensland for visiting magistrates and official visitors respectively.[47] Queensland has also preserved judicial review of maximum security orders.[48]

It is also clear that where procedural fairness requirements are specifically provided for by the relevant legislation, those procedures must be followed, as illustrated by two South Australian decisions. In *Sandery*,[49] the Supreme Court of South Australia declared that a prisoner's isolation in solitary confinement was unlawful, as it was not provided for in the relevant legislation.[50] In *Bromley*,[51] a prisoner's segregation order was set aside because he was not given reasons for the decision as required under the legislation.

JUDICIAL REVIEW OF PAROLE CONDITIONS

Decisions of the parole board are subject to judicial review,[52] although the jurisdiction is limited. It is supervisory, and does not entitle the court to canvass matters that it would in either a standard appeal or in a review of the merits of a decision.[53] As put by Doyle CJ in *Hill*,[54] 'the Court is not concerned with the soundness of the decision made. The Court's only concern is with the validity of the decision.'

A recent decision involved the conditions that may be imposed on prisoners when they are paroled. In the case of *Fletcher*,[55] the Supreme Court of Victoria confirmed that there are circumstances where the parole conditions placed on a prisoner may be subject to judicial review, even if the validity of the parole decision itself is not at issue. The Adult Parole Board had imposed an extended supervision order[56] on a prisoner, who was released into the community with an instruction as to where he was to reside. Mr Fletcher was obliged to remain within Ararat Prison, because there were no other facilities available. Gillard J held that the accommodation provided was not 'within the community', so that the exercise of the power in that respect was unlawful. His Honour declared that the condition had no effect.[57]

Similarly, in NSW, the 2007 decision of *White*[58] confirmed both the availability of judicial review of parole conditions (although prerogative relief was refused in that case)[59] and the broad power of the State Parole Authority of NSW to set conditions of release on parole.[60]

CONCLUSION

Judicial review of prison conditions is rare, and when available, limited to instances of bad faith and the failure to follow proper procedures, as expressly provided for in the relevant legislation. However, this does not mean that prisoners have no rights, or that prisoners cannot enforce the rights they have expressly retained. Over the past decade, in particular, the states have developed their own specific procedures for dealing with complaints and requests to review a variety of decisions affecting prisoners' daily and longer-term conditions. This is intended to provide a balance between the need for security and effective management of prisons, and the need to hold prison managements accountable. ■

Notes: **1** See *Crimes (Administration of Sentences) Act* 1999 (NSW), s155; *Attorney General for New South Wales v New South Wales Parole Authority & Maddison Hall* [2006] NSWSC 865 at [74]; *Esho v Parole Board Authority of NSW* [2006] NSWSC 304; *DCU v State Parole Authority of New South Wales* [2006] NSWSC 526. **2** See *Removal of Prisoners Act* 1968 (ACT); *Crimes (Administration of Sentences) Act* 1999 (NSW) and *Crimes (Administration of Sentences) Regulations* 2001 ('the NSW Regulations'); *Prisons (Correctional Services) Act* (NT); *Correctional Services Act* 1982 (SA) ('the SA Act'); *Corrections Act* 1986 (Vic); *Corrective Services Act* 2006 (Qld) ('the Qld Act'); *Correctional Services Act* 1982 (SA); *Corrections Act* 1997 (Tas); *Corrections Regulations* 1998 (Tas) ('the Tasmanian Regulations'); *Prisons Act* 1981 (WA); Director General's Rules (WA). Those convicted of federal offences and sentenced to be detained in prison are housed in state or territory prisons: *Crimes Act* 1914 (Cth), s19A. **3** *Corrections Act* 1986 (Vic), s47; *Corrections Act* 1997 (Tas), s29. **4** NSW Regulations, reg 50. **5** See *Electoral And Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), which came into operation in June 2006. **6** *Roach v Electoral Commissioner & Anor*, heard 12, 13 June 2007, judgment reserved. **7** NSW Regulations, reg 22. **8** See Qld Act, s12, Tasmanian Regulations, reg 5(2); Director General's Rules, reg 18. **9** Qld Act, s17. **10** *Corrective Services Act* 2006 (Qld) s17(2). **11** Director General's Rules, reg 18 Clause 11.4 (WA). **12** *Revised Standard Guidelines for Corrections in Australia*, 2004, para 1.21; O'Neill N, Rice S and Douglas R, Retreat from Injustice: Human Rights Law in Australia (2nd Ed, 2004) at 245. **13** See also Human Rights Commission, *Prisoners' Rights: A Study of Human Rights and Commonwealth*

Prisoners, Occasional Paper No 12, Canberra AGPS, 1986, where it was stated, at 25-6: 'If one asks ... what rights prisoners in Australia can currently claim, the answer is virtually none at all; not even the basic necessities of life.' **14** *Horwitz v Connor* (1908) 6 CLR 38; *Flynn v The King* (1949) 79 CLR 1; *Prisoners A-XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622; *Kelleher v Commissioner, Dept of Corrective Services* [1999] NSWSC 86 at [11]; *Behrooz v Secretary, Dept of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271; *Garland v Chief Executive, Department of Corrective Services* [2006] QCA 568. **15** See *Horwitz v Connor* (1906) 6 CLR 38; *Flynn v R* (1949) 79 CLR 1 at 8. **16** (1995) 38 NSWLR 622. **17** At 628. **18** [1992] 1 AC 58. **19** *Crimes (Administration of Sentences) Regulation* 2001, reg 59. **20** *Garland v Chief Executive, Department of Corrective Services* [2006] QCA 568. **21** *Ibid* at [22]. **22** *Ibid* at [23]. **23** *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664. **24** (2004) 219 CLR 486. **25** [21], [53], [153], [166], [176], [223]. **26** Per Gleeson CJ at [21]. **27** *Gray v Hunter* (1990) 45 A Crim R 364 at 371: 'today's favour is not yet tomorrow's duty'. **28** *Kelleher* at [11], [30]-[31]. **29** M Groves, 'International Law and Australian Prisoners' (2001) 24(1) *UNSWLJ* 17 at 21-3. **30** See, for example, *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; *Golder v United Kingdom* [1975] 1 EHRR 524; *Silver v United Kingdom* (1980) 3 EHRR 475. **31** See, for example, *Crimes (Administration of Sentences) Regulation* 2001 (NSW), reg 13; *Corrective Services Act* 2006 (Qld), s12; *Corrections Regulations* 1998 (Tas) reg 5. **32** *Corrections Regulations* 1998 (Tas) reg 5. **33** *McCallum v Commissioner of Corrective Services*, Unreported, 27 March 2001, Burchett AJ; confirmed in *McCallum v Commissioner of Corrective Services* [2002] NSWSC 497. **34** *Middleton v Dept of Corrective Services* [2002] QSC 356; *McEvoy v Lobban* [1990] 2 Qd R 235; *Masters v State of Queensland and Anor* [2001] QSC 055 at [18]. **35** *Re Walker* [1993] 2 Qd R 345. **36** *Griffiths v Department of Corrective Services* [2006] QSC 390. **37** At that time, the *Corrective Services Act* 2000 (Qld) s12, which contained five classification categories. **38** *Masters* at [18]. **39** *Stewart v Lewis & Anor* [1996] 1 Qd R 451; *McEvoy v Lobban* (1990) 2 Qd R 235. **40** *Masters v State of Queensland and Anor* [2001] QSC 055. **41** *Masters* at [18]. **42** *Masters* at [19]. **43** *Masters* at [21]. **44** *Stewart v Lewis & Anor* [1996] 1 Qd R 451. **45** SA Act, s46. **46** SA Act, s47. **47** NSW Act s54, Qld Act s285. **48** See the explanatory memorandum to the 2006 Bill, p27. **49** *Sandery v South Australia* (1987) 48 SASR 500. **50** *Corrections Services Act* 1982 (SA). **51** *Bromley v SA* (1990) 55 SASR 309. **52** *Kola v Parole Board of South Australia & Ors* [2004] SASC 423; *Eshu v Parole Board Authority of NSW* [2006] NSWSC 304; *R (Giles) v Parole Board* [2002] 1 WLR 654; *Fletcher v Secretary to the Dept of Justice and Anor* [2006] VSC 354 at [31]; *McEnroe v Queensland Community Corrections Board* (Unreported, 8 September 1997, Thomas J). **53** *Fletcher v Secretary to the Dept of Justice and Anor* [2006] VSC 354 at [36]. **54** *Hill v South Australia & Anor* [1999] SASC 347 per Doyle CJ at [33]. **55** *Fletcher v Secretary to the Dept of Justice and Anor* [2006] VSC 354. **56** Made under the *Serious Sex Offenders Monitoring Act* 2005. **57** *Fletcher v Secretary to the Dept of Justice and Anor* [2006] VSC 354. **58** *White v SPA of NSW & Anor* [2007] NSWSC 299. **59** *White* at [20]. **60** *White* at [43].

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