

# THE ROAD TO THE ACT'S FIRST PRISON (THE ALEXANDER MACONOCHIE CENTRE) WAS PAVED WITH REHABILITATIVE INTENTIONS

ANITA MACKAY\*

## ABSTRACT

The role of prisons in rehabilitating offenders is highly contested. The two main opposing arguments – that prison should be a ‘last resort’, on the one hand, and that a prison offering a range of programs could rehabilitate offenders, on the other – emerged during the debates about whether the Australian Capital Territory (ACT) should build a prison. An analysis of these arguments from a criminological perspective will assist the ACT to develop future correctional policies, given that rehabilitation has been enshrined in legislation as a primary goal of the Alexander Maconochie Centre. This analysis also reveals that the ACT is somewhat exceptional in consistently maintaining an ideological commitment to rehabilitation whilst other jurisdictions have shifted towards emphasising the more punitive aspects of imprisonment.

## I INTRODUCTION

‘It is the duty, and even still more the interest of society, in dealing with its criminals, to try earnestly while they are in custody, to reform them’

– Captain Alexander Maconochie 1853.<sup>1</sup>

The Australian Capital Territory’s (ACT) Alexander Maconochie Centre (AMC) has been operational since 30 March 2009. Prior to that, ACT prisoners were held in NSW prisons. The ACT government has elected to emphasise the role of the AMC in rehabilitating offenders. The media release issued about the official opening of the AMC stated that ‘[t]his is the first real

---

\* BA LLB (Hons) Macquarie University, LLM Australian National University, PhD Candidate at Monash University.

<sup>1</sup> Cited in John Barry, *Alexander Maconochie of Norfolk Island. A Study of a Pioneer in Penal Reform* (Oxford University Press, 1958) 214.

opportunity that the ACT has had to directly influence rehabilitative and therapeutic outcomes for our sentenced prisoners'.<sup>2</sup>

An independent consultant's review of the first year of operation made a total of 128 recommendations about how the AMC's operation can be improved.<sup>3</sup> As the ACT government considers their response to these recommendations, this article argues that it is worthwhile reflecting on the history that led to this point, which is outlined in Part II. Of particular interest are the two contradictory themes that emerged during the debates, both of which surround the ability of prisons to rehabilitate offenders. One of the themes was an argument used against the ACT establishing a prison; namely, that prison should be a 'last resort' because prisons are often filled to capacity, and community-based sanctions are more likely to rehabilitate offenders. The other theme was an argument in favour of the ACT establishing a prison; namely, that this was an opportunity to build a prison that could run programs to rehabilitate offenders. These themes are discussed and critiqued in Parts III and IV of the article.

The discussion about these themes is not entirely historical, however. The current state of play is assessed for both themes. That is, consideration is given to whether the AMC is actually a punishment option of 'last resort', as well as the status of rehabilitation in current legislation. Part V of the article, which provides an overview of the current legislation, also outlines the relevance of rehabilitation to the human rights framework within which the AMC has been established.

It is important to note at the outset that this article does not seek to assess whether the ACT's commitment to rehabilitation is working in practice. This is certainly an essential question for gaining an overall understanding of the relevance of rehabilitation to penal policies. However, it is too early to assess this, given the short period of time the AMC has been operational. Rather, the article seeks to provide a clear picture of the origins of the ACT's rehabilitation intentions such that future correctional policies are informed by a criminological analysis of the historical

---

<sup>2</sup> Katy Gallagher, Chief Minister, Australian Capital Territory, 'New Alexander Maconochie Centre officially opened' (Media Release, 11 September 2008).

<sup>3</sup> Knowledge Consulting, *Independent Review of Operations at the Alexander Maconochie Centre* (2011).

debates. The ACT's commitment to rehabilitation at an ideological level is also of interest because this is not a commitment that exists in other Australian jurisdictions.

## II THE ROAD TO THE ESTABLISHMENT OF A PRISON IN THE ACT

The ACT was established in 1911, but a decision was made that a separate correctional facility would not be built in the ACT largely due to economic reasons (ie the high costs involved).<sup>4</sup> Instead, an agreement was reached for NSW to be paid to accommodate all prisoners sentenced to imprisonment in the ACT.<sup>5</sup>

The first suggestion that the ACT build a prison was made in 1955 by the Department of the Interior. That suggestion was that a prison be built in the ACT to accommodate both ACT and Northern Territory prisoners.<sup>6</sup> A proposal was taken to Cabinet in 1970, but this did not result in any action.<sup>7</sup>

In 1974, the then Commonwealth Attorney-General, Senator Murphy, raised the need for consideration to be given to building a prison facility in the ACT in the Senate.<sup>8</sup> In the 1970s a survey of judges and magistrates was carried out to ascertain the type of sentences they would impose if they had the option of imposing a sentence of imprisonment that could be served in the

---

<sup>4</sup> Australian Law Reform Commission, *Sentencing Reform Options*, Discussion Paper No 10 (1979) 20.

<sup>5</sup> The legislative provisions for this arrangement were found in the *Removal of Prisoners (Australian Capital Territory) Act 1968* (Cth) and Part IX of the *Prisons Act 1952* (NSW). The Australian Law Reform Commission outlined in their 1979 Discussion Paper on sentencing reform that '[t]he prisoner's transfer to N.S.W. is authorised by a warrant. Under an inter-governmental agreement, the Commonwealth pays to N.S.W. the cost of imprisoning offenders from the Territory': Australian Law Reform Commission, above n 4, 17. In 1972-73 this was costing the ACT \$9.91 per inmate per day: Australian Law Reform Commission, above n 4, 20. By 2006 the daily rate had reached \$203 per inmate: Australian Capital Territory Department of Justice and Community Safety, Communication Plan. Alexander Maconochie Centre Project (April 2007) 5.

<sup>6</sup> This suggestion is mentioned in a 1979 Australian Law Reform Commission Discussion Paper, but there is no detail provided as to why the proposal was made – Australian Law Reform Commission, above n 4, 26.

<sup>7</sup> Ibid.

<sup>8</sup> Andrew Hopkins, Anne Schick and Stephen White, 'A Prison for the Australian Capital Territory?' (1977) 10 *Australian and New Zealand Journal of Criminology* 205, 205. A public seminar titled 'The Future of Corrective Services in the Australian Capital Territory' was held on 2-3 May 1975 – for more information see: 'The Future of Corrective Services in the ACT. Discussion Paper prepared at the Direction of the Minister for the Capital Territory' (Public Seminar, 2-3 May, 1975).

ACT.<sup>9</sup> This research found that the judges and magistrates considered that a minimum security prison or work camp was all that was required.<sup>10</sup>

In 1984, Professor Tony Vinson chaired a review of the ACT's 'welfare services and policies'.<sup>11</sup> The chapter on corrective services recommended '[a] prison system catering for all but maximum security adult prisoners should be created in the ACT'.<sup>12</sup>

The first detailed consideration of whether the ACT needed its own prison was by the Australian Law Reform Commission (ALRC) in their 1979 Discussion Paper and 1988 Report on sentencing.<sup>13</sup> That Report made the following recommendation: 'An Australian Capital Territory prison system should be established. That system should give proper emphasis to rehabilitation'.<sup>14</sup>

The ALRC made their recommendation after considering the arguments for and against an ACT prison. The arguments in favour of establishing a prison in the ACT were:

- the ACT is 'abandoning' its responsibilities by sending sentenced prisoners to NSW;<sup>15</sup>
- the ACT has 'virtually no influence over placement, classification, available programs, prison conditions or any other aspect of Australian Capital Territory prisoners' day to day conditions' and the only way to gain such control is to have a prison in the ACT;<sup>16</sup>

---

<sup>9</sup> Hopkins et al, above n 8, 205-6.

<sup>10</sup> Ibid, 211. This sentiment was echoed in a report released in December 1984 which recommended a prison catering for all except maximum security prisoners: Tony Vinson, Victor Coull and Robyn Walmsley, *Beyond the Image. Review of Welfare Services and Policies in the ACT* (Australian Government Publishing Service, 1985) 251 (see Recommendation 1).

<sup>11</sup> Vinson et. al, above n 10. Commonly referred to as the 'Vinson Review'.

<sup>12</sup> Ibid, 251 (Recommendation 1, Chapter VI).

<sup>13</sup> Australian Law Reform Commission, above n 4; Australian Law Reform Commission, *Sentencing*, Report No 44 (1988).

<sup>14</sup> Australian Law Reform Commission, above n 13, [169]. One member of the Australian Law Reform Commission, Mr Zdenkowski, expressed some reservations about the establishment of a prison in the ACT, noting that if it was to go ahead, the government should be provided with guidelines. He argued that these guidelines include that 'Australian Capital Territory prisoners are not kept in unsatisfactory conditions or subject to inhumane treatment', that correctional legislation 'contain a list of prisoners' rights' and that there be an effective enforcement mechanism for these rights. He also argued that all sentencers have 'first hand knowledge of the conditions which they may sentence offenders' and that they gain this by visiting any prison established in the ACT at least every two years: see Australian Law Reform Commission, above n 13, [263].

<sup>15</sup> Ibid, [251].

<sup>16</sup> Ibid, [252].

- prisoners could maintain better contact with their family and friends if located in the ACT;<sup>17</sup>
- conditions in NSW prisons are not ideal and were found not to be rehabilitating ACT prisoners, therefore they were more likely to commit further crimes following their release and return to the ACT;<sup>18</sup> and
- work release programs were not available to ACT prisoners in NSW prisons.<sup>19</sup>

The common thread in all of these arguments is that the ACT could rehabilitate offenders if a prison was built in the jurisdiction where the conditions were better than those in Swathes is a theme that is analysed in detail in Part IV of the article.

The arguments against establishing a prison in the ACT were:

- if the ACT had its own prison it may lead to a greater rate of imprisonment (‘the hardships imposed by present transportation arrangements, have arguably deterred sentencers from using imprisonment more often as a sanction’);<sup>20</sup>
- ‘entrenching prison as a punishment’, whereas if there is no prison it encourages greater use of non-custodial sanctions which are more likely to reduce future re-offending than imprisonment;<sup>21</sup>
- cost – it would be more expensive for the ACT to build a separate prison than to continue to pay NSW, and the small number of prisoners may make it difficult to justify expenditure on programs in an ACT prison;<sup>22</sup> and
- the difficulty of separating and catering for diverse groups of prisoners in a small jurisdiction.<sup>23</sup>

---

<sup>17</sup> Ibid, [253].

<sup>18</sup> Ibid, [254].

<sup>19</sup> Ibid, [255].

<sup>20</sup> Ibid, [256]. This hypothesis is supported by a presentation by Professor David Biles in March 2008: David Biles ‘How the ACT Compares – Facts and Figures in Australia’ (Paper presented at Christians for an Ethical Society Forum, 19 March 2008).

<sup>21</sup> Australian Law Reform Commission, above n 13, [257].

<sup>22</sup> Ibid, [258].

<sup>23</sup> Ibid, [259].

The first two of these arguments assume the importance of minimising the use of imprisonment (ie keeping prison as a ‘last resort’). This argument is based on two assumptions – that any prison is likely to be filled to capacity, and other sentencing options would be more likely to be relied on if there was not a prison in the jurisdiction. This is a theme that is analysed in detail in Part III of the article.

In 1991, a Discussion Paper entitled *Paying the Price: A Review of Adult Corrective Services and Juvenile Justice in the ACT* made numerous recommendations for alternatives to custodial sentences, such as periodic detention and community supervision orders.<sup>24</sup> However, the paper joined the growing chorus against continued transportation of people sentenced in ACT courts to NSW prisons, and of the need to establish a prison in the ACT.<sup>25</sup>

Discussions became more detailed and precise by the mid-1990s. For example, a 1997 paper recommended that ‘the construction in the ACT of a new 300 bed multi-purpose correctional facility should commence as soon as possible’.<sup>26</sup> In 1997, there were also indications of bipartisan support for building a prison (with the siting still contested).<sup>27</sup> In October 1998, the government announced a timetable for the building a prison and referred the question about location to the Standing Committee on Justice and Community Safety.<sup>28</sup>

---

<sup>24</sup> Australian Capital Territory Government, *Paying the Price. A Review of Adult Corrective Services and Juvenile Justice in the A.C.T.* (ACT Chief Minister’s Department, 1991) (see Recommendations 35 and 39 at xxvii-xix). This was followed a year later by a paper by Senator Gary Humphries, Shadow Attorney-General, in which Senator Humphries argued that the ‘Paying the Price’ Report was deficient in its failure to consider the option of a privately owned prison. Senator Humphries visited some privately owned prisons in Queensland and outlined some of his observations in his report – Gary Humphries, *Private Prisons Public Options. A Report on the options available to establish cost effective and humane prison and remand facilities in the ACT* (1992).

<sup>25</sup> Australian Capital Territory Government, above n 24, xix (Recommendation 42).

<sup>26</sup> Australian Capital Territory Corrective Services, *The Future Correctional Needs of the Australian Capital Territory To The Year 2020, Evaluation of the Current System and Alternatives* (ACT Government, 1997) 25. Another paper was released by the Attorney General’s Department at about the same time – Australian Capital Territory Attorney General’s Department, *The Possible Establishment of a Correctional Facility in the Australian Capital Territory*, Discussion Paper (Australian Capital Territory Government, 1996).

<sup>27</sup> Inquiry by the Standing Committee on Legal Affairs on the construction of a prison in the ACT conducted in 1997. As this was an informal inquiry, no formal report was produced; rather they reported to the legislative assembly on 4 September 1997 (see Australian Capital Territory, *Parliamentary Debates, Australian Capital Territory Legislative Assembly*, 4 September 1997, 2903- 9). This Inquiry recommended that the prison also be used to accommodate NSW regional prisoners, as a way of recouping costs (see *Debates*, at 2905).

<sup>28</sup> Gary Humphries MLA, Attorney-General, ‘Government Announces Timetable for Prison Project’ (Media Release, 26 October 1998).

That Committee conducted four public inquiries between 1999 and 2001,<sup>29</sup> once again considering the arguments in favour of, and against, establishing a prison in the ACT. These were essentially the same as those raised by the ALRC, with two additional arguments in favour of an ACT prison. These were the need to replace the Belconnen Remand Centre which had some serious design faults<sup>30</sup> and was overcrowded,<sup>31</sup> as well as cost savings<sup>32</sup> (whereas cost was given as an argument against by the ALRC).

Following the Standing Committee's inquiries the ACT moved into an implementation phase, which included the following:

- A site for the prison in the suburb of Hume being identified in January 2004;<sup>33</sup>
- The Chief Minister of the ACT's ministerial statement to the Legislative Assembly detailing the plans for the AMC on 24 August 2004;<sup>34</sup>
- The commissioning process beginning in mid-2006;<sup>35</sup>
- Legislation establishing the AMC being introduced into the ACT Legislative Assembly on 14 December 2006 (the Corrections Management Bill 2006 (ACT)), then subsequently being passed on 31 May 2007 (becoming the *Corrections Management Act 2007*(ACT)).<sup>36</sup>

The AMC was officially opened in September 2008. The first prisoners arrived on 30 March 2009. The ACT government commissioned a review of the AMC's first year of operation. On 12

---

<sup>29</sup> Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Establishment of an ACT prison: Justification and Siting* (1999) (hereafter referred to as 'Siting Report'); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *The Proposed ACT Prison Facility: Philosophy and Principles* (1999) (hereafter referred to as 'Philosophy Report'); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Committee Visit to Western Australia, the Northern Territory and South Australia* (2000); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *The ACT Prison Project: Operational Models, Strategic Planning and Community Involvement* (2001) (hereafter referred to as '2001 Report'). There was also a community reference group report prepared in 2000 (*An ACT Prison – 'Getting it Right'. Report of the ACT Prison Community Panel* (2000)) and a consultant's report prepared for the Department of Justice and Community Safety in 2001 – Rengain Pty Ltd, *ACT Prison Project* (17 April 2001).

<sup>30</sup> Australian Capital Territory Government, above n 24, 96.

<sup>31</sup> Siting Report, above n 29, 8-9.

<sup>32</sup> *Ibid* 10-11.

<sup>33</sup> ACT Department of Justice and Community Safety, ACT Procurement Solutions, Brown Consulting and Purdon Associates, Preliminary Assessment under Part 4 of the Land (Planning and Environment) Act 1991. ACT Prison Project. Part Block 6 Section 24 and Part Block 12 Section 18 Hume (2004) i.

<sup>34</sup> Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, 24 August 2004, 4046-50.

<sup>35</sup> Knowledge Consulting, above n 1, 88.

<sup>36</sup> Key provisions contained in the *Corrections Management Act 2007* are discussed in Part V.

March 2011, Knowledge Consulting produced a report entitled *Independent Review of Operations at the Alexander Maconochie Centre. ACT Corrective Services*.<sup>37</sup>

### III PRISON AS A ‘LAST RESORT’

This Part provides the historical backdrop to the discussion in the next two parts of the two major themes that arose during debates about the establishment of a prison in the ACT.

The argument that prison should be kept as a ‘last resort’ appeared consistently throughout the debates about whether the ACT should build a prison. This was the primary reason given against establishing a prison in the ACT. This argument was based on two assumptions. First, that any prison will be filled to capacity, and second, that offenders would be more likely to be rehabilitated if given community-based sentences.

After outlining the attention given to maintaining prison as a ‘last resort’ in the historical debates, this part will consider the debates about the relationship between prison populations and prison capacity, and whether prison has actually been kept as a ‘last resort’ since the AMC opened.

---

<sup>37</sup> The ACT government responded to the review in June 2011. The response states that of the 128 recommendations in the report, the government agrees to 98 and agrees in principle to 31. None of the recommendations have been rejected. The response outlines that a taskforce will be established to oversee the response to the recommendations. The taskforce is expected to operate for about 12 months: Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, *Government Response to The Knowledge Consulting Report, Independent Review of Operations of the Alexander Maconochie Centre (Report 1) and The Knowledge Consulting Report, Review ACT Corrective Services Governance including in relation to Drug Testing at the Alexander Maconochie Centre (Report 2)* (2011) 7. The Attorney-General has undertaken to provide a progress report on the implementation of the recommendations to the Legislative Assembly six months after the government response: Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, 5 April 2011, 1290.



## A Rhetoric During Historical Debates

An emphasis on alternative sentencing options and prison being the ‘last resort’ appeared early on in discussions about establishing a prison in the ACT, ie from the mid-1970s. A discussion paper prepared in 1975 made the point that ‘[a]s many offenders as possible should be rehabilitated within the community and only sent to institutions as a last resort’.<sup>38</sup> The reasons given were the cost of keeping people in prison, as well as the detrimental impact prisons have on individuals, their families and the community.<sup>39</sup>

A 1977 survey of judges and magistrates found that a work release program would be a more desirable option than building a high security prison in the ACT.<sup>40</sup> One of the magistrates surveyed suggested the following priority order for correctional facilities in the ACT: ‘work release hostel (top priority), weekend detention centre, rural prison, secure prison’.<sup>41</sup>

The ALRC’s Report on sentencing in 1988 considered the utility of prisons versus community-based sentences in achieving the goal of rehabilitation. In concluding that the latter is much more successful if recidivism rates are used as a measure of success they observed: ‘[t]hat Australian prisons have failed to reform or rehabilitate offenders is hardly surprising, given the lack of educational, vocational, life skills and drug and alcohol programs in many Australian prisons’.<sup>42</sup>

That same report gave significant attention to ‘reducing the emphasis on imprisonment’, with Chapter 3 having that as a title. The Report considered both the justifications for reducing the emphasis on imprisonment,<sup>43</sup> and some ‘techniques’ for reducing the emphasis.<sup>44</sup> One technique was to legislate that imprisonment is only to be considered after all other possible sentences have been considered. This type of provision was found in s 17A of the *Crimes Act 1914* (Cth) at the

---

<sup>38</sup> ‘The Future of Corrective Services in the ACT. Discussion Paper prepared at the direction of the Minister for the Capital Territory’ (Public Seminar, 2-3 May, 1975) 4.

<sup>39</sup> *Ibid.*

<sup>40</sup> Hopkins et. al., above n 8, 212.

<sup>41</sup> *Ibid* 212.

<sup>42</sup> Australian Law Reform Commission, above n 13, [50].

<sup>43</sup> *Ibid*, [42].

<sup>44</sup> *Ibid*, [54].

time of the ALRC's Report,<sup>45</sup> and is still in place.<sup>46</sup> This codifies a long standing common law principle,<sup>47</sup> and there are equivalent provisions in most Australian jurisdictions,<sup>48</sup> including in the ACT. The *Crimes (Sentencing) Act 2005* (ACT) provides that a prison sentence can only be imposed 'if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate'.<sup>49</sup> The ACT legislation goes one step further than other jurisdictions by requiring the court to provide written reasons for any sentence of imprisonment.<sup>50</sup>

It appears incongruous that the ALRC focused on ways to reduce the emphasis on imprisonment whilst at the same time recommending that a prison be established in the ACT. In making their recommendation, the ALRC did note, however, that the recommendation should not be considered out of context of the other recommendations they were making. They made the following statement: 'preference in the allocation of financial and other resources should go to improving and establishing community based sanctions. These options should be the punishment of first choice in all but the most serious cases'.<sup>51</sup>

The 2001 Report by the Standing Committee on Justice and Community Safety once again considered prison in the context of the spectrum of sentences available for criminal offences, noting concern at the recent decline in the use of community-based sentencing options. The Committee noted that '[t]here are very real dangers that a prison built to any capacity will be

---

<sup>45</sup> That particular provision was inserted into the *Crimes Act 1914* (Cth) in 1982.

<sup>46</sup> Section 17A of the *Crimes Act 1914* (Cth) provides that '[a] court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case'. The Australian Law Reform Commission confirmed their position that s 17A should remain the guiding principle for federal sentencing law in 2005: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 118.

<sup>47</sup> Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing*, (The Federation Press, 2010) 186.

<sup>48</sup> See, eg, Criminal Law (Sentencing) Act 1988 (SA) s 11, Crimes (Sentencing Procedure) Act 1999 (NSW) s 5(1) and Sentencing Act 1991 (Vic) s 5(4).

<sup>49</sup> *Crimes (Sentencing) Act 2005* (ACT) s 10(2) (this provision was previously found in s 345 of the *Crimes Act 1900* (ACT)). Recent examples of cases involving the interpretation of ss 10(2) include *Ajetovic v Johnston*; *Kahric v Johnston* [2011] ACTSC 201; *Dhol v MacKenzie* [2011] ACTSC 193.

<sup>50</sup> *Crimes (Sentencing) Act 2005* (ACT) s 10(4).

<sup>51</sup> Australian Law Reform Commission, above n 13, [260].

filled to that capacity. The ACT needs to ensure this does not happen by strengthening other corrections options'.<sup>52</sup>

## **B Prison Populations and Prison Capacity**

There are two main theories about the relationship between prison population and prison capacity which were put forward by Blumstein et al in 1983. The first is the 'reactive model', which is that prison construction occurs in response to increases in prison populations. The second is the 'capacity model', which suggests that prison construction to increase capacity leads to increases in the prison population to fill the capacity, which in turn prompts more construction.<sup>53</sup> It was the 'capacity model' upon which the Standing Committee on Justice and Community Safety based their warnings about the ACT building a prison.

For some time Blumstein argued that the 'reactive model' applied in the United States of America, and prison populations did not exceed the available prison places. However, in 1995 he retracted this argument.<sup>54</sup> Recent events in California show the unlikelihood of this model continuing to have any traction. Californian prisons recently reached prisoner numbers that were almost double capacity. The consequent lack of availability of medical services for prisoners led the Supreme Court to order that the prison population be reduced.<sup>55</sup>

Freiberg and Ross have analysed the Victorian prison population over time to test the validity of the 'capacity model'.<sup>56</sup> They conclude from this analysis that prison capacity is not irrelevant, but it is not the deciding factor behind increasing prison populations.<sup>57</sup> More important factors

---

<sup>52</sup> 2001 Report, above n 29, 17.

<sup>53</sup> Alfred Blumstein, National Research Council (US) Panel on Sentencing Research, *Research on Sentencing: The Search for Reform, Volume 1* (National Academy Press, 1983) 35.

<sup>54</sup> Described by Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change* (The Federation Press, 1999) 82.

<sup>55</sup> *Brown, Governor of California, et al v Plata et al* (Appeal No. 09-1233), 23 May 2011. For more information about this decision see Ian Freckelton, 'Cruel and Unusual Punishment of Prisoners with Mental Illnesses: From Oates to Plata. *Brown v Plata*, unreported, Supreme Court of the United States, 23 May 2011' (2011) 18(3) *Psychiatry, Psychology and Law* 329.

<sup>56</sup> Freiberg and Ross, above n 54, 82-4.

<sup>57</sup> *Ibid*, 84-5.

are demographic characteristics of the population, crime rates and sentencing regimes (including the type of sentencing options available, and the length of prison sentences imposed).

### C Imprisonment Rates Since the AMC Opened

The aspiration of keeping prison as a sentencing option of ‘last resort’ and minimising imprisonment rate is certainly a noble one, but the reality is that no Australian jurisdiction’s commitment to this (including the ACT) goes beyond a small amount of rhetoric in sentencing legislation.<sup>58</sup>

There are two points to emphasise here. The first is about imprisonment as a ‘last resort’ in sentencing practice, and the second is about other factors that have led to the increasing imprisonment rate in the ACT overall. Both will be discussed after an overview of the ACT’s imprisonment rate is provided.

The rate of imprisonment rate in Australia is growing at an average of 3% per year,<sup>59</sup> despite overall crime rates declining.<sup>60</sup> The rate of increase varies around the country, with the highest rate being in the Northern Territory, where the imprisonment rate increased by 46% between 2001-2011.<sup>61</sup>

The ACT had the lowest rate of imprisonment in Australia before the AMC was built. The year before the AMC opened, in 2008, Professor Biles gave a presentation on the ACT remand and imprisonment rates, compared to the national averages. He observed that the ACT imprisonment rate for *convicted* prisoners was ‘extraordinarily low’ – 38 per 100 000 compared to the national

---

<sup>58</sup> In the Western Australian context, Morgan has described legislation aimed at keeping prison as a ‘last resort’ to be a ‘pious aspiration’: Neil Morgan ‘Imprisonment as a Law Resort: Section 19A of the Criminal Code and Non-Pecuniary Alternatives to Imprisonment’ (1993) 23 *Western Australian Law Review* 299, 318.

<sup>59</sup> Australian Institute of Criminology, *Australian Crime: Facts and Figures 2010* (Canberra, 2011) 110. This statistic is for the years 1984-2009. Between the 2008-09 and 2009-10 financial years there was a 2% increase – Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011* (Canberra, 2012) 116.

<sup>60</sup> Australian Institute of Criminology, *Australian crime: Facts and figures 2011* (Canberra, 2012) 6-7. There are some exceptions to the general trend of declining crime rates – for a detailed discussion see Rick Sarre ‘The Importance of Political Will in the Imprisonment Debate’ (2009) 21(1) *Current Issues in Criminal Justice* 154, 157-8.

<sup>61</sup> Australian Bureau of Statistics, *Prisoners in Australia 2011*, ABS Catalogue No 4517.0 (2011) 27.

average of 126. The remand rate was not as far below the national average. It was 26 per 100 000 compared to the national rate of 38.<sup>62</sup>

If this is compared to the statistics since the AMC was built, a startling rise in the rate of imprisonment can be seen to have occurred between 2008-2011. As at December 2011, the ACT's imprisonment rate was 90.1 per 100 000, compared to the national rate of 165.2 per 100 000.<sup>63</sup> This rate combines sentenced prisoners and those on remand. When these two population sub-groups are separated, the rate of imprisonment for convicted prisoners in the ACT is 55.4 per 100 000 compared to the national average of 127.8 (in 2008 the rates were 38 and 126 respectively) and the rate of prisoners on remand is 27.2 per 100 000 compared to the national average of 38.6 (in 2008 the rates were 26 and 38 respectively).<sup>64</sup>

The ACT has maintained the lowest overall rate of imprisonment, and the lowest rate of convicted prisoners incarcerated in Australia. However, it should also be emphasised that the ACT's rate of imprisonment of convicted prisoners rose from 38 to 55.4 per 100 000 between 2008-2011, while the national rate increased by a lesser proportion (from 126 to 127.8 per 100 000). The number of prisoners on remand in the ACT (27.2 per 100 000) is higher than both Tasmania (25.8 per 100 000) and Victoria (20.7 per 100 000).<sup>65</sup>

The relationship between sentencing and imprisonment rates is complex, and Freiberg and Ross have noted that it 'is difficult, if not impossible in the absence of complex statistical models to isolate one factor from the other'.<sup>66</sup> Australian sentencing law is characterised by the provision of a high degree of judicial discretion; therefore it is difficult to accurately assess what emphasis is given by judges to legislation requiring prison to be kept as a 'last resort'. However, it is possible that judges have more scope to abide by this principle when it is left to their discretion to decide whether imprisonment is an appropriate sanction in the particular case. Mackenzie et al have posited that one of the reasons for the high imprisonment rate in Australia may be

---

<sup>62</sup> Biles, above n 20.

<sup>63</sup> Australian Bureau of Statistics, *Corrective Services Australia, December Quarter 2011*, ABS Catalogue No 4512.0 (2012) 17.

<sup>64</sup> *Ibid*, 19.

<sup>65</sup> *Ibid*.

<sup>66</sup> Freiberg and Ross, above n 54, 95.

prescriptive legislation that limits judicial discretion in determining sentences.<sup>67</sup> They give the following examples of such limits:

[P]rescribing statutory minimum penalties, requirements for certain classes of offenders to serve minimum terms before being considered for early release, or by mandating imprisonment as the penalty for certain offences.<sup>68</sup>

The emphasis given to intermediate sanctions (ie non-custodial sentences) is clearly pertinent. ACT sentencing laws were overhauled in 2005 by the introduction of the *Crimes (Sentencing) Act 2005* (ACT).<sup>69</sup> The aim of this Act was to consolidate sentencing laws into one Act, introduce new sentencing options and modernise terminology.<sup>70</sup> A particular feature of the Act is that it gives judges the option of making a ‘combination sentence’,<sup>71</sup> comprising a number of different sentence types (including imprisonment), which allow a great deal of flexibility.<sup>72</sup>

The ACT’s use of community-based corrections has increased, while the national average shows a decrease. In 2008, prior to the AMC being built, the ACT’s community-based correction rate was 491.1 per 100 000, compared to a national rate of 337 per 100 000. In June 2011, the ACT rate was 487.2 per 100 000, compared to a national rate of 309.9 per 100 000.<sup>73</sup>

Whether people are given community-based or custodial sentences does not provide a complete picture, however. There is a complex interplay of factors leading to a jurisdiction’s imprisonment rate. As Baldry et al have observed as part of the Australian Prisons Project:

The phenomenon of punishment is not a singular object of study. There is a variety of often contradictory and competing discourses on punishment including judicial decisions, parliamentary

---

<sup>67</sup> Mackenzie et al, above n 47, 185. See also the argument by Nicholson that courts do not adequately use provisions that promote rehabilitation: John Nicholson, ‘When sentencing becomes a walk into the future with the offender: The Griffiths Remand – Compulsion in Rehabilitation’ (2008) 32 *Criminal Law Journal* 142.

<sup>68</sup> Mackenzie et al, above n 47, 185 (fn 14).

<sup>69</sup> This followed the release of a discussion paper and extensive community consultation. The process is outlined in the Australian Capital Territory Law Reform Advisory Council’s Report on suspended sentencing report – Australian Capital Territory Law Reform Advisory Council, *A Report on Suspended Sentences in the ACT*, Report No 1 (2010) 12.

<sup>70</sup> Explanatory Statement, Crimes (Sentencing) Bill 2005 (ACT).

<sup>71</sup> Crimes (Sentencing) Act 2005 (ACT) Part 3.4.

<sup>72</sup> Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 342.

<sup>73</sup> Australian Bureau of Statistics, above n 63, 28.

reports, commissions of inquiry, media and popular culture depictions, government policy, academic research and prisoner activist voices.<sup>74</sup>

In summary, whilst it is easy to conclude that the AMC has not been kept as a punishment option of ‘last resort’ in the ACT, the reasons for this are far more complex and difficult to diagnose with any clarity. One of the reasons for this is that arguments about keeping prison as a ‘last resort’ are intermingled with arguments about using prison as a means to rehabilitate offenders. It is these arguments that are considered in the next Part of the article.

#### **IV REHABILITATIVE INTENTIONS**

It was argued in the previous part that the AMC has not been kept as a ‘last resort’. This can be partially explained by the strength of the counter argument, which is that a prison was required in order to rehabilitate offenders. This is the argument that ultimately prevailed.

It will be seen in this part that the argument that a prison should be built in the ACT for the purpose of rehabilitating offenders had two impetuses. The first was concern that people serving their sentences in NSW prisons were isolated from their family and friends. The second was that the conditions in NSW prisons were not conducive to their rehabilitation (particularly due to the lack of programs offered in NSW prisons).

It will also be shown in this part that the ACT did not follow broader international trends relating to rehabilitation. This will make it clear that the ACT is somewhat of an anomaly, as it has not followed other jurisdictions in rejecting rehabilitation in favour of more punitive ideologies.

---

<sup>74</sup> Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz and Alex Steel, ‘Imprisoning Rationalities’ (2011) 44 *Australian & New Zealand Journal of Criminology* 24, 26. The Australian Prisons Project is investigating the variation in imprisonment rates around Australia as well as national trends since the 1970s.

## **A The Rise and Fall (and Rise Again) of Rehabilitation: How the ACT Missed the Fall**

It is important at the outset to note that every jurisdiction's approach to the goals of imprisonment is complex and nuanced. At any given time the competing goals of rehabilitation, deterrence and retribution, as well as other goals, are likely to be present to varying degrees. The emphasis given to various goals can change quickly, especially with changes to the political party in government. In spite of this, criminologists have made some general observations at the meta-level. This Part of the article provides an over-simplified summary of these observations to give some context to the ACT debates. However, in doing so, it should be remembered that this is meta-level analysis and the picture at the micro-level will always present a more complex interplay of the goals. This is exemplified well by what was happening in the ACT during the relevant period, which was different to the observations made at the meta-level.

From the 1890s until the 1970s, what Garland terms 'penal welfarism' was the dominant operational framework for prisons in countries including the USA, the UK and Australia. The growth in penal welfarism paralleled the growth in the social sciences such as sociology, psychology and psychiatry, which shifted the focus away from the individual based explanations of criminal behaviour to socially based ones.<sup>75</sup> Garland has described this framework as having rehabilitation as 'the hegemonic, organising principle, the intellectual framework and value system'.<sup>76</sup>

The reports prepared about establishing a prison in the ACT in the 1970s-1980s fit squarely within the penal welfarism paradigm. The ALRC's 1979 Discussion Paper went into some detail about the negative impact of keeping ACT prisoners in NSW prisons on contact with family and friends, including reference to some case study interviews.<sup>77</sup> This concern was echoed by the Vinson report which also included the results of a more detailed survey of prisoners and their

---

<sup>75</sup> Clive Hollin and Charlotte Bilby, 'Addressing Offending Behaviour: "What Works" and Beyond', in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, 2007) 609.

<sup>76</sup> David Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 35.

<sup>77</sup> Australian Law Reform Commission, above n 4, 23-5.



families.<sup>78</sup> The latter survey found that most prisoners were in favour of a prison being built in the ACT, with 31 of the 34 prisoners interviewed giving improved access to visits and contact with family as the main reason.<sup>79</sup> The families who were interviewed were also in favour of a prison being built in the ACT as it would reduce the travel time and expense associated with visiting.<sup>80</sup>

The ALRC's 1988 Report raised concern about NSW prisons. They wrote that 'the conditions and lack of programs in New South Wales prisons are more likely to lead to continuing criminality than rehabilitation'.<sup>81</sup> This conclusion was reached following reference to the Royal Commission into NSW prisons, which had produced a damning report about the conditions in NSW prisons in 1978.<sup>82</sup> The ALRC went on to recommend that a prison be established in the ACT, emphasising that '[t]hat system should give proper emphasis to rehabilitation.'<sup>83</sup>

By contrast, from about the 1970s onwards, the same countries that had subscribed to penal welfarism experienced what has been termed 'the decline of the rehabilitative ideal'.<sup>84</sup> Rehabilitation was critiqued on three bases, identified by Hudson in 1987. The first was a 'civil liberties' based critique, which was that rehabilitation allowed unchallenged state intervention in the lives of people who were in most cases fairly powerless.<sup>85</sup> The second was that sentences that were perceived to be indeterminate were bringing the justice system into disrepute. This critique was based on the fact that it was left to people running rehabilitation programs to determine when prisoners were ready to be released, as opposed to judges at the time of sentencing.<sup>86</sup> The

---

<sup>78</sup> The survey was conducted by the Australian Institute of Criminology. Vinson et al, above n 10, 194.

<sup>79</sup> Ibid, 198.

<sup>80</sup> Ibid, 200.

<sup>81</sup> Australian Law Reform Commission, above n 13, [254].

<sup>82</sup> Australian Law Reform Commission, above n 4, 34-5. Parliament of New South Wales, *Report of the Royal Commission into New South Wales Prisons*, Volume I, II and III (Government Printer, NSW, 1978).

<sup>83</sup> Australian Law Reform Commission, above n 13, [169].

<sup>84</sup> Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press, 1981).

<sup>85</sup> Barbara Hudson, *Justice Through Punishment. A Critique of the 'Justice' Model of Corrections* (Macmillan Education, 1987) 22.

<sup>86</sup> Ibid, 22-3. Hudson notes that this was more of a problem in the USA than the UK: Ibid, 23. This was also less of a problem in Australia.

third was the right wing argument that the rehabilitative focus made prisons seem ‘soft’ and thereby undermined their legitimacy.<sup>87</sup>

In 1974, Robert Martinson published the famous article entitled ‘What Works? – Questions and Answers About Prison Reform’, to which he responded – there is ‘very little to hope that we have in fact found a sure way of reducing recidivism through rehabilitation’.<sup>88</sup> There was other research being done along these lines.<sup>89</sup> At the same time, there were complex societal changes tending towards increased punitiveness (this trend is analysed in detail by Garland<sup>90</sup> and Pratt et al<sup>91</sup>).

The end result was that ‘a range of rehabilitative strategies, ranging from education and vocational training to counselling and therapeutic communities, [were] condemned to failure’.<sup>92</sup> This was due to the perception that ‘nothing works’ to rehabilitate offenders, which was used as an argument in support of greater emphasis being given to the goal of retribution.<sup>93</sup>

Interestingly, the discussions in the ACT do not reflect this ‘decline in the rehabilitative ideal’. The discussions following the ALRC’s 1988 Report are more in line with what Ward and Maruna have described as the ‘rehabilitation renaissance’.<sup>94</sup> From the early 1990s, in response to the ‘nothing works’ argument, there was a movement that became known as the ‘what works movement’. This movement originated in Canada and aimed to conduct research and publicise results showing that offender rehabilitation was possible. Cullen has described the movement as follows:

These scholars rejected the ‘nothing works’ professional ideology and instead used rigorous science to show that popular punitive interventions were ineffective, that offenders were not beyond redemption,

---

<sup>87</sup> Ibid, 28.

<sup>88</sup> Robert Martinson, ‘What Works? – Questions and Answers About Prison Reform’ (1974) 35 *The Public Interest* 22, 49. Hudson identifies Martinson’s work as an example of the critique of rehabilitation that argued it was the ‘soft’ option: Ibid, 29.

<sup>89</sup> Hollin and Bilby, above n 75, 610.

<sup>90</sup> Garland, above n 76.

<sup>91</sup> John Pratt, David Brown, Mark Brown, Simon Hallsworth and Wayne Morrison (eds), *The New Punitiveness: Trends, Theories, Perspectives* (Willan Publishing, 2005).

<sup>92</sup> Hollin and Bilby, above n 75, 610.

<sup>93</sup> Ibid.

<sup>94</sup> Tony Ward and Shadd Maruna, *Rehabilitation: Behind the Risk Paradigm* (Routledge, 2007) 10.

and that treatment programs rooted in criminological knowledge were capable of meaningfully reducing recidivism.<sup>95</sup>

For example, the ACT Committee that prepared the *Paying the Price* Discussion Paper in 1991 provided a list of programs on offer in other jurisdictions (prepared by the Australian Institute of Criminology) and recommended provision of education, employment opportunities, recreational facilities and welfare/personal development programs, all with a focus on rehabilitation.<sup>96</sup> And more detailed consideration was given to rehabilitation programs considered to be effective in a 1996 Discussion Paper by the ACT Corrective Services,<sup>97</sup> which also emphasised the need to train staff in rehabilitative strategies.<sup>98</sup> Both of these papers are in the vein of the ‘what works movement’.

However, the ‘what works movement’ is not the end of the story when analysing rehabilitation as a goal of imprisonment at the meta-level. There have recently been eminent researchers calling for caution about the reliance on rehabilitation, particularly where results of complex criminological studies about recidivism may be misinterpreted by politicians.<sup>99</sup> Therefore, there is still a level of ambivalence about the acceptability of rehabilitation as a goal of imprisonment.<sup>100</sup> The general position currently is probably most accurately described by Garland when he wrote ‘today, rehabilitation programmes no longer claim to express the overarching ideology of the system, nor to be the leading purpose of any penal measure’.<sup>101</sup>

In contrast, there is evidence to suggest that the ACT has attempted to make rehabilitation the ‘overarching ideology’ of the AMC. When the ACT Standing Committee on Justice and Community Safety was asked to consider the philosophy of the proposed prison in 1999, following consultation they recommended that ‘the guiding philosophy of the prison facility be directed towards rehabilitation, restorative justice and reintegration into society’.<sup>102</sup> In making

---

<sup>95</sup> Cullen, cited in Ward and Maruna, above n 94, 10.

<sup>96</sup> Australian Capital Territory Government, above n 23, 103-4 (Recommendation 51).

<sup>97</sup> Australian Capital Territory Attorney General’s Department, above n 26, 83-6.

<sup>98</sup> *Ibid*, 88.

<sup>99</sup> Ward and Maruna, above n 94, 10-12.

<sup>100</sup> *Ibid*, 12.

<sup>101</sup> Garland, above n 76, 8.

<sup>102</sup> Philosophy Report, above n 29, 31 (Recommendation 2).

this recommendation they referred to the United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>103</sup> The Committee noted that there should be numerous activities and programs in the prison promoting rehabilitation,<sup>104</sup> as well as the use of case management plans.<sup>105</sup> They made a specific recommendation about programs.<sup>106</sup> The committee also considered ways to facilitate visits from family (including children) and friends as a way to further the goal of rehabilitation.<sup>107</sup>

The existing focus on rehabilitation in the AMC is discussed in the next Part.

## **V NO LONGER MERELY INTENTIONS – CURRENT APPROACH TO REHABILITATION**

It was argued in the last part that the ACT has demonstrated a commitment to rehabilitation that belied the ‘decline of the rehabilitative ideal’ that occurred more generally in Australia, the UK and the USA. Next, an overview of the legislative provisions relevant to the rehabilitation of prisoners in the AMC will be provided to support the argument that rehabilitation continues to be the ‘overarching ideology’ of the AMC.

Before discussing the legislation, it is worth noting that the choice of the name for the ACT’s prison – the Alexander Maconochie Centre – also demonstrates its ‘overarching ideology’ of rehabilitation. Captain Alexander Maconochie was the Superintendent of the Norfolk Island

---

<sup>103</sup> Ibid, 29. The rules cited by the Committee were Rule 65, which provides that ‘[t]he treatment of prisoners shall have as its purpose the establishment of the will to lead law abiding and self-supporting lives after release. The treatment shall be such which will encourage prisoners’ self-respect and responsibility’; and Rule 66 which provides that ‘[t]o these ends, all appropriate means shall be used including religious care, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his (sic) social and criminal history, his (sic) physical and mental capacities and aptitudes, his (sic) personal temperament, the length of his sentence and his (sic) prospects after release’. Another relevant rule, not referred to by the Committee, is Rule 61 which provides that ‘[t]he treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of prisoners’.

<sup>104</sup> Ibid, 29, 35.

<sup>105</sup> Ibid, 30.

<sup>106</sup> Recommendation 5 was as follows: ‘the committee recommends that the project brief emphasise that prison programs should be aimed at reducing recidivism rates and contributing significantly to the rehabilitation of prisoners meeting the educational, employment and social skill deficits of prisoners’: Ibid, 36.

<sup>107</sup> Ibid, 50-51.

penal colony from 1840-1844. This penal colony had ‘over 900 doubly and trebly convicted prisoners who were regarded as the dregs of the convict system, irreconcilable and irreclaimable’.<sup>108</sup>

Prior to going to Norfolk Island, Maconochie had developed a system of prison discipline, aimed at rehabilitating prisoners, which he was to test during his time on the Island. In writing about his approach, Maconochie stated that:

[t]he object of the New System of Prison Discipline is besides inflicting a suitable punishment on men for their past offences, to train them to return to society, honest, useful and trustworthy members of it, and care must be taken in all its arrangement that this object be strictly kept in view, and that no other be preferred to it.<sup>109</sup>

Maconochie implemented his approach by using a system of marks whereby convicts were rewarded for their labour and good behaviour with marks. They used these marks to purchase privileges (such as better food) and, for every ten marks saved, their term of imprisonment was shortened by a day. So the ultimate reward was their freedom. The only punishment was the loss of marks.<sup>110</sup>

The ACT government has asserted that the AMC has been named after Alexander Maconochie to reflect the ACT’s overall philosophy of rehabilitating, rather than punishing, prisoners.<sup>111</sup> The AMC has not, however, adopted Maconochie’s system of prison discipline.

## **A Rehabilitation As A Legislative Requirement**

In a review of prison-based rehabilitation programs around Australia conducted for the Criminology Research Council, Heseltine, Day and Sarre emphasised the importance of

---

<sup>108</sup> John Barry, ‘Alexander Maconochie 1787 – 1860’, in Hermann Mannheim (ed), *Pioneers in Criminology* (Patterson Smith Publishing Corporation, 1972) 92.

<sup>109</sup> *Ibid.*, 91.

<sup>110</sup> *Ibid.*, 93. For more information about Maconochie’s mark system see John Moore ‘Alexander Maconochie’s “Mark System”’ (2011) 198 *Prison Service Journal* 38. For more information about Maconochie’s reforms more generally see Barry, above n 1.

<sup>111</sup> Simon Corbell (Attorney General for the ACT) ‘The New ACT Prison: What is Planned and What will be Achieved’, (Paper presented at Christians for an Ethical Society Forum, 19 March 2008). The Dame Phyllis Frost Centre, a women’s prison in Victoria, was named after a campaigner for the rights of female prisoners.

legislation containing ‘affirmations of rehabilitative purposes’, arguing they are ‘essential’.<sup>112</sup> That Report noted that the ACT was the only jurisdiction to have legislation of this sort.<sup>113</sup>

The *Corrections Management Act 2007* (ACT) (CMA) was brought in to establish the operating framework for the AMC. However, prior to the ACT legislative assembly passing the CMA, the assembly had passed the *Human Rights Act 2004* (ACT) (HR Act), so the latter Act will be discussed first.

The HR Act incorporates some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR)<sup>114</sup> into ACT law. Particularly relevant Articles of the ICCPR are Article 7 which provides that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, and Article 10 of the ICCPR which provides:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons [...]
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.<sup>115</sup>

The ICCPR was drafted during the period of penal welfarism, which explains the prominence given to rehabilitation by Article 10(3).<sup>116</sup> Joseph, Shultz and Castan have written that ‘[t]he

---

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

<sup>113</sup> Ibid.

<sup>114</sup> Ratified by Australia on 23 November 1980, however not expressly part of Australian law except to the extent provided for in Commonwealth anti-discrimination legislation: Martin Flynn, Sam Garkawe and Yvette Holt, *Human Rights: Treaties, Statutes and Cases* (LexisNexis Butterworths, 2011) 73.

<sup>115</sup> Only an extract from Article 10 is quoted here.

<sup>116</sup> The Standard Minimum Rules for the Treatment of Prisoners, which also prioritise rehabilitation, are from the same era. The Rules were first adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955. The relevant rules are quoted in fn 103.

“rehabilitation” paradigm was more prevalent, at least in Western criminal justice systems, when the ICCPR was adopted in 1966’.<sup>117</sup>

Section 10 of the HR Act incorporates Article 7 of the ICCPR into ACT law. However, it should be noted that s 19 of the HR Act only incorporates Articles 10(1) and 10(2)(a) into ACT law (the right to humane treatment when deprived of liberty and the segregation of accused and convicted prisoners). The HR Act does not incorporate Article 10(3) (about rehabilitation of prisoners).<sup>118</sup>

The decision not to incorporate Article 10(3) is inconsistent with the stated intention that the AMC, the ACT’s only prison, rehabilitate offenders. The omission is not adequately explained in the Explanatory Statement circulated with the Human Rights Bill 2003. The Explanatory Statement glosses over the omission of certain Articles with the following statement: ‘In some instances a right has been omitted because it is not appropriate to the ACT as a territory under the authority of the Commonwealth’.<sup>119</sup> However, given the ACT government has responsibility for corrections in the Territory,<sup>120</sup> this does not provide an adequate explanation as to why Article 10(3) has been omitted from the HR Act.<sup>121</sup>

Joseph, Shultz and Castan have noted that Article 10(3) has not attracted as much attention from the Human Rights Committee (HRC) as other paragraphs of Article 10. However, they have observed that this is not critical, as adherence to other paragraphs in Article 10 should achieve the same outcome. They write ‘proper adherence to the other aspects of Article 10, which have

---

<sup>117</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 291. The ICCPR came into force on 23 March 1976.

<sup>118</sup> The only mention of ‘rehabilitation’ in the HR Act is in s 22, which concerns rights in criminal proceedings. The provision about rehabilitation concerns children accused of a criminal offence: see subsection 22(3) of the *Human Rights Act 2004* (ACT).

<sup>119</sup> Explanatory Statement, Human Rights Bill 2003 (ACT), 3.

<sup>120</sup> See s 37 and Schedule 4 to the Australian Capital Territory (Self-Government) Act 1988 (Cth).

<sup>121</sup> Article 10(3) of the ICCPR was also omitted from the *Charter of Human Rights and Responsibilities 2006*(Vic). In the Victorian Government’s submission to the review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* by the Victorian Scrutiny of Acts and Regulations Committee it was stated that this was because ‘the prison system may have other aims and that this was a matter for public debate’: Victorian Government, Submission to the Scrutiny of Acts and Regulations Committee’s Review of the Charter of Human Rights and Responsibilities Act 2006, *Review of the Victorian Charter of Human Rights and Responsibilities Act* (2011) <<http://www.parliament.vic.gov.au/sarc/article/1447>> 70.

been vigorously monitored by the HRC, would result in a humane penitentiary system which would aid the reformation and rehabilitation of inmates'.<sup>122</sup>

The CMA, on the other hand, does explicitly deal with the rehabilitation of offenders. Section 7 of that Act sets out the objects, which are stated to include both 'ensuring that detainees are treated in a decent, humane and just way'<sup>123</sup> and 'promoting the rehabilitation of offenders and their reintegration into society'.<sup>124</sup> Further, s 9 of the CMA, which is about the treatment of detainees generally, provides that:

[f]unctions under this Act in relation to a detainee must be exercised as follows [.....] (f) if the detainee is an offender—to promote, as far as practicable, the detainee's rehabilitation and reintegration into society.

When considering the type of education or vocational training to be included in a detainee's case management plan, rehabilitation and reintegration into society is also a relevant consideration.<sup>125</sup> It can be seen, therefore, that the ACT has shown a consistent commitment to the rehabilitation of offenders despite the failure to incorporate Article 10(3) of the ICCPR into the HR Act. It is a separate, and important, question as to how effective this commitment is in reality. However, that particular question cannot be answered at this time, as no formal evaluations of the rehabilitation programs being run in the AMC has been carried out to date.<sup>126</sup>

## VI CONCLUSION

Contradictory arguments about building a prison to rehabilitate offenders, but keeping the prison as a 'last resort' because community-based sentences are more likely to rehabilitate offenders, arose during the historical debates about whether the ACT should build a prison. It is not surprising that there was some confusion about whether rehabilitation should be the goal of

---

<sup>122</sup> Joseph et al, above n 117, 292.

<sup>123</sup> Paragraph 7(c).

<sup>124</sup> Paragraph 7(d).

<sup>125</sup> Corrections Management Act 2007 (ACT) s 52.

<sup>126</sup> In noting that no evaluations have been carried out, the ACT Standing Committee on Justice and Community Safety recommended that this be rectified 'at the earliest possible opportunity': Australian Capital Territory Standing Committee on Justice and Community Safety, Australian Capital Territory Legislative Assembly, *Report on Annual and Financial Reports 2009-2010* (2011) 51 (Recommendation 3).



imprisonment or not, as during the period the debates were taking place in the ACT (from 1955-2001), rehabilitation was the dominant organising principle, then viewed as not working ('nothing works'), then the position changed to the view that there are some programs that can work ('what works movement').

Despite the debates which considered arguments in favour of, and against, building a prison; what was consistent was the ACT's commitment to the rehabilitation of offenders. It then became a question of what would be the best way to achieve this goal. The ACT is thereby revealed to be exceptional, as this ideological commitment to rehabilitation as a goal of imprisonment does not exist in other Australian jurisdictions. Other jurisdictions have instead shifted away from rehabilitation towards a more punitive approach to imprisonment.

The ACT's ideological commitment to rehabilitation has been translated into legislative provisions governing the operation of the AMC. Whilst it is too soon to assess whether the rehabilitative initiatives are working in practice, an understanding of the past is useful for informing future correctional policies in the ACT. The analysis of two of the themes that emerged during the historical debates contained in this article should contribute to this understanding.