

Chapter 12

The Second Charters of Prisoners' Rights

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I Introduction

There is no doubt that the charters of rights enacted in the ACT and Victoria significantly advance human rights. Both have been widely lauded for securing greater protection of rights for vulnerable individuals and groups who face disadvantage and discrimination, such as women, children, prisoners and defendants in criminal trials. The position of prisoners is made more complex because Victoria created a statutory charter of prisoners' rights 20 years before enacting the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter). That first charter was contained in prison legislation and provided the model for a similar charter of prisoners' rights enacted in Tasmania and the ACT. These prisoners' charters were almost never invoked and faded into obscurity, largely because the inclusion of such rights within correctional statutes almost certainly doomed them to failure because of longstanding rules preventing prisoners from enforcing prison laws. This chapter explains the content of those earlier charters of prisoners' rights and the few times they have been successfully invoked. It will be argued that prisoners are still some way from gaining full and effective legal protection of their rights, but the Victorian and ACT Charters can greatly improve their legal position and invigorate the specialist prisoners' charters.

II The Historical Legal Position of Prisoners

The common law of prisoners' rights is a short story because, for many centuries, most people convicted of serious offences were executed or transported. The dead and disappeared can hardly assert their legal rights. Prisoners began to agitate for change as lengthy terms of imprisonment became commonplace, but the courts created several obstacles. One was the judicially created rule that correctional laws and rules were not intended or capable of conferring enforceable rights upon prisoners. This principle originated in England,¹ but was quickly adopted in Australia.² One consequence was that prisoners could not seek relief in judicial review if prison officials failed to observe

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1 The leading case point was *Arbon v Anderson* [1943] KB 252. See also *Morris v Winter* [1930] 1 KB 243.

2 *Flynn v The Queen* (1949) 79 CLR 1; *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317 at 328-329; *Bromley v Dawes* (1983) 10 A Crim R 98 at 113.

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