

# LGBT people in prison in Australia and human rights: A critical reflection

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## Abstract

This article examines the human rights protections relevant to lesbian, gay, bisexual and/or transgender ('LGBT') people in Australian prisons. We commence by addressing some of the inequalities experienced by incarcerated LGBT people, before outlining the relevant international human rights frameworks and their implementation in Australia. We focus on Victoria as a case study, demonstrating that there are limited provisions for LGBT people in prisons, and these provisions are generally not legally enforceable. We conclude by recommending legislative reforms that would increase protections for a particularly vulnerable cohort in the prison environment and promote compliance with Australia's obligations under international human rights law.

## Keywords

Criminal justice, equality, prisons, lesbian, gay, bisexual, transgender

The prison experience is often fraught with challenges, but these challenges can be compounded for individuals who identify as lesbian, gay, bisexual and/or transgender ('LGBT').<sup>1</sup> LGBT people are overrepresented in Australian prisons,<sup>2</sup> and are particularly vulnerable to physical and psychological trauma, systemic discrimination<sup>3</sup> and social stigmatisation, which contribute to a more perilous carceral experience. This article outlines some of the challenges faced by these individuals, and the

current human rights laws and policies governing their treatment while incarcerated, with an emphasis on the state of Victoria. As a starting point, we suggest legal reforms that Victoria could implement to better align with international human rights standards. However, reform is needed across Australia to uphold the rights of LGBT people in prisons.

LGBT is an initialism for Lesbian, Gay, Bisexual and Transgender.<sup>4</sup> These terms describe sexual orientations

<sup>1</sup>See Jason A Brown and Valerie Jenness, 'LGBT People in Prison: Management Strategies, Human Rights Violations, and Political Mobilization' (2020) *Oxford Research Encyclopedia of Criminology and Criminal Justice* <https://doi.org/10.1093/acrefore/9780190264079.013.647>.

<sup>2</sup>Data is limited, but research has found that sexual and gender minorities are overrepresented in Australian prisons: see, eg, Tony Butler et al, 'Sexual Behaviour and Sexual Health of Australian Prisoners' (2013) 10(1) *Sexual Health* 64; Paul L Simpson, Danika Hardiman and Tony Butler, 'Understanding the Over-Representation of Lesbian or Bisexual Women in the Australian Prisoner Population' (2019) 31(3) *Current Issues in Criminal Justice* 365.

<sup>3</sup>When using the term 'discrimination' throughout this article, we refer to direct or indirect social discrimination, akin to unfair treatment, prejudice or disadvantage experienced by an LGBT person, as a result of their sexual orientation, gender identity or gender expression. We do not use this term to refer to the legal definition of discrimination, such to infer that the prisons discussed here would be conclusively found to have engaged in unlawful discrimination.

<sup>4</sup>See Zein Murib, 'Lgbt' (2014) 1(1–2) *Transgender Studies Quarterly* 118.

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and gender identities that differ from the cisgender and heterosexual majority. Lesbians are women who are attracted to other women, gay men are attracted to other men, bisexual people are attracted to both men and women, and transgender people identify with a gender different than the one they were assigned at birth. These communities often face discrimination and marginalisation, due to their sex and gender characteristics.<sup>5</sup> The traditional 'LGBT' initialism has been criticised for not being inclusive of other sexual orientations, gender identities and expressions. Although some of the issues faced by incarcerated LGBT people discussed in this article will also be relevant to other sexual and gender minorities, we have confined our discussion to LGBT people to avoid the erasure or oversimplification of the unique experiences of other sub-groups. We recognise, however, that some conflation of the issues faced by LGBT people may still occur.<sup>6</sup>

## Experiences of LGBT incarcerated people in Australia

The discrimination, isolation and mistreatment that LGBT people experience in mainstream society are typically replicated and intensified in prison.<sup>7</sup> Prison systems based on cis- and hetero-normative conceptions result in structural discrimination against LGBT people, with their unique needs frequently overlooked. The social dynamics within prisons often form a hierarchy that can be influenced by factors such as sexual orientation and gender identity. Within this context, LGBT people often find themselves marginalised and relegated to the lower strata of the social hierarchy. This can exacerbate the difficulties they face in society more generally, including their vulnerability to harassment, abuse and isolation.<sup>8</sup>

LGBT people face a disproportionately high risk of violence and sexual assault while in custody, at the hands of other incarcerated people and corrections staff. Detention situations expose already vulnerable groups to becoming the targets of torture and ill-treatment.<sup>9</sup> A growing body of research evidences that LGBT people are exceptionally vulnerable to violence while incarcerated, with transgender people facing the highest risk.<sup>10</sup> For example, studies in the United States have recorded that lesbian, gay and bisexual people are 10 times more likely than their heterosexual peers to be sexually victimised by other incarcerated people and 3.3 per cent more likely to be sexually victimised by corrections staff,<sup>11</sup> while transgender people are 13 times more likely than cisgender people to be sexually assaulted by other incarcerated people.<sup>12</sup> There is a paucity of empirical evidence on the rates of violence and sexual assault against LGBT people while incarcerated in Australia. However, the existing studies suggest that violence and sexual assault are prevalent, and that prison staff often fail to respond appropriately to reports of assault.<sup>13</sup> For example, a 2022 study found that transgender and gender-diverse people in Victorian prisons experienced intense physical and sexual harassment and violence,<sup>14</sup> including in one case being 'offered as [the] "prize" for a prisoner[s] billiard tournament and raped', and then being 'told to get over it' when they reported the incident to prison staff.<sup>15</sup> In addition, a 2016 study of 2000 men in New South Wales ('NSW') and Queensland prisons found that gay and bisexual men were over seven times more likely than their heterosexual counterparts to report having experienced sexual coercion in prison,<sup>16</sup> and a 2013 examination of transgender women in Australian prisons identified recurrent experiences of coercion, physical violence and violent sexual assault.<sup>17</sup> Prolonged exposure to such abuse, whether threatened or actual, can cause a persistent state of fear and anxiety, which can lead to long-term

<sup>5</sup>Ibid.

<sup>6</sup>The conflation of lesbian, gay, bisexual and transgender experiences can obscure issues specific to these separate groups, such as health disparities experienced by transgender people, but not lesbian, gay or bisexual people: see Institute of Medicine (US) Committee on Lesbian, Gay, Bisexual and Transgender Health Issues and Research Gaps and Opportunities, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (National Academies Press, 2011).

<sup>7</sup>Gráinne Donohue, Edward McCann and Michael Brown, 'Views and Experiences of LGBTQ+ People in Prison Regarding Their Psychosocial Needs: A Systematic Review of the Qualitative Research Evidence' (2021) 18(17) *International Journal of Environmental Research and Public Health* 9335; Bradley Brockmann et al, *Emerging Best Practices for the Management and Treatment of Incarcerated Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals* (The Fenway Institute, 2019).

<sup>8</sup>Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/13/39/Add.5 (5 February 2010) 60 [231].

<sup>9</sup>United Nations Committee against Torture, *Eleventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63<sup>rd</sup> sess, Agenda Item 5, UN Doc CAT/C/63/4 (26 March 2018) 9 [48].

<sup>10</sup>See, eg, Brown and Jenness (n 1); Tom Butcher, 'Human Rights, Trans Rights, Prisoners' Rights: An International Comparison' (2023) 18 (Spring) *Northwestern Journal of Law and Social Policy* 43.

<sup>11</sup>Allen J Beck et al, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12* (US Department of Justice, 2013) 18, 30.

<sup>12</sup>Valerie Jenness et al, 'Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault' (2007) 2(2) *The Bulletin* 1, 2.

<sup>13</sup>See, eg, Paul L Simpson et al, 'Factors Associated with Sexual Coercion in a Representative Sample of Men in Australian Prisons' (2016) 45 *Archives of Sexual Behaviour* 1195; Sam Lynch and Lorana Bartels, 'Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy' (2017) 19 *Flinders Law Journal* 185; Mandy Wilson et al, "'You're a Woman, a Convenience, a Cat, a Poof, a Thing, an Idiot": Transgender Women Negotiating Sexual Experiences in Men's Prisons in Australia' (2017) 20 *Sexualities* 380; Matthew Mitchell et al, 'Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System' (2022) 11(4) *International Journal for Crime, Justice and Social Democracy* 99, 106.

<sup>14</sup>See Mitchell et al (n 13).

<sup>15</sup>Ibid 106.

<sup>16</sup>Simpson et al (n 13).

<sup>17</sup>Wilson et al (n 13).

psychological conditions such as post-traumatic stress disorder.<sup>18</sup>

Compared to their heterosexual and cisgender peers, LGBT people in prison also experience higher rates of self-harm and suicide, as well as an increased prevalence of mental health issues. For example, a study published in 2023 that surveyed 2698 adults incarcerated in Queensland and Western Australia found that 37 per cent of lesbian, gay, bisexual and other same-sex attracted individuals reported that they had self-harmed (versus 14 per cent of their heterosexual peers) and 49 per cent reported a history of at least one suicide attempt (versus 23 per cent of their heterosexual peers).<sup>19</sup> As a result of minority stress,<sup>20</sup> LGBT people are disproportionately affected by mental illness, self-harm and suicide.<sup>21</sup> This is compounded by intersectionality for those with multiple marginalised identities, such as people who are both Indigenous and identify as part of the LGBT community.<sup>22</sup> Experiences of discrimination, abuse, stigma and rejection – which frequently occur for LGBT people in prison – can cause and perpetuate mental health issues.<sup>23</sup> Depression, anxiety disorders and suicidal tendencies can also appear in LGBT people who experience excessive solitary confinement and isolation while incarcerated, often as a protective strategy against potential harm.<sup>24</sup> While isolation may offer a temporary respite from immediate physical threats, it may lead to a lack of a support system within the prison environment, amplifying feelings of loneliness and psychological distress. These issues can make reintegration into society more difficult on release, creating a cycle that perpetuates the disadvantages faced by LGBT people in the criminal justice system.

Structural discrimination within prison systems results in a failure to address the specific needs of LGBT people. For example, prisons may have forced haircut policies that

impose traditional gender norms,<sup>25</sup> or may display a heterosexist bias to reading materials by not stocking gay-oriented magazines,<sup>26</sup> thereby perpetuating invisibility and implying that homosexuality is abnormal or taboo.<sup>27</sup> Cis-normative prison systems result in a lack of consistency in the housing of transgender people, with transgender women often placed in male prisons, and vice-versa. This can cause transgender people significant distress and increase the risk of them being subjected to violence or sexual assault.<sup>28</sup> LGBT people also frequently encounter insufficient access to healthcare while they are incarcerated.<sup>29</sup> Conventional mental health services in prisons can lack the specialisation required to address the trauma and stress specifically associated with being an LGBT person in a prison environment, and unique healthcare needs may therefore not be met. Transgender people, for example, may require specific medical treatments as part of their gender transition, including hormone therapy or gender-affirming surgeries.<sup>30</sup> The absence of access to these treatments in many correctional facilities not only denies these individuals the medical care they need, but also disregards established medical guidelines for the treatment of transgender people, including those outlined by the World Professional Association for Transgender Health.<sup>31</sup>

These challenges result in a significant disparity between the wellbeing of incarcerated LGBT people and their heterosexual and cisgender counterparts.<sup>32</sup> Discrimination against LGBT people in correctional facilities is not solely a consequence of individual prejudices; in many instances, it is embedded in the policies and procedures that govern these institutions.<sup>33</sup> Even when inclusive policies are in place, they are not always consistently implemented, and a lack of proper training and education among prison staff regarding challenges faced by LGBT people can exacerbate discrimination. In addition, there are issues with incarcerated

<sup>18</sup>See Alicia Piper and David Berle, 'The Association between Trauma Experienced during Incarceration and PTSD Outcomes: A Systematic Review and Meta-Analysis' (2019) 30(5) *Journal of Forensic Psychiatry & Psychology* 854.

<sup>19</sup>Katie Hail-Jares et al, 'Self-Harm and Suicide Attempts among Incarcerated Lesbian, Gay and Bisexual People in Australia' (2023) 57(4) *Australian & New Zealand Journal of Psychiatry* 562.

<sup>20</sup>Minority stress refers to high levels of stress experienced by members of minority groups, including LGBT people, which stems from experiences of stigma and discrimination and creates a higher risk of negative physical and mental health outcomes: Elizabeth A McConnell et al, 'Multiple Minority Stress and LGBT Community Resilience among Sexual Minority Men' (2018) 5(2) *Psychology of Sexual Orientation and Gender Diversity* 1.

<sup>21</sup>Donohue, McCann and Brown (n 7) 9335.

<sup>22</sup>Hail-Jares et al (n 19) 562–3; Laura Dalzell, Sam Pang and Annette Brömdal, 'Gender Affirmation and Mental Health in Prison: A Critical Review of Current Corrections Policy for Trans People in Australia and New Zealand' (2023) *Australian & New Zealand Journal of Psychiatry* 1, 2.

<sup>23</sup>Dalzell, Pang and Brömdal (n 22) 11.

<sup>24</sup>See Brenda V Smith and Jaime M Yarussi, *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings* (US Department of Justice, 2<sup>nd</sup> ed, 2015) 12; Mitchell et al (n 13) 106.

<sup>25</sup>See Matthew Maycock, 'The Transgender Pains of Imprisonment' (2022) 19(6) *European Journal of Criminology* 1521.

<sup>26</sup>Peter Dunn, 'Slipping off the Equalities Agenda? Work with LGBT Prisoners' (2013) 206 *Prison Service Journal* 3, 7–8; Nicola Carr, Siobhán McAlister and Tanya Serisier, *Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison* (Irish Penal Reform Trust, February 2016) 16.

<sup>27</sup>Carr, McAlister and Serisier (n 26) 23.

<sup>28</sup>See Marie-Claire Van Hout and Des Crowley, 'The "Double Punishment" of Transgender Prisoners: A Human Rights-Based Commentary on Placement and Conditions of Detention' (2021) 17(4) *International Journal of Prisoner Health* 439, 440.

<sup>29</sup>See Hail-Jares et al (n 19) 571; Jess Rodgers, Nicole Asquith and Angela Dwyer, *Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons* (University of Tasmania, February 2017) 6.

<sup>30</sup>Maycock (n 25) 1529.

<sup>31</sup>Eli Coleman et al, 'Standards of Care for the Health of Transgender and Gender Diverse People, Version 8' (2022) 23(S1) *International Journal of Transgender Health* S1, S104.

<sup>32</sup>Donohue, McCann and Brown (n 7) 9335; Jason Lydon et al, *Coming Out of Concrete Closets: A Report on Black & Pink's National LGBTQ Prisoner Survey* (October 2015).

<sup>33</sup>Dwayne Antojado, 'Gender Not Fit for Prisons: On the Incompatibility of Gender as a Means to Segregate Prisoners' (2023) 32(2) *Journal of Prisoners on Prisons* 81, 83.

people being unaware of their rights or how to challenge their treatment in prison.<sup>34</sup> The systemic nature of this discrimination often makes it difficult to address, perpetuating a cycle of disadvantage and abuse for incarcerated LGBT people. A comprehensive approach to reform is therefore needed. From housing policies to medical treatments, the distinct challenges faced by LGBT people in prisons must be recognised and addressed in a manner that aligns with human rights standards.

## Human rights frameworks to protect incarcerated LGBT people in Australia

The experiences of incarcerated LGBT people in Australia highlight the tension between human rights principles and the realities of the prison environment. As incarcerated people have been deprived of their liberty, they are particularly vulnerable to human rights violations and, as discussed above, LGBT people face heightened risks due to their minority status. Incarceration of LGBT people raises important considerations about the State's responsibility to safeguard human rights within its detention facilities. While correctional services have a primary responsibility for maintaining community safety and the security of their facilities, they also bear a duty of care toward the individuals they detain.<sup>35</sup> Specific consideration needs to be given to measures to protect incarcerated LGBT people from human rights violations, including reducing instances of violence and sexual assault and ensuring the provision of adequate healthcare.

A number of international treaties and soft law instruments provide guidance and minimum standards for the management of LGBT people in prisons.<sup>36</sup> The international consensus is that LGBT people in prison must be treated with respect, due to their inherent dignity and value

as human beings.<sup>37</sup> Given that imprisonment deprives people of their liberty and restricts their rights, the prison system should not aggravate the suffering inherent in this situation,<sup>38</sup> and should seek to minimise any differences between prison life and life at liberty.<sup>39</sup> LGBT people have the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment while in prison, and States have a positive obligation to take measures to prevent this conduct from occurring.<sup>40</sup> LGBT people also have the right to the highest attainable standard of physical and mental health while incarcerated,<sup>41</sup> and should enjoy equivalent standards of healthcare to those available in the community.<sup>42</sup> This includes access to adequate physical and mental healthcare and, in the case of transgender people, access to gender-affirming treatment while in prison. Transgender and gender non-conforming people should also be able to participate in decisions regarding their placement in detention, appropriate to their gender identity.<sup>43</sup> LGBT people are entitled to the protection of their human rights without discrimination.<sup>44</sup> This means that States must adopt and implement laws and policies on the placement and treatment of people in detention that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions and sex characteristics.<sup>45</sup> States must also implement systems for regular oversight and monitoring of both public and private prisons, to ensure the safety and security of all persons and to address the specific vulnerabilities of LGBT people.<sup>46</sup>

Australia has a fragmented approach to protecting the rights of people in detention. Australia's dualist legal system means that international treaties it ratifies do not have effect until incorporated into domestic law,<sup>47</sup> and most of the core international human rights treaties have not been implemented. Australia is the only democratic nation in the world that does not have a national charter or bill of rights.

<sup>34</sup>See, eg, Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (November 2017) 11, 67.

<sup>35</sup>Dalzell, Pang and Brömdal (n 22) 2; Lynch and Bartels (n 13) 193.

<sup>36</sup>*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 9 January 2003, UN Doc A/RES/57/199 (entered into force 22 June 2006); ('OPCAT'); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 43<sup>rd</sup> sess, UN Doc A/RES/43/173 (9 December 1988); *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016) ('Mandela Rules'); *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, GA Res 65/229, UN GAOR, 65<sup>th</sup> sess, Agenda Item 105, UN Doc A/RES/65/229 (16 March 2011, adopted 21 December 2010) ('Bangkok Rules'); International Commission of Jurists, *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (adopted 10 November 2017) ('Yogyakarta Principles').

<sup>37</sup>ICCPR (n 36) art 10(1); *Mandela Rules* (n 36) rule 1.

<sup>38</sup>*Mandela Rules* (n 36) rule 3.

<sup>39</sup>*Ibid* rule 5(1).

<sup>40</sup>UDHR (n 36) art 5; ICCPR (n 36) art 7; *Yogyakarta Principles* (n 36) principle 9(H). Many prisons keep LGBT people, in particular transgender people, in solitary confinement, to protect them from violence and assault by other prisoners. However, solitary confinement can amount to cruel and inhuman or degrading treatment: see Juan Méndez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, 19<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/19/61/Add.4 (29 February 2012) 72–3. The *Mandela Rules* (n 36) prohibit indefinite or prolonged solitary confinement, stating that it should only be used in exceptional cases as a last resort: at rules 43(1), 45(1).

<sup>41</sup>ICESCR (n 36) art 12.

<sup>42</sup>*Mandela Rules* (n 36) rule 24.

<sup>43</sup>*Yogyakarta Principles* (n 36) principle 9(I).

<sup>44</sup>ICCPR (n 36) art 26; ICESCR (n 36) art 2(2); *Mandela Rules* (n 36) rule 2.

<sup>45</sup>*Yogyakarta Principles* (n 36) principle 9(I); *Mandela Rules* (n 36) rule 2(2).

<sup>46</sup>See OPCAT (n 36); *Yogyakarta Principles* (n 36) principle 9(J).

<sup>47</sup>*Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

Some rights have been incorporated through legislation, such as federal and state anti-discrimination laws. For example, the *Sex Discrimination Act 1984* (Cth) and *Equal Opportunity Act 2010* (Vic) make it unlawful to discriminate against a person on the basis of their sex, sexual orientation, gender identity or intersex status. In addition, three jurisdictions have human rights charters;<sup>48</sup> as the Victorian experience will illustrate, however, the protections these instruments offer are not comprehensive.

Australia ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT') in 2017 but failed to implement the National Preventive Mechanism ('NPM') by the due date of 20 January 2023, despite an extension.<sup>49</sup> Monitoring bodies have since been established for the Commonwealth and some states and territories, but NSW, Queensland and Victoria have not yet nominated an NPM. Australia has also been uncooperative with the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT'). In late 2022, the SPT commenced its first visit to Australia, but was denied access to some Australian detention facilities and forced to suspend its visit.<sup>50</sup> The SPT's report from this visit noted that it had experienced a 'discourteous, and in some cases hostile, reception from a number of government authorities and officials' and had observed a 'fundamental lack of understanding' of OPCAT, Australia's obligations under this treaty, and the mandate and powers of the SPT.<sup>51</sup> In February 2023, after Australia had failed to provide requested assurances, the SPT terminated its visit, resulting in Australia becoming only the second country after Rwanda to have its visit terminated.<sup>52</sup>

Australia has a set of national principles for the management of correctional facilities – the *Guiding Principles for Corrections in Australia* ('*Guiding Principles*').<sup>53</sup> The *Guiding Principles* are modelled on international standards and reference human rights. The *Guiding Principles* were updated in 2018, in a revision which sought, inter alia, to 'focus on contemporary and emerging themes, trends and challenges facing corrections in Australia including: ... the specific needs of particular prisoner cohorts including ... Lesbian, Gay, Bisexual,

Transgender, Queer and Intersex (LGBTQI) offenders'.<sup>54</sup> The *Guiding Principles* also state, in this context, that:

The Principles consider different implications for specific prisoner/offender cohorts. A mainstreaming approach ensures that broad principles reflect the needs of all prisoners/offenders, but with specific principles also included for particular prisoner/offender cohorts who have unique requirements.<sup>55</sup>

Furthermore, one of the guiding principles is that '[h]ealth care provided to LGBTQI persons in custody is appropriate to their individual needs'.<sup>56</sup> However, the *Guiding Principles* do not create any legal obligations.<sup>57</sup> It is left to the individual states and territories to manage prisons through corrections legislation, policies and procedures. All jurisdictions have some rights for people in correctional institutions through legislation and the common law, but the level of rights protection for LGBT people varies significantly. There have been some progressive policy developments for incarcerated transgender and gender-diverse people in the past few years, but these are often discretionary and are inconsistent between jurisdictions.<sup>58</sup> The authors are currently unaware of any state and territory corrections policies addressing the needs of lesbian, gay and bisexual people in Australian prisons.

## Victoria: A case study

Victoria has more comprehensive rights protections for incarcerated LGBT people than some other Australian jurisdictions,<sup>59</sup> but there remain significant gaps. Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('*Charter*') requires public authorities, including Corrections Victoria, to give 'proper consideration' to human rights when making a decision, and to act compatibly with human rights.<sup>60</sup> The *Charter* has been successfully relied upon to uphold incarcerated people's rights. For example, in *Certain Children v Minister for Families and Children (No 2)*,<sup>61</sup> children detained in the adult maximum security Barwon Prison succeeded in a challenge to the lawfulness of their detention under the *Charter*. However, the *Charter* contains only a selection of civil, political and cultural rights. It does not contain economic and social rights, including

<sup>48</sup>*Human Rights Act 2004* (ACT) ('ACT HRA'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'); *Human Rights Act 2019* (Qld).

<sup>49</sup>See *OPCAT* (n 36) art 3.

<sup>50</sup>See Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Australia Undertaken from 16 to 23 October 2022: Recommendations and Observations Addressed to the State Party*, UN Doc CAT/OP/AUS/ROSP/1 (20 December 2023) 2 [1], [4].

<sup>51</sup>*Ibid* 3 [14]–[15].

<sup>52</sup>*Ibid* 2 [6].

<sup>53</sup>Corrective Services Administrators' Council, *Guiding Principles for Corrections in Australia* (2018).

<sup>54</sup>*Ibid* 4.

<sup>55</sup>*Ibid* 30.

<sup>56</sup>*Ibid* 21.

<sup>57</sup>*Ibid* 4.

<sup>58</sup>For a recent comparative review of Australian corrections policy for transgender, non-binary and other gender-diverse people, see Dalzell, Pang and Brömdal (n 22).

<sup>59</sup>For example, Queensland's corrections policy discriminates against transgender people who have not undergone a medical transition, but Victoria's does not: Queensland Corrective Services, *Transgender Prisoners* (Custodial Operations Practice Directive, version 6, 2 February 2023) 3; Corrections Victoria Commissioner, *Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex* (CR 2.4.1, March 2021) 5 [6.1.1]–[6.1.2], 6 [3.6.4] ('*TGDI Guidelines*').

<sup>60</sup>*Victorian Charter* (n 48) s 38(1).

<sup>61</sup>[2017] VSC 251.

core rights like the right to health and the right to education. It also has procedural limitations. A person in prison cannot bring a claim in court alleging a violation of Charter rights unless they also argue another non-rights-based action.<sup>62</sup> They will also not be entitled to damages for a breach of the Charter.<sup>63</sup>

The *Corrections Act 1986* (Vic) ('*Corrections Act*') provides additional rights for people in prison, including the right to access reasonable medical care and treatment 'necessary for the preservation of health',<sup>64</sup> but does not address the needs of LGBT people, except in relation to supervised drug tests,<sup>65</sup> and strip searches.<sup>66</sup> Corrections Victoria has implemented the *Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex* ('TGDI'), which must be adopted by all staff who provide correctional services in Victoria ('*TGDI Guidelines*').<sup>67</sup> These guidelines emphasise human rights and provide guidance regarding the specific needs of TGDI people in Victorian correctional facilities, including in relation to placement, access to gender-affirming treatment, the use of pronouns, and strip searches.<sup>68</sup> While a positive step, the TGDI Guidelines are not without shortcomings, such as the lack of a clear policy statement regarding the right to treatment and housing according to gender identity.<sup>69</sup> In addition, as with the Guiding Principles, the TGDI Guidelines are not legally enforceable and it is unclear the extent to which they are followed in practice. Crucially, there are no provisions to address the specific needs of lesbian, gay or bisexual people.

Victoria has now passed legislation to support the implementation of OPCAT, but it does not allow the SPT unrestricted access to all places of detention.<sup>70</sup> In addition, as discussed above, Victoria has fallen behind other states and territories in failing to establish an NPM, to provide independent oversight of prisons. Such an entity could play a significant role in preventing human rights abuses of LGBT people in prisons.

Legislative reform is required to appropriately address the human rights needs of LGBT people in Victorian prisons, and incarcerated people more generally. First, the Charter should be amended to include economic and social rights, including the right to health. There has been increasing focus on the health needs of people in prison recently,<sup>71</sup> and our discussion highlights that this has

specific relevance to incarcerated LGBT people. Second, s 39(1) of the Charter should be amended to include a direct cause of action, to enable all Victorians, including LGBT people, to bring a claim against a public authority in respect of a Charter contravention, without having to rely on a non-Charter claim. The Australian Capital Territory ('ACT') *Human Rights Act 2004* ('ACT HRA') is instructive in this regard, as it allows a person to both start a proceeding against a public authority for contravening an ACT HRA right, or rely on that person's ACT HRA rights in other legal proceedings.<sup>72</sup> We recognise, though, that this provision has only been tested twice by an incarcerated person in the ACT.<sup>73</sup> Third, s 29(3) of the Charter should be amended to allow victims of human rights violations to be awarded damages. Damages are already available for breaches of anti-discrimination laws, including breaches by public authorities,<sup>74</sup> and for breaches of human rights charters in comparable jurisdictions such as the United Kingdom, New Zealand and Canada.<sup>75</sup> It should be open to the court to award appropriate remedies, including damages, to adequately redress loss or damage suffered by victims of Charter violations.

In addition, the Victorian legislature should amend the *Corrections Act* to address the specific needs of LGBT people, rather than relying on policy. The ACT's equivalent *Corrections Management Act 2007* contains some such protections, with specific provisions for the treatment of incarcerated transgender and intersex people.<sup>76</sup> These could be incorporated and expanded on in Victoria's *Corrections Act*, alongside some of the policy standards in the TGDI Guidelines. The *Corrections Act* should also address the needs of lesbian, gay and bisexual people, including measures to increase protection from violence and sexual assault and ensure access to adequate mental and physical healthcare. These amendments should be developed in consultation with key stakeholders from the LGBT community and ideally would involve input from current and/or formerly incarcerated LGBT people.

Finally, Victoria should do more to support Australia's compliance with its obligations under OPCAT. The *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic) ('*Monitoring Act*') should be amended to allow unrestricted access by the SPT, in particular by removing s 8 which

<sup>62</sup>Victorian Charter (n 48) s 39(1).

<sup>63</sup>Ibid s 39(3).

<sup>64</sup>*Corrections Act 1986* (Vic) s 47(1)(f).

<sup>65</sup>Supervised urine drug tests must be taken by someone of either the same gender the incarcerated person identifies with, or a gender that they request: *ibid* s 76A(2B).

<sup>66</sup>These must be conducted by someone of either the same gender the incarcerated person identifies with, or a gender that they request: *Corrections Regulations 2019* (Vic) regs 86(2)(g), 90(3)(f).

<sup>67</sup>*TGDI Guidelines* (n 59).

<sup>68</sup>*Ibid* 5, 8, 10, 11.

<sup>69</sup>See further Dalzell, Pang and Brömdal (n 22) 11.

<sup>70</sup>See *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic) ('*Monitoring Act*') s 8.

<sup>71</sup>See, eg, Damien Linnane, Donna McNamara and Lisa Toohey, 'Ensuring Universal Access: The Case for Medicare in Prison' (2023) 48(2) *Alternative Law Journal* 102.

<sup>72</sup>ACT HRA (n 48) s 40C(2).

<sup>73</sup>Re *Application for Bail by Islam* (2010) 244 FLR 158; *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83.

<sup>74</sup>See, eg, *Equal Opportunity Act 2010* (Vic) s 125(a)(ii).

<sup>75</sup>*Human Rights Act 1998* (UK) s 8; *Human Rights Act 1993* (NZ) s 92M; *Canada Act 1982* (UK) c 11, sch B pt 1, s 24(1) ('*Canadian Charter of Rights and Freedoms*').

<sup>76</sup>*Corrections Management Act 2007* (ACT) ss 79, 109.

allows a detaining authority to temporarily prohibit or restrict access to a place of detention.<sup>77</sup> In addition, Victoria must establish an independent oversight body to conduct regular monitoring of prisons, as most other states and territories have done.<sup>78</sup> A pilot OPCAT-style inspection in 2017 by the Victorian Ombudsman at a maximum security women's prison in Victoria identified practices that did not align with international human rights standards, including excessive use of force, long-term separation practices, a lack of privacy, concerning strip searches and insufficient access to healthcare.<sup>79</sup> External monitoring and oversight is important, to reduce the risk of human rights violations against LGBT people going undetected and to prevent further abuse and mistreatment.

Victoria's *Pride in Our Future: Victoria's LGBTIQ+ Strategy 2022–32* states that it 'strives to create a more inclusive and cohesive state, where LGBTIQ+ Victorians can enjoy the same opportunities as any other Victorian' and that it 'places human rights at its core'.<sup>80</sup> If these statements are to be practically meaningful, this must include human rights protections for LGBT people in Victorian prisons.

## Conclusion

This article has examined the frameworks designed to protect the human rights of incarcerated LGBT people in Australia, with a particular emphasis on the Victorian context. Our analysis demonstrates that, although there have been some developments in relation to transgender and gender-diverse people in recent years, there are few provisions that address the specific needs of those who identify as lesbian, gay or bisexual. Furthermore, the available provisions are generally not legally enforceable. We outline recommendations for reform to the Victorian Charter, Corrections Act and Monitoring Act that, if

adopted, would increase protections for a particularly vulnerable cohort in the prison environment. Victoria's reforms could also influence other states and territories to improve their own standards and promote compliance with Australia's obligations under international human rights law.

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<sup>77</sup> *Monitoring Act* (n 70) s 8. Section 7 already permits the Minister to object to a Subcommittee visit, if there is an urgent or compelling reason on the grounds of national defence, public safety, natural disaster or serious disorder, in line with Article 14(2) of *OPCAT* (n 36).

<sup>78</sup> For a detailed consideration of an NPM model for Victoria, see Victorian Ombudsman, *OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People* (September 2019) 47–68.

<sup>79</sup> Victorian Ombudsman (n 34) 8–12.

<sup>80</sup> Department of Families, Fairness and Housing, *Pride in Our Future: Victoria's LGBTIQ+ Strategy 2022–32* (February 2022) 4.