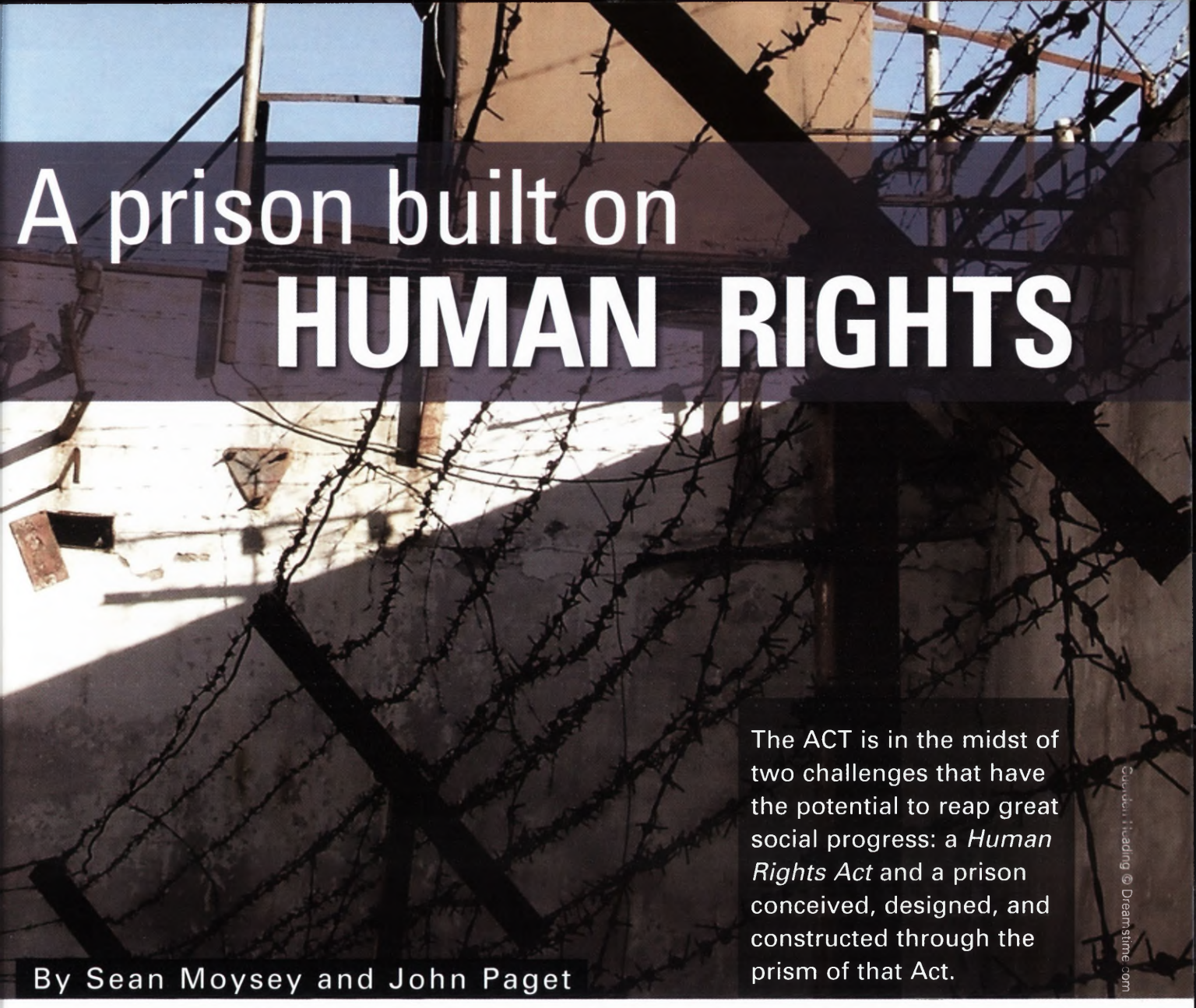
A prison built on HUMAN RIGHTS



The ACT is in the midst of two challenges that have the potential to reap great social progress: a *Human Rights Act* and a prison conceived, designed, and constructed through the prism of that Act.

By Sean Moysey and John Paget

In November 2003, the ACT government announced that it would cease transporting its residents to NSW to serve their sentences and would build a prison for the ACT community. The government named it the Alexander Maconochie Centre (AMC) after the Superintendent of Norfolk Island (1840–1844), whose ideas of humane reform broke with Australia's penal tradition.

A year later, the Territory's Legislative Assembly passed the *Human Rights Act* 2004 (HRA). The HRA requires the interpretation of ACT laws to be consistent with human rights as far as possible;[1] expressly encourages the consideration of international jurisprudence and instruments to assist interpretation;[2] and requires the ACT attorney-general to provide a human rights compatibility statement to the Legislative Assembly along with each Bill presented by a minister.[3]

The HRA applies the 'proportionality test' to the human rights compatibility of Bills, and the exercise of statutory powers. Section 28 of the HRA requires that any exercise of power that limits or infringes a human right must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued. The origins of the proportionality test lie in the Canadian case of *R v Oakes*.[4] The court in *Oakes* held that to be proportionate:

- the measure limiting human rights must be carefully designed to achieve the relevant objective, and not be arbitrary, unfair, or based on irrational considerations;
- the limitation should impair the right in question as little as possible; and
- even if the objective of the measure is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects on individuals or groups, the measure will not be justified.

Prior to the development of human rights law, common law jurisdictions approached prisoners' legal rights from the 'ground up'. They began by assuming that prisoners had no rights, then selectively decided what entitlements to allow. Human rights law reverses this presumption: a prisoner retains all rights apart from those lost, or limited, as a consequence of imprisonment.

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In Australia, the High Court in *Flynn v King*[5] asserted the traditional view that, unlike other citizens, prisoners had no right to seek judicial review of the acts of the Executive.

Only in the late 1970s did the legal position begin to change, marked by the UK case of *R v Board of Visitors of Hull Prison; ex parte St Germain (No. 1)*.[6] In *Hull*, the Court of Appeal decided that prisoners have the right to seek judicial review of disciplinary decisions.

Since *Hull* and the Nagle Royal Commission into NSW Prisons,[7] Australian courts have moved away from *Flynn* and allowed prisoners to apply for judicial review on a range of matters such as decisions affecting release,[8] procedural fairness,[9] conditions of imprisonment[10] and leave from prison.[11]

The ACT's HRA advances the status of prisoners' rights beyond accrued administrative law and into a rights-based methodology. The ACT government's *Corrections Management Act* 2007 (yet to be proclaimed) reflects this shift by explicitly setting out minimum living conditions for all people detained (chapter 6); providing a comprehensive set of review procedures for segregation and discipline (part 9.2, chapters 10 and 11); and incorporating human rights obligations into the management of all detainees (preamble and chapter 2).

The Act and the HRA will create a legal framework consistent with international human rights standards, and an ethos for the AMC that will focus on rehabilitation and positive change. The aim is to prepare inmates for their release from the outset of their sentence, and to support them as they re-enter the wider community.

Programs on offer will include:

- parenting, family and other relationships;
- health education and promotion;
- remedial education;
- cognitive skills;
- substance abuse treatment and education;
- sex offender's treatment;
- vocational training, initially not involving commercial industries;
- positive recreational skills and habits;
- skills and habits for living and working; and
- victim awareness.[12]

An essential goal of the AMC project is to foster a 'healthy prison' culture and effective throughcare. Everyone in the AMC should be and feel safe, everyone should be treated with respect and be encouraged to improve themselves, and everyone should have the opportunity and means to maintain relationships with family and friends.

Throughcare aims to reduce the impact the shift from prison to the community at the end of a sentence. Essential to this goal is continuity of healthcare, contact with family and friends, support with the move back into the wider community, and co-ordination with community-based programs.

The AMC and the ACT government's new laws aim to change the place of the prison as an institution divorced from the community, to somewhere that is part of the community. The primary tasks of the AMC will be rehabilitation as well as community safety. ■

Notes: **1** Section 30. **2** Section 31. **3** Section 37. **4** [1986] 1 SCR 103. **5** (1949) 79 CLR 1. **6** [1979] QB 425. **7** *Report of the Royal Commission into New South Wales Prisons*, Justice Nagle, Royal Commissioner, NSW, 1978. **8** *Smith v Corrective Services Cmr of NSW* (1980) 147 CLR 134; *Kelleher v Parole Board of NSW* (1984) 156 CLR 364; *Ex parte Fritz* (1992) 59 A Crim R 132. **9** *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533; *Bromley v Dawes* (1983) 34 SASR 73; *Maybury v Osborne* [1984] 1 NSWLR 579; *Hogan v Sawyer; Ex parte Sawyer* [1992] 1 Qd R 32. **10** *R v Walker* [1993] 2 Qd R 345; *Binse v Williams & anor* [1998] 1 VR 381; *Collins v State of South Australia* (1999) 74 SASR 200. **11** *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261. **12** *Alexander Maconochie Centre Functional Brief*, ACT government, 2005.

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This article is an expression of the authors' personal views.