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'DOING HER TIME': A HUMAN RIGHTS ANALYSIS OF OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE

ERIN LEACH*

At the end of 2016, the Queensland Ombudsman released his report 'Overcrowding at Brisbane Women's Correctional Centre'. This investigation, alongside reports from the Anti-Discrimination Commission Queensland and Crime and Corruption Commission Queensland reveal that, despite the best efforts of Queensland Correctives Services, there are a number of potential human rights violations that have arisen within Brisbane Women's Correctional Centre as a result of ongoing overcrowding. As of 27 February 2019, Queensland has become the third Australian state or territory to pass a human rights Act, 14 years after the Australian Capital Territory introduced the Human Rights Act 2004, and 12 years after Victoria introduced the Charter of Human Rights and Responsibilities Act 2006. In 2019, Australia remains to be the only Western democracy that is yet to introduce a national Act or bill of human rights. This article will consider the potential violations of female prisoners' human rights inside Queensland's largest female correctional facility, drawing on case law from Canada, Scotland, and the ECtHR to discuss their potential for recourse under Queensland's new Human Rights Act 2019.

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I THE SCOPE OF CURRENT HUMAN RIGHTS PROTECTIONS IN QUEENSLAND, AUSTRALIA

Prior to 2004, neither the federal state, nor any of the six Australian states had introduced a human rights Act or Charter. This meant that Australia fell outside the modern international tradition of express legal protection for human rights,¹ placing faith instead in a historical reliance on the doctrine of government responsibility.² This position changed in 2004 when the Australian Capital Territory ('ACT') introduced its own *Human Rights Act 2004* ('2004 Act'), followed by Victoria in 2006 with the *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter'). Though each are key historical developments towards giving human rights legal protection at the domestic level in Australia, both in their original forms showed inherent weaknesses.

The 2004 Act broke 'the political deadlock' that had precipitated the development of human rights law in Australia,³ marking a growing awareness that common law no longer stood as an 'invincible safeguard' for breaches of fundamental rights.⁴ Initially, however, the 2004 Act did not provide a platform for individuals to bring a human rights claim against the government, meaning that there were no direct remedies available for human rights violations. This has since been resolved with *The Human Rights Amendment Act 2008*,⁵ which introduced a new basis for claims to be brought against a public

¹ Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33(1) *Melbourne University Law Review* 105, 106 ('Gans').

² George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 881 ('Williams'); see also Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 2.

³ The Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, (Final Report, May 2009) 6.

⁴ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 12.

⁵ *The Human Rights Amendment Act 2008* (ACT).

authority for breach of human rights.⁶ Despite this, in its first five years of operation, only 91 cases were heard, with most judgements playing ‘spectator to the HRA dialogue’⁷ and failing to grasp and develop the apparatus at hand. In the Victorian Charter, section 39(1)⁸ was described as ‘the last in a series of built-in obstacles’⁹ to applying any of the Charter’s operative provisions, and has been interpreted as ‘a conditional prohibition’,¹⁰ meaning in effect that the section blocks some of the remedies that would have otherwise been available where a breach of the Charter was established. George Williams, Chair of the Human Rights Consultation Committee, which recommended the Charter, comments that the ambiguity in the Charter ‘reflects the need for the [Charter] to give rise to remedies as well as the preference expressed by the Government... [that it] does not wish to create new individual causes of action based on human rights breaches.’¹¹

A decade on, and with the ratification of Optional Protocol to the Convention Against Torture (‘OPCAT’) in 2017, the Victorian Charter has enjoyed some successes. In 2017, Victoria’s higher courts heard more than 40 cases,¹² including the protection of children’s rights in detention in *Certain Children v Minister for Families and Children & Ors (No 2)*,¹³ and the protection of the right to fair trial for those with learning disabilities self-representing in court in *Matsoukatidou v Yarra Ranges Council*.¹⁴ Undoubtedly, the strides made by the 2004 Act and The Victorian Charter were significant, yet simultaneously ACT and Victoria failed to foster a strong culture of human rights in which the true potential of their respective Acts could be utilised.

At the federal level in Australia, human rights proceedings may be brought where the claim falls under the umbrella of one of the four discrimination statutes.¹⁵ Ordinarily, the

⁶ Australian National University: College of Law, ‘ACT Human Rights Act Portal’ *Australian National University* (Web Page, 2 October 2014) <<http://acthra.anu.edu.au/faq.php#faq6>>.

⁷ ‘HRA 2004’ (n 4) 7.

⁸ Which provides for the process where a breach of section 38(1) occurs, namely, that a public authority has acted in a way that is incompatible with human rights.

⁹ Gans (n 1) 106.

¹⁰ *Ibid* 115.

¹¹ Williams (n 3).

¹² Victorian Equal Opportunity & Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities: Human Rights in Courts and Tribunals* (Report, August 2018) 35.

¹³ [2017] VSC 251.

¹⁴ [2017] VSC 61.

¹⁵ *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Age Discrimination Act 2004* (Cth).

case will be brought first to the Australian Human Rights Commission ('AHRC')¹⁶ before proceeding to the Federal Court of Australia.¹⁷ In the event that the claim is successful, the applicant may be financially compensated, or else receive a remedy requiring the respondent to stop the discrimination. Where human rights claims fall outside the four discrimination Acts, the legal protection of human rights in Australia is very limited, as admitted by the AHRC itself in 2015.¹⁸ At present citizens of New South Wales ('NSW'), South Australia ('SA'), Tasmania, and Western Australia ('WA') are without domestic legal protection of human rights.

Where domestic remedies fall short, international human rights mechanisms may be utilised to establish specified breaches of Convention obligations. Despite the fact that Australia has ratified many of the core human rights treaties, including the International Covenant on Civil and Political Rights ('ICCPR'),¹⁹ the Convention on the Rights of the Child (CRC),²⁰ the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ('CAT'),²¹ and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),²² the legal backing of the human rights protections is limited until incorporated into national legislation, either by way of an Act which makes reference to international human rights law, such as the *Human Rights Act 1998* in the UK or by establishing its own bill of rights, such as the United States *Bill of Rights*. *Collins v State of South Australia*²³ ('*Collins*') is a sobering illustration of the prospects for cases within Australian States that do not have recourse to an Act of human rights. In *Collins*, the applicant claimed that the doubling up conditions at the Adelaide Remand Centre

¹⁶ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 1.

¹⁷ *Ibid* s 46.

¹⁸ Australian Human Rights Commission, 'About a Human Rights Act for Australia' (Web Page, 2015) <https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf>.

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

²⁰ *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²¹ *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 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/RES/57/199 (22 June 2006, adopted 18 December 2002).

²² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 28 (entered into force 3 January 1976).

²³ [1999] SASC 257.

breached Article 10(1) of the ICCPR.²⁴ The judge was satisfied on the evidence that there was indeed a breach, however, he was forced to conclude that as the ICCPR is not incorporated into legislation at the domestic level, he was not able to provide a legal remedy.²⁵

For each of the core international human rights treaties there exists a treaty body or committee which acts as a monitoring system to ensure Member State compliance. In order for Australian citizens to bring complaints to the committees, Australia must have accepted the Committee's competence, doing so by either ratifying the convention, plus the optional protocol of the relevant treaty, or by making a declaration to be bound to that effect.²⁶ In the absence of robust domestic human rights Acts, the only course of action for human rights claims that fall outside the discrimination Acts is to bring an individual communication before the relevant human rights treaty body (where there is provision to do so) or make a complaint to the Special Procedures of the Human Rights Council. As of 27 February 2019,²⁷ this position has now changed for Queensland.

The introduction of the *Human Rights Act 2019* ('HRA') marks a historic change in Australia. This new piece of legislation sets out 23 human rights protected by law in Queensland, largely derived from the ICCPR and the ICESCR. Although it does not make international law part of domestic legislation,²⁸ these statutory rights can be utilised to breathe the life of international treaties into domestic legislation, offering protection to some of the most marginalised members of our society. Notably, it is not a magic wand, one wave of which will end current rights violations throughout Queensland. If Queensland is to move past the progress of the 2004 Act and The Victorian Charter, the introduction of the HRA requires a willingness to tackle the hurdles that will come with

²⁴ ICCPR (n 20) art 10(1): 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

²⁵ Ibid [53].

²⁶ 'Human Rights Bodies — Complaints Procedures', *Office of the High Commissioner for Human Rights* (Web Page) <<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>>.

²⁷ The date on which The Human Rights Bill 2018 was passed in Parliament. Please see e.g. 'Media Statements', The Queensland Cabinet and Ministerial Directory (Web Page, 2019) <<http://statements.qld.gov.au/Statement/2019/2/27/historic-day-for-queenslanders-as-human-rights-bill-passes>>. As of the 1 July 2019, the ADCQ became the Queensland Human Rights Commission, marking the realisation of the first stage of the Human Rights Act 2019. As of the 1 January 2020 the Commission will begin accepting complaints.

²⁸ 'Human Rights Law', *Queensland Human Rights Commission* (Web Page) <https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0009/19908/QHRC_factsheet_QueenslandHumanRightsAct.pdf>.

applying it to complex, socially entrenched problem areas. One such issue is overcrowding in women's prisons. At the outset of 2017, the Anti-Discrimination Commission Queensland ('ADCQ'), now the new Human Rights Commission Queensland ('HRCQ'), began their 10 year review of women in prison. The ensuing report, *'Women in Prison 2019: A Human Rights Consultation Report'* (2019 Report) details a number of human rights concerns which prior to 2019 had not been dealt with in law in Australia. As such, this article has used Brisbane Women's Correctional Centre ('BWCC') as its focal point, drawing from legislation in Scotland and Canada, and jurisprudence from the European Court of Human Rights (ECtHR) in order to illuminate how the Queensland Courts may interpret the HRA and maximise its potential to protect the 23 rights now enshrined in Queensland law in regard to prisoners' rights.

II OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE

The State of Queensland is the second largest contributor to the national prisoner population in Australia, accounting for 21% (8,905 persons) of the 43,018 full-time prisoners held in Australian correctional centres, as of September 2018.²⁹ The Australian Bureau of Statistics ('ABS') reports that from 2017 to 2018 the national imprisonment rate rose by 3% from 216 to 221 prisoners per 100,000 adult population.³⁰ There has been a 10% (326 persons) increase in female prisoners over the last year, outpacing the statistics recorded for men in prison: 4% (1,430 persons).³¹ Over the last decade, females in custody have increased by 66%³² and as of September 2018, 773 women were detained in Queensland.³³ At the end of 2016, the Queensland Ombudsman, Phil Clarke, named BWCC the most overcrowded facility of the 13 operational correctional centres in Queensland,³⁴ and said that this had been the case for a period of three years since his first investigation in 2013.³⁵ As of September 2018, the Crime and Corruption

²⁹ Australian Bureau of Statistics, *Corrective Services Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019) ('Corrective Service Australia: Report'): only New South Wales has more prisoners.

³⁰ Australian Bureau of Statistics, *Prisoners in Australia, 2018* (Catalogue No 4517.0, 2018).

³¹ *Corrective Services Australia: Report* (n 30).

³² Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (ADCQ 2019) 52.

³³ Queensland Corrective Services, *Queensland Corrective Services Report 2017-2018* (Annual Report, 2018) 116.

³⁴ Queensland Ombudsman, *Overcrowding at Brisbane Women's Correctional Centre: An Investigation into the Action Taken by Queensland Corrective Services in Response to Overcrowding at Brisbane Women's Correctional Centre* (Report, September 2016) 11 ('Queensland Ombudsman').

³⁵ *Ibid* 20.

Commission Queensland ('CCC') reported that Queensland's Correctional Centres were running at 128% capacity.³⁶ The rise in numbers has been referred to as 'a symptom of a system under pressure',³⁷ and at the end of 2018 the Queensland Corrective Services ('QCS') Commissioner named overcrowding as the 'most pressing operational issue' currently facing the QCS.³⁸

'Overcrowding' is defined as the circumstance where the number of persons in prison exceeds the official capacity for a prison.³⁹ At its core, overcrowding overburdens the infrastructure of the prison itself: it interferes with the processes that are designed to keep persons in prison and staff safe and with the procedures in place to ensure the smooth running of the facility and all of its programs. Overcrowding was identified by the ADCQ as one of the most pressing concerns in their 2019 Report,⁴⁰ and similarly, by prisoners in Victoria when then Victorian Ombudsman, Bronwyn Naylor, consulted prisoners as to the realities of their detention and the respect of rights in the prison environment.⁴¹ At the end of 2018 the CCC produced '*Taskforce Flaxton – An Examination of Corruption Risks and Corruption in Queensland Prisons*,'⁴² (2018 Report) which details a number of consequences that flow from overcrowding in Queensland's correctional centres, including the:

- (1) difficulty in classification of and separation of persons in prison;⁴³
- (2) difficulty in the provision of efficient and effective health care;⁴⁴
- (3) strain on infrastructure including provisions for water, sewage, sanitation, heating and cooling;

³⁶ Ibid 57 (see Table A3.1 in Appendix 3).

³⁷ Walter Sofronoff QC, *Queensland Parole System Review: Final Report November 2016* (Report, 30 November 2016) 58 ('Sofronoff').

³⁸ Crime and Corruption Commission Queensland, *Taskforce Flaxton: An Examination of Corruption Risks and Corruption in Queensland Prisons* (Report, December 2018) 64 ('CCCQ').

³⁹ United Nations Office on Drugs and Crime and the International Committee of the Red Cross, *Handbook on Strategies to Reduce Overcrowding in Prisons* (2013) 8: 'Official capacity or design capacity of a prison: The total number of prisoners a prison can accommodate while respecting minimum requirements, specified beforehand, in terms of floor space per prisoner or group of prisoners including the accommodation space. The official capacity is generally determined at the time the prison is constructed.'

⁴⁰ Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 10 ('ADCQ').

⁴¹ Bronwyn Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014) 31 *Law in Context* 94.

⁴² CCCQ (n 39).

⁴³ As is the case for Townsville Women's Correctional Centre, as provided by ADCQ (n 41) 61.

⁴⁴ Corroborated by Anti-Discrimination Commission Queensland, *Women in Prison* (Report, March 2006) 89-105.

- (4) further restricted access to kitchen space and telephones;
- (5) diminished capacity for constructive days and participation in programs;
- (6) increased anger and frustration which leads to higher risk of conflict;
- (7) less time out of cell; and
- (8) an increase in the risk of corrupt conduct occurring.⁴⁵

A number of human rights issues are called into question here, ranging from the right to be free from torture and cruel, inhuman, or degrading treatment — which is included in section 17 of the HRA — and the right of an accused person in detention to be segregated from convicted persons — included in section 30 of the HRA — among others. Overcrowding has a domino effect and an increase in persons in prison causes the first block to fall: adequate staffing. Without the correct number of guards on duty, QCS is hard pressed to maintain the regular routine of the centre. Low staffing leads to escalated security concerns, which in turn may amount to excessive 'lockdown' periods. As the Ombudsman comments, restrictive periods of lockdown, alongside the 'doubling up' of inmates can lead to conditions that have a deleterious effect on prisoners.⁴⁶ Notwithstanding the severity of the other consequences that flow from overcrowding, this article will focus on the particularly confronting conditions of 'doubling up,' 'lockdown', and the issue of overflowing sewage. These conditions will first be identified in BWCC and then discussed in the context of Canadian, Scottish, and ECtHR case law which provides a well-established and progressive line of jurisprudence on the respective issues.

A Doubling Up

Prior to the opening of Southern Queensland Correctional Centre (SQCC) in August 2018, women at BWCC experienced what is described as 'doubling up' as a result of overcrowding, whereby two inmates are placed in a cell designed for one person.⁴⁷ At the time of his 2015 investigation, the Ombudsman reported that BWCC was over capacity by 47.7%.⁴⁸ In the 2016 report, the Ombudsman wrote that doubling up in BWCC

⁴⁵ CCCQ (n 39) 5–6.

⁴⁶ *Trang v Alberta (Edmonton Remand Centre)* 2010 ABQB 6 [164] (*'Trang'*).

⁴⁷ *Queensland Ombudsman* (n 35) iv.

⁴⁸ Sofronoff (n 38) 59.

involved placing an extra mattress on the floor, with the second prisoner required to sleep with their head close to an exposed toilet and shower, as pictured in *Figure 1* below. The 2016 report concluded that as a result of, and in an effort to manage overcrowding, BWCC made 'extensive use of doubling-up',⁴⁹ with prisoners sharing cells in both secure and residential units.⁵⁰ The ADCQ reported that this was still the case during their investigations in 2017,⁵¹ and cautioned that if the rate of imprisonment continues, women's prisons in Queensland are likely to be at full capacity again as early as 2020.⁵²

BWCC's standard secure cells are 8.5 m² with facilities for one person, including one bed, one desk with a fixed seat, shelving for personal items, one toilet, a wash basin, and a shower. At the time of writing, the Queensland Ombudsman noted that while 30 cells had had bunk beds introduced, the majority of doubled-up cells just had one bed. To accommodate an extra person, a mattress would be wedged against the desk and wall on the floor. For checks to be carried out during the night, QCS required that this person sleep with their head at the end closest to the exposed toilet. The Ombudsman identified this layout as problematic, particularly in instances where the first person needed to use the bathroom during the night and must navigate her way, over the second person, to the toilet in the dark.⁵³



Figure 1: A doubled-up single secure cell at BWCC, taken during the Queensland Ombudsman's 2013 investigation.⁵⁴

⁴⁹ *Queensland Ombudsman* (n 35) vii.

⁵⁰ *Ibid* 13.

⁵¹ *ADCQ* (n 40) 108.

⁵² *Ibid* 109.

⁵³ *Queensland Ombudsman* (n 34) 13.

⁵⁴ *Ibid* 14.



Figure 2: A doubled-up single residential cell at BWCC, taken during the Queensland Ombudsman's 2013 investigation. At the time of their 2015 investigations there had been no changes to the fixtures since that time.⁵⁵

The conditions were different for those doubled-up in residential cells, where bathrooms are located outside cells and in communal areas. These cells are designed to accommodate six persons, each with their own cell, sharing a communal kitchen, living/dining area, and bathrooms. As pictured in *Figure 2* above, the extra mattress in these cells took up almost all of the floor space.⁵⁶ As stated in Rule 9(1) of the Standard Minimum Rules, though placing two inmates in one cell is not prohibited in instances such as temporary overcrowding, 'it is not desirable to have two prisoners in a cell or room'.⁵⁷ It is also anticipated as a temporary measure, and where it fails to be such, concern as to the effect of persons living in these conditions increases. As the Ombudsman reported, such a layout creates 'concerns about privacy, dignity, and hygiene'.⁵⁸ Privacy concerns, for example, orientate around the use of the toilet in the presence of another. Rule 15 of the Mandela Rules provides that each prisoner should be able to 'comply with the needs of nature when necessary and in a clean and decent manner'.⁵⁹ In the 2016 Report the Ombudsman noted that issues of privacy 'remain largely unaddressed' with QCS stating that it is not feasible to introduce temporary privacy screens.⁶⁰ It is particularly alarming that pregnant prisoners were not identified as unsuitable to occupy spaces on the floor. The Ombudsman reports that on one occasion a pregnant woman sleeping on the floor

⁵⁵ Ibid 15.

⁵⁶ Ibid 15.

⁵⁷ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015).

⁵⁸ *Queensland Ombudsman* (n 35) i.

⁵⁹ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/C.3/70/L.3 (29 September 2015) (Note by the Secretariat).

⁶⁰ *Queensland Ombudsman* (n 35) 17.

suffered a miscarriage, and after returning from hospital was again made to sleep on the floor.⁶¹

B Lockdown

'Lockdown'⁶² for women living in secure accommodation,⁶³ refers to the period when women are confined to their cells without access to their central common area or yards. For women in residential accommodation,⁶⁴ lockdown refers to the period of time when women are locked in their units with access to their communal living area.⁶⁵ The 2019 Report found that from October 2018, a standard day at BWCC for women in secure accommodation consisted of being locked down in their cells for 13 hours in a regular day, and for women in residential up to 17.5 hours a day,⁶⁶ concurrent with the Ombudsman's findings that women in prison were spending at least 14 hours every day on lockdown in 2015.⁶⁷ According to QCS's own 'Healthy Prisons Handbook' 2007, prisoners should have 'access to a minimum of 10 hours out of their cells except in exceptional circumstances'⁶⁸ and be actively encouraged to engage in out of cell activities with provision for structured days.⁶⁹ Despite this, the 2016 Report found in one case that two prisoners were locked together in one cell in excess of 80 hours, having been denied the minimum statutory requirement of two hours out of cell over the course of three days.⁷⁰ The 2019 Report revealed that 'women advised us that there were many disruptions to the usual routine, and they were frequently locked down for much longer periods'.⁷¹ Not only does lockdown give rise to human rights concerns, as identified in the

⁶¹ Ibid 16.

⁶² The term 'lockdown' refers first and foremost to the practice of keeping prisoners locked in their cell, usually without access to their communal areas or yards. During this time, it is common for all resources to be restricted from the prisoner, e.g. access to telephones or daily programmes. Defining the term by way of reference to a particular allotment of time is particularly problematic as it could refer to anything from 30 minutes up to 80 hours in exceptional cases in Queensland and will vary across different jurisdictions. The ambiguity of the timeframe is what makes the practice all the more confronting as prisoners lose all control over their daily schedules.

⁶³ ADCQ (n 41) 106.

⁶⁴ Ibid 107.

⁶⁵ Ibid 108.

⁶⁶ Ibid.

⁶⁷ Queensland Ombudsman (n 35) 14.

⁶⁸ State of Queensland, 'Healthy Prisons Handbook' Queensland Corrective Services (Report Handbook, November, 2007) 65 [20.1].

⁶⁹ Ibid [20.2].

⁷⁰ Corrective Services Regulation 2017 (Qld) s 4(d); Queensland Ombudsman (n 35) 16.

⁷¹ ADCQ (n 41) 108.

cases of *Ogiamien v Ontario* and *Trang v Alberta* below,⁷² CCC established in their 2018 report that less time-out-of-cell was associated with an increase in allegations related to QCS staff made to the CCC.⁷³

C Overflowing Sewage

The conditions of doubling up and lockdown are particularly problematic given the recurring problems with drainage at BWCC. In its 2017 investigations, the ADCQ found that overcrowding was straining the prison's plumbing system and as such blockages were frequent, overflows were common (up to three or four times per week) and bad sewage odours occasional.⁷⁴ Overflowing sewage is even more so concerning in light of mattresses being placed on the floor next to the exposed toilets and where there is a requirement of having the prisoners head at the end of the exposed toilet to allow for checks to be carried out at night.⁷⁵ The 2019 Report revealed that mattresses on the floor could become wet with toilet water,⁷⁶ giving rise to a justified concern as to the standards of hygiene and dignity experienced by some women at BWCC. Blocked toilets also give rise to issues of accessibility and humiliation: the 2019 Report revealed that one woman had resorted to using another 'receptacle' to relieve herself due to the toilet being blocked.⁷⁷

III A HUMAN RIGHTS ANALYSIS OF OVERCROWDING

The conditions identified above encroach upon prisoners' rights to be treated with humanity and respect for human dignity;⁷⁸ their right to be free from torture, inhuman, or degrading treatment;⁷⁹ their right to privacy;⁸⁰ the right for accused persons to be separated from convicted persons;⁸¹ and their right to the highest attainable standard of physical and mental health.⁸² As summarised by the United Nations Office on Drugs and

⁷² 2016 ONSC 3080 (*Ogiamien*); *Trang* (n 47).

⁷³ *CCCQ* (n 39) 6.

⁷⁴ *ADCQ* (n 41) 110.

⁷⁵ *Queensland Ombudsman* (n 35) 17.

⁷⁶ *ADCQ* (n 41) 110.

⁷⁷ *Ibid.*

⁷⁸ See ICCPR (n 20) 10(1).

⁷⁹ *Ibid* 7.

⁸⁰ *Ibid* 17.

⁸¹ *Ibid* 10(2).

⁸² See Article 12(1) of *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Crime ('UNODC'): '... overcrowding is the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners'.⁸³

Due to the inherent weaknesses as pertaining to the enforceability of the 2004 Act and the Victorian Charter, and the resulting lack of developments, this article has sought to shed light on the potential of the HRA 2019 by comparing it to a number of other jurisdictions, outside of Australia. At the time of conception of the Victorian Charter the government instructed that they were particularly interested in the UK's Human Rights Act 1998 model,⁸⁴ and paid particular attention to the impact of the Act in Scotland which had a similar population size to Victoria.⁸⁵ Alike Victoria, Queensland follows a system of law and government similar to the UK and at present, Queensland and Scotland each boast a modest population of just over five million. As such, this article has chosen Scotland as a primary comparator to Queensland's HRA 2019, followed by Canada, who equally derives her laws from England. Further comparison will be made to jurisprudence flowing from the ECtHR which offers a wide breadth of knowledge and development of understanding of the European Convention on Human Rights (ECHR). Having been established in 1959, it has delivered over 21,600 judgements by the end of 2018, interpreting issues in relation to our fundamental rights and finding Convention violations in 84% of its judgements.⁸⁶ ECtHR case law offers an example of a well-established judiciary, actively interpreting the Convention in an effort to ensure our fundamental rights are protected. Though the case-load will certainly differ between each jurisdiction, the potential for the Queensland Courts to learn from the progress of other jurisdictions and foster a strong human rights culture has been handed to them with the HRA 2019.

⁸³ *UNODC* (n 40) 14.

⁸⁴ Williams (n 3) 887.

⁸⁵ *Ibid* 894.

⁸⁶ European Court of Human Rights: Public Relations Unit, *Overview ECHR 1959 — 2018* (Report, March 2019).

A Canadian Caselaw

Correctional Service Canada ('CSC') maintains 43 institutions across North America, responsible for the care and order of 40,147 prisoners in 2015-16.⁸⁷ In 2017, females accounted for 25% of criminal incidents in Canada, with their rates of offending falling by 15% between 2009 and 2017. A 22% decrease for male offenders was recorded over the same period.⁸⁸ The rate to which Aboriginal females were accused as opposed to non-Aboriginal females was 27 times higher in 2017. For Aboriginal males the rate was 12 times higher.⁸⁹

In the case of *Ogiamien v Ontario*,⁹⁰ the Superior Court of Justice held that the rights of Jamil Ogiamien and Huy Nguyen were violated under section 12 of the Canadian Charter of Rights and Freedoms,⁹¹ which prohibits cruel and unusual punishment, due to the conditions of their detention, specifically arising out of intensive periods of lockdown.⁹² The daily schedule for inmates at Maplehurst Correctional Complex was:

- a) 0800 – 0930 – Inmates locked down in cells for meal service – breakfast;
- b) 0930 – 1130 – day room access;
- c) 1130 – 1330 – inmates locked down in cells for meal service – lunch;
- d) 1330 – 1530 – day room access;
- e) 1530 – 1730 – inmates locked down in cells for meal service – supper;
- f) 1730 – 1930 – day room access;
- g) 1930 – 0800 – inmates locked down in cells overnight.⁹³

Despite a well-intentioned schedule, statistics revealed that due to a variety of reasons such as staff absences; a number of prisoners requiring hospital escorts; mandatory staff training; emergency situations or searches,⁹⁴ Maplehurst was placed on lockdown for

⁸⁷ Correctional Service Canada, 'CSC Statistics — Key Facts and Figures' *CSC* (Web Page, 1 August 2017) <<https://www.csc-scc.gc.ca/publications/005007-3024-en.shtml>>.

⁸⁸ Laura Savage, *Female Offenders in Canada, 2017* (Catalogue No 85-002-X, 10 January 2019) <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00001-eng.pdf?st=5UKB_mYX>.

⁸⁹ *Ibid*.

⁹⁰ *Ogiamien* (n 73).

⁹¹ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), s 12 ('CCRF'): 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment'.

⁹² *Ogiamien* (n 73) [245]-[270].

⁹³ *Ibid* [17].

⁹⁴ *Ibid* [33].

167 days of the year, or 46% of the total days in 2014,⁹⁵ and 199 days or 55% of the total days in 2015.⁹⁶ A study showed that during a period of seven months in 2015 Ogiamien and Nguyen were locked down for 74 days, out of which 68 days were caused by staff shortages.⁹⁷ During this time prisoners lost access to programs,⁹⁸ and were contained within their doubled-up cell for 24 hours per day.⁹⁹ Judge Gray remarks that in some ways, lockdowns are worse than the experience of segregation or solitary confinement.¹⁰⁰ The Deputy Superintendent of Administration and Staff Relations at Maplehurst, Mr Marchegiano, gave evidence that there is generally an adverse reaction by prisoners to lockdowns.¹⁰¹ He also acknowledged that there would likely be a delay in providing cells with cleaning supplies, or allowing them to have access to laundry.¹⁰² Time to make phone calls or access showers is largely restricted.¹⁰³ Judge Gray also pays attention to the violation of two international standards — that non-convicted criminals are being housed with convicted criminals and are subjected to double-bunking.¹⁰⁴

The case of *Ogiamien* illustrates Canada's willingness to consider international guidelines, subject to a Canadian perspective.¹⁰⁵ Judge Gray states that '...non-observance of an international standard does not, standing alone, mean that [s 12] of the *Charter* has been violated. However, it is a starting point.'¹⁰⁶

In the case of *Trang v Alberta*,¹⁰⁷ the applicants submitted that overcrowding was the root cause of their oppressive conditions and that taken in combination they amounted to a violation of section 12 of the Canadian Charter.¹⁰⁸ In assessing whether the conditions of overcrowding may amount to a violation of human rights, *Trang* stated that factors such as lockdown 'cannot be applied in a vacuum'.¹⁰⁹ Justice Marceau concluded that the evidence showed that the cells were all double-bunked, without enough room for two

⁹⁵ *Ibid* [39].

⁹⁶ *Ibid* [40].

⁹⁷ *Ibid* [42].

⁹⁸ *Ibid* [46].

⁹⁹ *Ibid* [47].

¹⁰⁰ *Ibid* [252].

¹⁰¹ *Ibid* [50].

¹⁰² *Ibid* [52].

¹⁰³ *Ibid* [247].

¹⁰⁴ *Ibid* [250].

¹⁰⁵ *Ibid* [221].

¹⁰⁶ *Ibid* [251].

¹⁰⁷ *Trang* (n 47).

¹⁰⁸ CCRF (n 92).

¹⁰⁹ *Trang* (n 47) [1018].

roommates to move around freely at the same time, with only enough room for one person to sit at the table at a time. There was no privacy with regards to using the toilet and inmates would spend up to 13 hours in which they were awake on lockdown in their cell.¹¹⁰ Further, they had restricted access to recreation, both inside and outside their cell.¹¹¹

Trang applied the case of *R v Smith* (1987),¹¹² which identified nine factors to consider before concluding a section 12 breach of the Canadian Charter. Among these factors were whether there are any adequate alternatives, whether the conditions would shock the general conscience or be regarded as intolerable as a matter of fundamental fairness, and whether the regime is unusually severe and hence degrading to human dignity and worth.¹¹³ Justice Marceau concluded that where prisoners are on lockdown for 18-21 hours a day and doubled up, with limited access to recreation, alongside limited access to activities within their cell, and endure these conditions over a delayed period of time, the conditions collectively 'shock the conscience and are "grossly disproportionate"'.¹¹⁴

B Scottish Position

'If I had to sum up the last 40 years of women in prison... who knew you could travel so far to stay still?' (Mitch Egan CB, a former prison governor).¹¹⁵

In January 2019, Scotland was exposed as having the highest imprisonment rate in western Europe, with around 144 per 100,000 people incarcerated.¹¹⁶ Scotland's prison population boasts 7,982 persons, with 387 women in custody.¹¹⁷ Liam McArthur MSP raised the issue of overcrowding in Scottish Parliament at the beginning of 2019.¹¹⁸ In a subsequent letter, Cabinet Secretary for Justice, Mr Humza Yousaf MSP, revealed that nine

¹¹⁰ Ibid [1013].

¹¹¹ Ibid [1014]-[15].

¹¹² [1987] 1 SCR 1045.

¹¹³ Ibid [1063].

¹¹⁴ *Trang* (n 47) [1016].

¹¹⁵ Helen Pankhurst CBE, *Deeds Not Words: The Story of Women's Rights Then and Now* (Sceptre, 8 February 2018) 198.

¹¹⁶ Scottish Parliament, *Meeting of the Parliament 'Official Report'* (Report, 15 January 2019) 3; World Prison Brief, 'United Kingdom: Scotland' (Web Page) <<http://www.prisonstudies.org/country/united-kingdom-scotland>>.

¹¹⁷ 'SPS Prison Population' Scottish Prison Service (Web Page, 2019) <<http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>>.

¹¹⁸ Scottish Parliament, *Meeting of the Parliament 'Official Report'* (Report, 15 January 2019) 3 ('*Scottish Parliament*').

out of 15 of Scotland's prisons were 'at or above capacity' as of December 2018, with its largest prison, HMP Barlinnie, operating at 139% capacity and HMP Inverness at 137%.¹¹⁹ In his parliamentary speech, Mr Yousaf MSP details a number of consequences regarding the harm that overcrowding causes, including its effect on rehabilitation and on the overall morale of the prison. He explained that overcrowding affects the amount of time prisoners spend out of their cell, which in turn increases frustration levels, and triggers issues for staff safety.¹²⁰ At present, Scotland is working to introduce the presumption against short sentences and speaks of introducing 'radical solutions'¹²¹ to tackle their issue of overcrowding.

In a line of Scottish cases, dubbed as the 'slopping out saga',¹²² conditions of detention as potentially constituting breaches of Article 3,¹²³ and Article 8,¹²⁴ of the ECHR were considered. Article 3, namely the prohibition on torture, inhuman or degrading treatment or punishment, requires treatment to attain one of the three thresholds of suffering in order to qualify as a breach of the right. The ECtHR has gone some lengths to identifying the particularities of each threshold. In the case of *Docherty v Scottish Ministers*,¹²⁵ it was held that Stuart Docherty could competently bring an action for damages against the Scottish Ministers for a breach of his rights under Article 3 of the ECHR, given that he experienced periods where he was forced to resort to using chamber pots or similar structures to perform bodily functions whilst in the presence of another as a consequence of being doubled up.¹²⁶

¹¹⁹ 'Scottish Prisoners Forced to Double-up in Cells', *BBC News* (online, 17 February 2019) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-47264322>>.

¹²⁰ *Scottish Parliament* (n 117) 6.

¹²¹ *Ibid.*

¹²² Chris Himsworth, 'At the Interface of Public and Private: *Docherty v Scottish Ministers*' (2012) 16(1) *Edinburgh Law Review* 92.

¹²³ *The Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953): Prohibition on Torture: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

¹²⁴ Right to respect for private and family life: '1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

¹²⁵ [2011] CSIH 58.

¹²⁶ *Ibid*; *Docherty v Scottish Ministers* 2012 SC 150.

This case was preceded by *Napier v The Scottish Ministers*,¹²⁷ in which Lord Bonython found that the conditions of detention experienced by Robert Napier, combined with a consideration of all of the circumstances of his detention, were capable of attaining the minimum level of severity necessary to constitute degrading treatment, thus breaching Article 3 of the ECHR.¹²⁸ Counsel for Mr Napier described such conditions as the 'triple vices' of overcrowding, slopping out, and impoverished regime¹²⁹ and Lord Bonython placed emphasis on examining Mr Napier's experience of his conditions through the 'context of the triple vices'¹³⁰ and not in isolation.¹³¹ The process of slopping out was described by Lord Bonython as a two-part practice of: (1) using a bottle to urinate and a chamber pot to defecate whilst in the cell; and (2) emptying these containers at the same time as other prisoners, up to four times a day in a communal area.¹³² The Court held that the petitioner was, in an assessment of his conditions *taken together*, being exposed to conditions that diminished his human dignity and brought forth feelings of anxiety, anguish, inferiority, and humiliation — which met the standard for degrading treatment. In reaching his conclusion, Lord Bonython placed importance on the following features of Mr Napier's detention: the size and condition of the cell,¹³³ including the poor levels of illumination and ventilation;¹³⁴ overcrowding and the doubling up of inmates;¹³⁵ inaccessibility to toilets overnight;¹³⁶ the slopping out process,¹³⁷ poor daily regime and access to out of cell activities;¹³⁸ confinement to a small holding unit during court appointments;¹³⁹ and the overall negative effect of the conditions on his physical health, particularly the outbreak of serious eczema, and on his mental state.¹⁴⁰

¹²⁷ [2005] CSIH 16.

¹²⁸ Ibid [75].

¹²⁹ Ibid [6].

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid [19].

¹³³ Ibid [8-12].

¹³⁴ Ibid [13]-[15],[16]-[18].

¹³⁵ Ibid [7].

¹³⁶ Ibid [75].

¹³⁷ Ibid [19]-[27].

¹³⁸ Ibid [28].

¹³⁹ Ibid [75].

¹⁴⁰ Ibid [34]-[48].

C Influence of the ECtHR

The ECtHR has also handed down a number of instructive judgements which may be used in an evaluation of potential human rights violations arising out of conditions associated with overcrowding. With regards to assessing a prisoner's lack of personal space in an attempt to establish a breach of Article 3, the case of *Ananyev v Russia*¹⁴¹ sets out a three-fold test, in which the absence of *any* of these requirements creates a strong presumption that the conditions experienced amount to degrading treatment:

- (a) each detainee must have an individual sleeping place in the cell;
- (b) each detainee must have at his or her disposal at least three-square metres of floor space; and
- (c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.¹⁴²

This test was most recently upheld in the case of *Mursic v Croatia*,¹⁴³ which found that 3 m² of floor surface per detainee was the relevant minimum standard to be applied under Article 3 of the ECHR. The ruling did, however, introduce a caveat to this test. The evaluation of whether there has been a breach of Article 3 of the ECHR must take into account the 'cumulative effects' and the duration to which the prisoner was subjected to these conditions. The presumption outlined above could be 'rebutted' by the cumulative effects of all of the conditions of detention.¹⁴⁴ In this particular instance, the applicant had enjoyed: (1) 'sufficient freedom of movement inside the prison';¹⁴⁵ (2) 'various out-of-cell activities...';¹⁴⁶ (3) 'unobstructed access to natural light and air, as well as drinking water';¹⁴⁷ and (4) 'an otherwise appropriate facility'.¹⁴⁸ It was held that the restriction of his personal space was not so severe as to violate Article 3, except during the time he was subjected to 3 m² surface space continuously for a period of 27 days.¹⁴⁹ In the case of

¹⁴¹ (2012) 55 EHRR 18.

¹⁴² Ibid [148].

¹⁴³ 65 EHRR 1.

¹⁴⁴ Ibid [76].

¹⁴⁵ Ibid [78]; Ibid [77].

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid [78].

¹⁴⁹ Ibid [H3].

Apostu v Romania,¹⁵⁰ the ECtHR noted the additional considerations of: (5) ‘heating arrangements’; (6) access to ‘basic sanitary requirements’; and (7) ‘the possibility of using the toilet in private’.¹⁵¹

In *Szafrański v Poland*,¹⁵² where the ECtHR found that the minimum level of severity, namely degrading treatment, had not been met for a breach of Article 3,¹⁵³ a violation of Article 8 was recognised on the basis that the applicant was deprived of ‘a basic level of privacy in his everyday life’ each time he had to use the toilet in the presence of other inmates with only a fibreboard partition and no doors to offer privacy.¹⁵⁴ Notably, this prison did not suffer from overcrowding.¹⁵⁵ In finding a breach of Article 8, the court gave weight to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT),¹⁵⁶ which has ruled that partially concealed toilets are not acceptable in circumstances where a cell is occupied by more than one prisoner.¹⁵⁷ The case of *Szafrański* held that domestic authorities are under a positive obligation to ensure that the minimum level of privacy is reached for prisoners under their care.¹⁵⁸

IV QUEENSLAND’S POSITION UNDER THE 2019 ACT

Case law from around the world has emphasised the special status of the prohibition on torture, inhuman or degrading treatment or punishment. There is a minimum level of severity which ill treatment must reach before it will fall under the parameter of Article

¹⁵⁰ (2017) 65 EHRR 8.

¹⁵¹ *Ibid* [79].

¹⁵² 64 EHRR 23.

¹⁵³ *Ibid* [29].

¹⁵⁴ *Ibid* [39].

¹⁵⁵ *Ibid* [16].

¹⁵⁶ The CPT was set up under the Council of Europe’s ‘European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’, which came into force in 1989. The CPT is responsible for organising visits to places of detention in order to evaluate treatment of those in detention, whether they be in prisons, police stations, holding centres for immigration detainees, or so on. While it is not an investigative body, and as such does not produce findings which are binding, it provides non-judicial preventive mechanisms which complement the work of the ECtHR. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘About the CPT’ Council of Europe Portal (Web Page) <<https://www.coe.int/en/web/cpt/about-the-cpt>>.

¹⁵⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT’s Activities* (Report, 1992) s 49.

¹⁵⁸ *Szafrański v Poland* (2017) 64 EHRR 23 [40].

3 of the ECHR or Article 7 of the ICCPR. Case law from Scotland, Canada, and the ECtHR suggests that consideration must be given to all of the circumstances of the case.

Section 17 of the HRA 2019 provides for protection from torture and cruel, inhuman or degrading treatment, stating: 'a person must not be (a) subjected to torture; or (b) treated or punished in a cruel, inhuman, or degrading way...'.¹⁵⁹ Protections of privacy are less robust, with section 25 providing: 'A person has the right (a) not to have the person's privacy, family, home, or correspondence unlawfully or arbitrarily interfered with'.¹⁶⁰ Protection of this particular group is seemingly strengthened by section 30(1) which provides that '[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.¹⁶¹ This again is strengthened by section 5, which provides that the Act binds all persons, 'including the State', the courts and tribunals, Parliament, and public entities that have functions under Part 3 and Division 4 of the Act. A corrective services facility is identified as a function of a public nature under section 10(3)(a),¹⁶² and the conduct of such public entities is regulated by section 58, which provides: '(1) It is unlawful for a public entity: (a) to act or make a decision in a way that is not compatible with human rights; or (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.'¹⁶³ It would seem that the 2019 Act has set up a well defended statute of rights, intended to offer and secure fundamental protections.

Yet, we begin to walk through muddier waters as we approach section 13, which provides that human rights may be limited. Section 13(2) provides a list of relevant factors that may be considered in an evaluation of whether a human right is reasonably and justifiably limited.¹⁶⁴ Section 13 is followed by section 14 which reassures us that '[n]othing in this Act gives any person or other entity a right to limit *to a greater extent than is provided for under this Act*, or destroy, a human right of any person.'¹⁶⁵ As human rights organisations such as Amnesty International have already contended,¹⁶⁶ these sections markedly

¹⁵⁹ *Human Rights Act 2019* (Qld) s 17 ('HRA').

¹⁶⁰ *Ibid* s 25.

¹⁶¹ *Ibid* s 30(1).

¹⁶² *Ibid* s 10(3)(a).

¹⁶³ *Ibid* s 58.

¹⁶⁴ *Ibid* s 13(2).

¹⁶⁵ *Ibid*.

¹⁶⁶ Amnesty International, Submission No 069 to the Legal Affairs and Community Safety Committee, *Inquiry into Human Rights Bill 2018 Queensland* (26 November 2018).

change the force of these fundamental and hard fought for protections. They are further confounded by section 43 which permits Parliament to override '1 or more human rights... despite anything else in this Act.'¹⁶⁷ Worse still, in the context of prison overcrowding, section 126(2) amends the Corrective Services Act 2006:

To remove any doubt, it is declared that the chief executive or officer does not contravene the Human Rights Act 2019 s 58(1) only because the chief executive's or officer's consideration takes into account:

- (a) The security and good management of corrective services facilities; or
- (b) The safe custody and welfare of all prisoners.¹⁶⁸

It is thus for the Queensland Courts to determine whether the human rights consequences of overcrowding in BWCC, which drastically impact on the human rights of inmates, can be justified by security considerations.

V CONCLUSION

The introduction of the HRA to Queensland marks a significant step forward in the state's commitment to human rights and should be praised. While it does not offer an immediate solution to the various human rights debates that exist, it is an important new tool to attack the harmful consequences that follow from political neglect and reluctance to make funds available for prison reform, as well as from the impact of severe sentencing policies. The interpretation of the HRA should draw on existing case law from comparable countries as a guide. Where it utilises this potential, the Act offers a real remedy for prisoners currently subject to the miseries of overcrowding.

¹⁶⁷ HRA (n 160) s 43.

¹⁶⁸ Ibid s 126(2).

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