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COVID-19 and Australian Prisons: Human Rights, Risks, and Responses

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Abstract Australian prisons are overpopulated with people suffering from numerous health problems. COVID-19 presents a significant threat to prisoner health. This article examines the current regulatory responses from Australian state and territory governments to COVID-19 and a recent case which tested the human rights of prisoners during a pandemic.

Keywords COVID-19 · Prisoners · Human rights

Introduction

The modern prison is a perfect breeding ground for COVID-19. For example, more than 20,000 prisoners and 6,400 prison staff have tested positive in the United States (Human Rights Watch 2020), with reports highlighting very high rates of infection of between 74 and 98 per cent of prisoners in correctional facilities in Ohio, California, and Louisiana (Lartey 2020) and a seven-fold infection rate observed in New York City jails (Barnert 2020). Reasons cited for high risk and prevalence within prisons include overcrowding, poor ventilation, close habitation, and social-distancing challenges, all of which can contribute to virus transmission (Montoya-Barthelemy et al. 2020). In both Italy and Colombia, the pandemic has been also a cause of large-scale prison rioting and escape attempts (Anthony 2020).

Australia has, so far, avoided these levels of infection, but the potential for high infection rates remains. Australia has over forty-three thousand prisoners of whom 32 per cent are on remand (awaiting trial or sentencing) and 66 per cent are serving sentences of less than five years (Australian Institute of Health and Welfare 2019). This population has almost doubled in the last twenty years, with Australian prison capacity sitting at around 112 per cent (World Prison Brief 2020). The population is overwhelmingly male (92 per cent), with 27 per cent of the population coming from Aboriginal and Torres Strait Islander backgrounds (Australian Law Reform Commission 2018). There are high rates of recidivism, with 73 per cent of the prison population having been in prison before, and 43 per cent of the Aboriginal and Torres Strait Islander prisoners having been in prison at least five times before.

Research amongst prisoners has identified higher levels of mental health problems, alcohol consumption, smoking, illicit drug use, chronic disease, and communicable diseases than the general population (Binswanger

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et al. 2016). Significant morbidity exists in the Australian prison population, which places them at risk of complications and compromised health. Recent Australian data indicates that 40 per cent of new prisoners and 37 per cent of discharged prisoners report being diagnosed with a mental health condition (including addiction disorders), with more than one in five (21 per cent) prison entrants reporting a history of self-harm (AIHW 2019). Seventy-five per cent of prison entrants said they smoked, whilst 65 per cent of prison entrants report that they have used illicit drugs during the previous twelve months, with methamphetamine being reported as the most commonly used drug (AIHW 2019). Australian prisoners also have a high prevalence of chronic conditions, with 30 per cent of prison entrants stating that they had a history of arthritis, asthma, cancer, cardiovascular disease, or diabetes (AIHW 2019).

There is also a high prevalence of communicable disease in the prison population. Hepatitis C in the prison population sits at 21 per cent for males and 28 per cent for females (Butler and Simpson 2017). Hepatitis B was found to infect 16 per cent; chlamydia 3.9 per cent; and gonorrhoea 1.5 per cent (AIHW 2019). Six per cent of prison entrants tested positive for syphilis markers (a rate of infection about 250 times higher than the general population) (Butler and Simpson 2017).

Australian prisoners are therefore a vulnerable/at-risk population that is under state care and control. What steps should the state take to protect them? Internationally, concern for COVID-19 transmission within the prison context has brought about calls for the early release of prisoners to minimize the risk (Akiyama, Spaulding, and Rich 2020; Henry 2020; Hawks, Woolhandler, and McCormick 2020; Nowotny et al. 2020; Shinkman 2020; Simpson and Butler 2020). The United Nations Office on Drugs and Crime (UNODC), the World Health Organization (WHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), and the Office of the High Commissioner for Human Rights (OHCHR) issued a joint statement urging

> … political leaders to consider limiting the deprivation of liberty, including pretrial detention, to a measure of last resort, particularly in the case of overcrowding, and to enhance efforts to resort to non-custodial measures. These efforts should encompass release mechanisms for people at particular risk of COVID-19, such as older people and people with pre-existing health conditions, as well as other people who could be released without compromising public safety, such as those sentenced for minor, non-violent offences, with specific consideration given to women and children. (UNODC et al. 2020, ¶4)

Unsurprisingly, risk of COVID-19 infection has been an issue in bail applications and in applications for early release of prisoners. Judges must consider the individual facts of each case against relevant legislation but be "deeply mindful of the wide-ranging consequences of their decisions for defendants and society during the COVID-19 pandemic" (Fuentes 2020, 475).

Australian Regulatory Responses to COVID-19

The combination of overcrowding and poor health means that Australian prisoners are vulnerable to the COVID-19 pandemic. All state and territory governments (there are no federal prisons in Australia) responded to the COVID-19 threat in March 2020 by introducing a mix of restrictive practices, including

- suspension of social visits,
- restriction of non-essential inmate movement between centres,
- introduction of temperature testing for staff,
- suspension of work release,
- introduction of quarantine periods for new inmates,
- creation of isolation hubs and field hospitals within existing centres to isolate positive inmates, and
- trials of family video visitation.

As in other international jurisdictions, there has been a call for decarceration for some prisoners. Professor Thalia Anthony, for example, advocated

> [t]he release of prisoners should begin with those with health conditions, children and youth, and the substantial number of adult prisoners who are detained for summary offences (unlawful driving, public disorder, fine default and so on), property crimes, common assault and breach of justice procedures. A moratorium should also be imposed on imprisoning minor offenders and unsentenced persons. (Anthony 2020, ¶4 under "Why releasing some prisoners is the best option")

Anthony (2020) called attention to the disproportionate risk on Aboriginal and Torres Strait Islander people, given their over-representation in Australian prisons and raised concerns about overcrowding and the impact of poorer health on susceptibility to COVID-19 transmission. She also argued that the high churn rate of prisoners, such as those on remand, as well as the general lack of viable arrangements for self-directed or imposed quarantine following release, presented additional risks to the broader community in the event that prisoners contract the virus during detention.

Shepherd and Spivak (2020) have also pointed out that, during lockdown periods, post-release services may have reduced capacity to support early release prisoners. Consequently, this may bring with it increased risks to those released and the broader community, not only of COVID-19 transmission but of recidivism and harms to general health and well-being.

The response from Australian governments to such calls has been muted. The Northern Territory government stated that it may release fifty to sixty prisoners (Gibson 2020). Only New South Wales passed specific legislation to formally create a power to decarcerate on COVID-19 grounds. The *Crimes (Administration of Sentences) Act 1999* (NSW) s 276 gave power to the commissioner of corrective services to grant early parole to inmates prior to the expiry of their non-parole period, when releasing the inmate on parole was "reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic." Prisoners serving a life sentence or a sentence of imprisonment for murder, any serious sex offence, or a terrorism offence; Commonwealth prisoners; and post-sentence detainees were not eligible. The commissioner was also required to consider risks to community safety, impact on victims, and protection of victims from domestic violence when exercising the power.

A Human Right to Be Released?

While New South Wales was the only jurisdiction to pass a specific COVID-19 release power, all other jurisdictions could use already existing powers to release prisoners on the grounds of a risk to the health of prisoners caused by the virus. Every state and territory recognizes the right of prisoners to have access to medical treatment, but do prisoners have a right to demand release during a pandemic?

Such a demand was discussed recently in the Victorian case of *Rowson v Department of Justice and Community Safety* [2020] VSC 236. This case was brought by Mark Rowson, a fifty-two-year-old prisoner at Port Phillip Prison, Truganina. Rowson had been imprisoned for a little over five years for fraud. Rowson had heart disease, including chronic atrial fibrillation, angina, asthma, poor blood pressure and decreased renal function. He also had a history of repeated lung infections and pneumonia throughout his life. Rowson argued that because of his health status he was particularly prone to the risk of serious injury or death from COVID-19, and he requested that he be released into home detention at his mother's house.

The Victorian secretary of corrections had the power to release prisoners on health grounds via a Corrections Administration Permit ("CAP") under s 57A of the *Corrections Act 1986* (Vic). Rowson had made an application to the secretary for a CAP, and, while the matter was still being formally decided, the secretary had given a very strong indication that the application would be refused. Rowson brought an application for an injunction to allow him to be released in the meantime, while the application was being considered.

Rowson asserted that a failure to release him would be a breach of the common law duty of care owed to him as a prisoner to take reasonable steps to ensure that he did not suffer serious injury or death from COVID-19 (at [65]). Rowson argued that the prison conditions were not hygienic, that proper social distancing measures were not being observed, and that consequently he was being placed at risk of contracting the virus. The failure to abate the risk was said by Rowson to be a breach of the duty of care owed by prison officials to prisoners, and that breach should be remedied by ordering him to be released.

Rowson also claimed that the failure to release him was a breach of his human rights under the Victorian *Charter of Human Rights and Responsibilities*. The particular rights that Rowson argued were breached were the right to recognition and equality before the law (s 8), the right to life (s 9), and the right to humane treatment when deprived of liberty (s 22). Rowson's lawyers quoted from the United Nations Human Rights Committee general comment on the right to life, which includes the requirement to protect life against threats, including taking positive measures. Rowson's

counsel also argued that Victoria was subject to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) which require "good health" in prison accommodation.

Corrections Victoria argued that Rowson's claims were weak as there was no prima facie case of negligence and no breach of any standard. There was simply no material risk being faced by Rowson as there were no infections in the prison population. Moreover, there was a public interest in keeping Rowson in jail as he had been imprisoned for offences and should serve his sentence. Finally, the secretary was still considering Rowson's application for a CAP, and because no decision had been made, there were no grounds for a complaint.

The Decision

In Australia, applications for an interim or interlocutory injunction can only be granted when there is a serious question to be tried and where the balance of convenience favours the grant of the injunction (*Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618).

Ginnane J accepted that there was a serious question to be tried and that the court did have the power to release Rowson; however, he decided to refuse Rowson's application on the basis of the balance of convenience. His Honour examined the evidence of the measures that had been taken to avoid infection, including the exclusion of personal visitors, the limitation of professional visitors, the quarantine of new prisoners for fourteen days, and staff undergoing regular temperature checks. Prisoners' time out of cells had also been reduced and prisoners were being required to keep 1.5 metres apart when in common spaces. Efforts were being made to provide increased access to soap and hand sanitizer, and prisoners with symptoms were being isolated and tested. Ginnane J accepted the assessment of risk of infection as being 0.006 per cent and noted that "[e]ven at the height of the infection in March and early April there was no transmission into a prison" (at [89]).

Ginnane J found that the balance of convenience was against releasing Rowson while the primary application was still being considered. However, Ginnane J was concerned enough about Rowson's allegations of a lack of cleanliness and problems with social distancing that the judge ordered Corrections Victoria to perform a risk assessment on the prison where Rowson was incarcerated. Ginnane J ordered that any recommendations made by the risk assessment should be implemented even before Rowson's application for a CAP had been decided.

Conclusions—Prisoner's Health Is Protected by Human Rights Law

Prisoners enjoy fundamental rights under international law. This includes the rights not to be subjected to "cruel, inhuman or degrading treatment or punishment" and "to be treated with humanity and respect for the inherent dignity of the human person" (*International Covenant on Civil and Political Rights,* arts. 7, 10). However, only three of Australia's jurisdictions have implemented a formal charter or bill of rights: the Australian Capital Territory (*Human Rights Act 2004*), Victoria (*Charter of Human Rights and Responsibilities 2006*), and Queensland (*Human Rights Act 2019*). While human rights jurisdictions have been around for some time in Australian law, the jurisprudence regarding these schemes is still in its infancy. While none of these schemes created an independent basis for bringing a civil action, they all require public bodies to make decisions in accordance with the rights enumerated, and they all require judges to assess existing laws and administrative decisions in light of the human rights expressed within them.

Rowson may have failed in his application to be released, but his case is important in the way it sheds light on how Australian courts will employ human rights in any discourse regarding prisoners' health. While the court was not convinced to exercise its power in Rowson's case, the court clearly believed that it had power to examine the conditions of prisoners on human rights grounds and make orders to inspect and assess the risk to prisoners' health. And while the facts did not support Rowson's claims of overwhelming risk, should the facts change and infection rates rise, claims like Rowson's are more likely to succeed. Rowson's case is, therefore, a major development in the governance of prison healthcare in Australia.

Ultimately, COVID-19 presents an opportunity to reconsider the deeper issues regarding use of incarceration as a punishment and the human rights of prisoners more generally. The pandemic also shines a light on the disturbing reality that Australian prisoners are

overwhelmingly unwell and disproportionately from Aboriginal and Torres Strait Islander backgrounds. If decarceration is put into operation and is shown to work, we should ask ourselves questions about why, how, and when incarceration is employed as a punishment.

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