Prisoners' Rights: Treatment, Testing, Accommodation and Privacy of Documents

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Many people may ask why prisoners should have any rights at all, or may say that they already have too many rights. The idea of prisoners' rights is in conflict with policies which give administrative discretion and convenience overriding importance in prison administration. Cooperation was a waning concept in NSW prisons before the alleged assault on a prison officer at Long Bay Gaol on 22 July 1990 and the subsequent policy of removal of prisoners' property. Proposals to introduce mandatory linked HIV testing without adequate support and counselling staff being available, in breach of international standards, is another aspect of such a policy.

In the middle ground are cases and reports of inquiries which stress that while persons who are prisoners have lost their right to liberty, they keep residual civil rights. Such comments may be found in the reports of the inquiries into NSW (1978), Victorian (1973) and South Australian (1981) prisons. They may also be found in judgments of British (*R v. Board of Visitors of Hull Prison: ex parte St. Germain* (1979) 2 WLR 42) and US (*Coffin v. Reichart* 143 F. 2d 443 (6th Cir. 1944)) courts. Unfortunately, prisoners' attempts to define these residual rights through litigation relying on either the English and US Bill of Rights have been largely unsuccessful.

Prisoners' rights were a late-developing chapter in the evolution of human rights philosophy. The expression of such concepts is to be found in twentieth century human rights documents rather than the common law.

The early documents setting out rights and liberties dealt mainly with the issue of rights at the point of entry into custody, including:

> No free man shall be arrested or imprisoned or disseissed (have property taken) or outlawed or exiled or in any way victimised . . . except by the lawful judgment of his peers or by the law of the land.
> (Magna Carta, 1215 (England), para. 39.)

> [E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
> (Bill of Rights, 1689 (England))

> No man may be accused, arrested or detained except in the cases determined by Law, and following the procedure that it has prescribed . . .
> The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied.
> (Declaration of the Rights of Man, 1789 (France), Articles 7 & 8.)
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
> (Bill of Rights, 1791 (US Constitutional Amendments), Article 8.)

It is only in later human rights documents that concepts of the right of access to proper care and medical treatment for all citizens were developed, and prisoners included because 'everyone is entitled' to the rights and freedoms and to 'equal protection of the law'. These statements include:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . .Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care . . .
> (Universal Declaration of Human Rights, 1948 (United Nations), Articles 5 & 25.)
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
>
> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person . . .
>
> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.
> (International Covenant on Civil and Political Rights (came into force 1976, first introduced 1966). Articles 7, 10(1) and 17.)
>
> The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
>
> (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.
> (International Covenant of Economic, Social and Cultural Rights (UN), Article 12.)

Public opinion about prisoners' rights has often been negative as shown, for example, in the following summary of a 1976 McNair Anderson opinion poll:

Table 1

Conditions in Australian Gaols

	Too severe on prisoner %	Too lenient on prisoner %	About what they should be %	Don't know %
NSW	15	29	40	16
Vic.	11	41	33	15
Qld	4	42	35	19
SA	8	53	25	14
WA	8	44	30	18
Tas.	2	52	27	19
TOTAL:	**11**	**38**	**35**	**16**

* Source: Australian Law Reform Commission 1980, p. 144.

One lamentable aspect of the public attitude towards prisoners has been well expressed by the late Victorian Supreme Court Judge Sir John Barry:

> the prescription that the criminal should receive a dose of his own medicine has always possessed a dreadful attractiveness . . .
>
> The public image of prison as a place of degradation where it is right and proper that inmates should be repressed and debased is still strong. In the public mind . . . a prison is a place where people who have done wicked things are kept apart and held in subjection, so that they will not contaminate law-abiding citizens (Barry 1969, p. 74, 78).

The AIDS epidemic presents the same challenges to prison administrators as it does to other government agencies - protecting privacy, providing proper care for sufferers, preventing the spread of the disease and obtaining sufficient funds to carry out all these new as well as old commitments. There are international standards which guide the way generally and for prisons in particular, such as those of the World Health Organization and the UN Standard Minimum Rules for the Treatment of Prisoners. None is legally enforceable. The Australian States should pass legislation only permitting HIV testing with consent and protecting of the privacy of HIV test results.

The Lack of Enforceable Rights for Prisoners

Rights do not exist without enforceable remedies. What, if any, enforceable rights exist in international or domestic law for Australian prisoners with HIV/AIDS?

International Standards

Rights relating to prisoners are included in the UN International Covenant on Civil and Political Rights (ICCPR). Unfortunately these rights may only be invoked by prisoners convicted of federal offences such as drug smuggling and social security fraud. This is because the *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth) can and does only oblige the Commonwealth Government to observe human rights standards in areas of Commonwealth powers. At 1 July 1989 there were 516 federal prisoners in custody out of a national prison population of 12 429, or 4 per cent of the total prison population. They serve their sentences in State gaols by virtue of s. 120 of the Australian Constitution.

A complaint from a federal prisoner may be investigated by the Human Rights and Equal Opportunity Commission. However, there is no legislation creating jurisdictions, offences and penalties for breaches of prisoners' rights.

An individual prisoner cannot complain to the United Nations about an alleged breach of right. This is because Australia has not yet ratified the 'Optional Protocol' of the ICCPR by which Australia could permit its citizens to complain to the UN after they had exhausted domestic remedies.

Further, the rights in the ICCPR are accompanied by qualifying phrases which permit the derogation of rights if they are 'prescribed by law' (Article 18) or 'imposed in conformity with the law' (Article 21). On the face of it, it would be a complete defence to such a complaint if the rights had been taken away by Parliament. The State Parliaments, in particular, have extraordinarily wide constitutional powers to legislate, for example, for 'peace, welfare and good government' even where such legislation seriously impinges upon access to the courts (*Building Construction Employees & Builders Labourers Federation of NSW v. Minister for Industrial Relations* (1986) 7 NSWLR 372).

UN Standard Minimum Rules

The UN Standard Minimum Rules for the Treatment of Prisoners provide standards of custody and medical care, with special rules for 'unconvicted prisoners'. The Rules are not an international convention and so do not create legal obligations in Australia. Nor do the Australian adaptions of the Rules published by the Australian Institute of Criminology in 1984 and 1989 have any force of law (Bailey 1990, p. 307).

Prisons Acts and Regulations

Prisons Acts and Regulations are not expressed in terms which give enforceable rights to prisoners. The High Court has held that prison regulations do not confer rights on prisoners (*Flynn v. R* (1949) 79 CLR 1). This interpretation was adopted partly for policy reasons:

> for if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the courts by prisoners for legal remedies addressed either to the Crown or the gaolers in whose custody they remain. (Flynn v. R (1949) 79 CLR 1 per Dixon J at 8).

Not only are rights not conferred, prison regulations actually take away rights enjoyed by other citizens including:

- the right to refuse treatment; and
- the right to refuse to give a body sample (including blood, breath and urine samples).

It appears that the only enforceable statutory right is that of federal prisoners to communicate with the outside world (s. 20(6), *Human Rights and Equal Opportunity*

Commission Act 1986 (Cwlth)). That section provides that a person in custody is 'entitled' upon making a request to the custodians to be provided with facilities (paper, pen and envelope) for making a written complaint to the Ombudsman and to have that complaint sent to the Ombudsman.

World Health Organization Guidelines

The World Health Organization set out guidelines for the prevention and control of AIDS in prisons in November 1987. The recommendations included voluntary testing, confidentiality of results and availability of counselling. They are not enforceable.

Right to Treatment

The introduction of mandatory linked HIV testing in prisons should place, one would think, an onus on prison administrators to provide proper medical and other care for prisoners identified as being HIV positive. Does a prisoner, or any person, have a right to treatment?

The law is expressed in terms of doctors' duties rather than patients' rights. There is no common law duty on doctors in private practice to treat 'all comers', although a refusal to assess (and treat) by medical staff in the casualty department of a public hospital has been held to be a breach of the duty of care (*Barnett v. Chelsea & Kensington Hospital Management Committee* (1969) 1 QB 428). Failure to give treatment in an emergency may be in breach of ethical duties, however, and may lead to disciplinary action (e.g. s. 27(1)(h), *Medical Practitioners Act 1938* (NSW)).

The duties of members of the Prison Medical Service are set out in the Prisons (Administration) Regulations (NSW), rr. 10-14, 17, 19, including attendance at medical emergencies (r. 10(2)) and carrying out 'such medical examinations, investigations and treatment of each prisoner as may be reasonably necessary' (r. 11(2)).

There are various services and treatments available to persons with or at risk of HIV/AIDS, some of them very expensive as the cost estimates in the 1988 Commonwealth government discussion paper show (Australia. Department of Community Services and Health, pp.74-5):

- access to diagnostic procedures, including pre- and post-test counselling (estimated minimum cost $6 per person);
- access to doctors experienced in dealing with HIV/AIDS;
- access to AZT (estimated cost of $10 000 per person per year);
- access to nutritional supplements and dietary advice to counter the effects of a weakened immune system, severe weight loss and chronic diarrhoea;
- access to services that assist in the maintenance of the immune system, positive attitudes and good health, including counselling and relaxation classes;
- assistance in containing the spread of the disease by sexual contact (condoms) or intravenous drug use (clean needles and needle cleaning procedures); and

- if necessary, hospitalisation (estimated average cost $35 000 per person per year).

Clearly, many large gaol systems are concerned about the possible future costs of caring for a large number of identified HIV/AIDS prisoners. One solution is to not introduce mandatory linked HIV testing, and thereby limit the number of prisoners identified as needing treatment. Another is to test but minimise costs by limiting services such as expert medical care and counselling, support and housing services. For example, the NSW HIV testing program is reportedly going ahead without adequate counselling staff.

The level of medical services may also vary from gaol to gaol. In many NSW country gaols, including Goulburn, prisoners are treated by a local GP on contract and not by the Prison Medical Service.

At law, however, any enforceable right to treatment for HIV/AIDS must await the determination of what is an acceptable reasonable standard of care for people who are HIV positive. That has not yet been established (Hammett 1987, p. xxiv).

Further, US case law suggests that prisoners do not have any rights to demand a diagnostic test (*Estelle v. Gamble,* 429 US 97 (1976)). It is not clear whether prisoners have a right to be informed of the results of any tests they undergo.

The Right to Refuse Treatment and Testing

Legislation has also affected rights to refuse treatment or testing.

No right to refuse treatment

In civilian life, mandatory medical treatment is usually limited to the area of psychiatric treatment. In prison, it occurs in a number of States in connection with medical treatment. One example can be seen in the *Prisons Act 1952 (NSW)*, s. 16(2).

No right to refuse testing

Non-consensual testing of prisoners for HIV was not recommended by the Commonwealth Government's National HIV/AIDS Strategy published in August 1989. Only voluntary testing is recommended in World Health Organization guidelines.

Mandatory testing does, however, exist in various States, including Queensland, South Australia, Tasmania and the Northern Territory, with a quasi-voluntary scheme in Victoria (some prisoners say they did not know or were not told that they could refuse) and a voluntary scheme in Western Australia except for prisoners regarded as 'high-risk'. At the time of writing legislation has been passed in NSW but not yet commenced. The policies are contained in the following legislation:

- *Prisons (Medical Tests) Amendment Act 1990* (NSW) which amends the *Prisons Act 1952* (NSW), ss. 46 & 50; Prisons (General) Regulations, r.34A;
- *Prisons (Correctional Services) Act 1985* (NT), s.75;
- *Corrective Services Act 1988* (Qld), s. 50;
- Correctional Services Act Regulations 1985 (SA), r. 65(1);
- *Prisons Amendment Act 1987* (Tas..) which amends the *Prisons Act 1977* (Tas.), s. 17(3)-(6);
- *Corrections Act 1986* (Vic.), s. 29; and
- *Prisons Act 1981* (WA), s. 39(b).

Confidentiality of Documents and Information

Do prisoners have any right to privacy and confidentiality in relation to information held on their prison files, whether it be based on a general right to privacy of sensitive personal information or on a particular right to have medical information dealt with confidentially?

At present, the general right to documentary privacy under the *Privacy Act 1988* (Cwlth) is limited to documents held by Commonwealth government departments and agencies, and will shortly be extended to the private sector to regulate credit reference agencies. There is no data protection legislation in the States.

The traditional concept of medical confidentiality is qualified by legislation and the needs of many groups to have access to information. These qualifications include mandatory notification of citizens with HIV infection or AIDS as seen in:

- *Public Health Act 1902* (NSW), ss. 50F-L;
- *Health Act 1958* (Vic.), s. 130; and
- *Health Act 1937* (Qld), ss. 32, 32A.

Confidentiality is further undermined by provisions in prisons legislation permitting disclosure of AIDS test results. Table 2 is based on material in the report of Heilpern and Egger (1989, pp.73-74), updated with the 1990 amendments to the NSW Prisons (Administration) Regulations 1989.

As well, the informal spread of information in prisons concerning HIV status is well-known. Such information may be spread by word-of-mouth or as a result of legal, informal or unlawful access to various prison and police records, including:

- property cards at police stations;
- police criminal records (in NSW, the practice of recording alleged HIV/AIDS status on the criminal records computer was prohibited in a circular from Commissioner Avery dated 9 March 1989);
- warrants requiring someone to be taken into custody; and
- administrative, medical and disciplinary prison records. Some have the insignia 'K5' on their cover and a yellow sticker denoting a contagious disease.

The rationale for confidentiality of HIV/AIDS information is the same in gaols as it is in the community - unauthorised release may result in the person suffering discrimination.

Table 2

Disclosure of AIDS Information in Prisons

	Vic.	NSW	SA	Tas.	NT	Qld	WA	
Medical Superintendent	Y	Y	Y	Y	Y	Y	Y	
Medical officer of the prison	-	Y	-	-	-	-	-	
Department Head	-	Y	Y	Y	Y	Y	Y	
Deputy Department Head	-	Y	-	-	-	-	-	
Prison Superintendent	-	Y	Y	Y	Y	Y	Y	
Executive Director, Prison Operations	-	Y	-	-	-	-	-	
Manager, Prisoner Classifications	-	Y	-	-	-	-	-	
Chairman, Serious Offenders Review Board	-	Y	-	-	-	-	-	
Chairman, Offenders Review Board	-	Y	-	-	-	-	-	
All staff (need to know)	-	Y	-	Y	-	Y	Y	
All staff (prisoner has a communicable disease)		-	-	Y	-	-	-	-
All staff:		-	-	-	Y	-	-	
Health Department (communicable disease)	-	Y	-	-	-	Y	Y	
Health Department (at the discretion of prison medical staff)	-	-	Y	-	Y	-	-	
Relatives of prisoner (if eligible for home detention, day leave, etc)		-	-	Y	-	-	-	-
Any person whom the (a)Executive Director, Prisons Operations; or (b)Director of Prison Medical Service considers requires the information to provide for the welfare of the prisoner or the good management of the prison in which the prisoner is being held.	-	Y	-	-	-	-	-	

Accommodation: Segregation/Integration

Should prisoners identified as being HIV/AIDS positive have the right to choose between non-medical segregation and integration? At law, they are subject to the direction of the prison superintendent, with the court having no power to direct the kind of custody in which a person will be held although it may make recommendations.

The adverse effects on prisoners kept in segregation in AIDS units have been documented in the press (Stapleton 1989) and recognised by the courts as a factor in sentencing (*Bailey v. DPP* (1988) 62 ALJR 319; *R v. Bailey* (1988) 35 A Crim R 458; *R v. Smith* (1987) 44 SASR 587). They include depression, preclusion from gaol activities

(including sport and work) and restrictions on movement around the gaol and the gaol system. These conditions could clearly be alleviated if funding were made available.

Hardship conditions may apply just as much, however, if a prisoner is not segregated but his or her HIV/AIDS status is known to prison officers and prisoners. These hardships include the threat of assaults, and lack of adequate counselling and nutritional support in a decentralised prison system. In some gaol systems there is also discrimination through denial of access to work, participation in sport and other activities.

The third option is the regular prison protection units. These are very crowded, offer little guarantee that there will be no assaults by other prisoners on protection, and have all of the faults and none of the special counselling and other services that the AIDS units had.

In an ideal world HIV positive prisoners would be accepted by others, but that acceptance requires a degree of peer education, cooperation and the provision of single cell accommodation that, regrettably, is not available at present in NSW gaols at least. The deeply qualified and unenforceable nature of standards set out in prisons regulations (*R v. Flynn* (1949) 70 CLR 1) has already been mentioned including r. 1 of the NSW Prisons Regulations which recommends single cell accommodation.

Civil Prisoners: Public Health Legislation

Public health legislation in many Australian jurisdictions also provides for the taking into custody of persons having or suspected of having, HIV infection or AIDS. For example, the NSW *Public Health Act 1902,* as amended by the *Public Health (Proclaimed Diseases) Amendment Act 1989,* provides for the detention of a person alleged to be suffering from HIV infection or AIDS if he/she is endangering or likely to endanger the health of the public. This legislation commenced on 19 January 1990 and is popularly known as the 'Charlene Amendment' after a prostitute who was HIV positive and who was reckless enough to appear on television current affairs programs to talk about her work. The Act provides for a medical practitioner to issue a 28-day detention order which is reviewed by a magistrate after it is executed and which may be extended for six months by a Supreme Court judge. The place of detention is not specified, but if the detained person or any other person attempts to contravene the detention order they face criminal penalties of a maximum of six months imprisonment and/or a $5000 fine.

Other jurisdictions with comparable legislation include the Northern Territory (*Notifiable Diseases Act 1981*, s. 13), South Australia (*Public and Environmental Health Act 1987,* ss. 32, 33), Tasmania (*Public Health Act 1962*, s. 17) and Victoria (*Health (General Amendment) Act 1987* amending the *Health Act 1958*, s. 121).

Such legislation takes society back to the days of 'syphilis gaols'. The appeal procedures against such detention are unfair and the detention conditions unregulated. The statutory provisions should be repealed.

Remedies

Existing laws and practices do not adequately protect the privacy interests of citizens, including prisoners, in relation to HIV testing and the disclosure of test results. Many US jurisdictions do have such legislation. One example is the Californian Health and Safety Code ss. 199.20-23, passed in 1985. The position can be rectified in Australia by all States and Territories passing legislation which:

- repeals compulsory universal HIV testing of prisoners;
- requires that written consent be obtained before HIV testing is carried out, with a separate and detailed consent form which is not part of a list of consents to be ticked; and
- provides civil and criminal penalties for the release of test results except where there is signed authorisation by the test subject. The civil penalties should be liability to court costs and fines of between $1000 and $5000 for each

> disclosure. The criminal penalties following conviction for a misdemeanour should be a maximum of twelve months imprisonment and/or a fine of $10 000. The test subject should be able to sue for damages.

Although there are some exceptions in criminal legislation which undermine the same confidentiality protection being extended to prisoners (California Penal Law, s. 7520, s. 7521(a), s. 7522) such exceptions should be extremely limited.

Such legislation would also constitute recognition that prisoners have the least rights of any group in Australian society and should have enforceable minimum standards of custody and treatment.

Select Bibliography

Arriola, A. 1988, AIDS in prisons and jails, in *AIDS Practice Manual: A Legal and Educational Guide*, eds P. Albert 2nd edn, Joint Publication of the National Gay Rights Advocates and the National Lawyers Guild AIDS Network.

Australia. Department of Community Services and Health 1988, *AIDS: A Time to Care, A Time to Act. Towards a Strategy for Australians*, AGPS, Canberra.

Australia. Department of Community Services and Health 1989, *National HIV/AIDS Strategy*, AGPS, Canberra.

Australian Law Reform Commission 1980, *Sentencing of Federal Offenders*, Interim Report no. 15, AGPS, Canberra.

Australian National Council on AIDS (ANCA). Testing Working Party 1988, *Report on Sentinel Testing in Australia,* September.

Avery, J.K. (Commissioner of NSW Police) 1989, 'Confidentiality of persons with Human Immunodeficiency Virus (AIDS)', NSW Police Circular no. 89/44, 9 March.

Bailey, P. 1990, *Human Rights: Australia in an International Context*, Butterworths, Sydney.

Barry, J. 1969, *The Courts and Criminal Punishments*, NZ Government Printer, Wellington.

Cullen, B., Dowding, M. & Griffin, J. (eds) 1988, *Corrective Services in New South Wales*, Law Book Co., Sydney.

Dix, A., Errington, M., Nicholson, K. & Powe, R. (eds) 1988, *Law for the Medical Profession*, Butterworths, Sydney.

Hammett, T. 1987*, AIDS in Correctional Facilities: Issues and Options*. 2nd edn, 1987, National Institute of Justice, Washington DC.

'The Harvard Model AIDS Legislation Project' 1990, *American Journal of Law and Medicine*, vol. 16, no. 1.

Hawkins, G. 1986, *Prisoners' Rights: A Study of Human Rights and Commonwealth Prisoners*, Human Rights Commission Occasional Paper no. 12, AGPS, Canberra.

Heilpern, H. & Egger, S. 1989, *AIDS in Australian Prisons. Issues and Policy Options*, Dept of Community Services and Health, Canberra, March.

Kirby, M. 1990, 'AIDS Strategies and Australian Prisons', Annual Oration, South Australian Justice Administration Foundation.

New South Wales. Royal Commission into New South Wales Prisons 1978, *Report*, Commissioner: Mr Justice Nagle, NSW Govt Printer, Sydney.

Norberry, J. & Chappell, D. 1989, '*AIDS and Prisons*', Trends and Issues in Crime and Criminal Justice, no. 21.

South Australia. Royal Commission into Correctional Services in South Australia 1981, *Report*, South Australian Government Printer, Adelaide.

Stapleton, J. 1989, 'AIDS tests stall, but life goes on in "Death Row"', *Sydney Morning Herald*, 4 Feb.

United Nations 1984, *Standard Minimum Rules for the Treatment of Prisoners*, UN Department of Public Information.

United States. Department of Health and Human Services. Public Health Services Centers for Disease Control 1987, *Recommended Additional Guidelines for HIV Antibody Counselling and Testing in the Prevention of HIV Infection and AIDS,* 30 April, Washington DC.

Victoria. Board of Inquiry into Allegegations of Brutality and Ill Treatment at HM Prison Pentridge 1973, *Report*, (Chairman: K.W. Jenkinson) Victorian Government Printer, Melbourne.

Vinson, T. 1982, *Wilful Obstruction: The Frustration of Prison Reform*, Methuen, Sydney.