



No.32

# HIV/AIDS, Prisons and the Law

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*The increase in identified HIV seropositive prisoners in Australia's gaols, as outlined in this Trends and Issues, is of major concern, and raises serious questions concerning legal obligations within the prison community.*

*The minimisation of HIV/AIDS in the Australian prison system is a complicated matter, and the formulation of corrections policy involves a number of considerations: what are the health issues - both for prisoners and prison employees? Are prisoners' rights being met whilst we ensure our prisons are managed safely? Are all our legal duties being complied with?*

*This Trends and Issues looks at some of the legal aspects of HIV/AIDS in the prison setting. It calls for law reform and policy changes to assist in combating the spread of HIV/AIDS in our nation's gaols, and to ensure that the interests and rights of prisoners and prison employers are recognised and safeguarded.*

**Duncan Chappell**  
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In 1989 the Australian Institute of Criminology published its first Trends and Issues on AIDS and Prisons. It reported that to January 1989 there had been a cumulative total of 99 identified HIV seropositive prisoners in the nation's gaols. As at October 1990 the cumulative total of identified HIV seropositive prisoners was 206 (Egger & Heilpern 1991). Both figures must be interpreted with caution. Compulsory testing is not carried out in all Australian prison systems. Even in those jurisdictions where mandatory testing programs are in place, not all receptees are tested, and testing is not carried out periodically or at exit in all systems.

In policy terms, the most significant change recorded since 1989 is the introduction of compulsory HIV testing in NSW, the State with the largest prison population. The *Prisons (Medical Tests) Amendment Act 1990* (NSW) commenced on 5 November 1990 and testing on reception began on the same day in three New South Wales prisons. By the end of March 1991, testing on entry and prior to release was reported to be occurring in all NSW prisons.

This Trends and Issues examines some of the legal aspects of HIV/AIDS in the prison setting. The presence of HIV/AIDS in prisons raises questions about appropriate administrative and medical responses to prisoners with HIV infection or AIDS, about the liability of prison authorities for HIV/AIDS transmission, and

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about the occupational health and safety of prison employees. For convenience, this paper is divided into four main although overlap exists. The first, as a prelude to the issue of HIV/AIDS in prisons, examines prisoners' rights. The second considers prison conditions including medical treatment, testing and accommodation. The third looks at HIV transmission, legal duties and liabilities in the prison context. The fourth discusses occupational health and safety issues.

### Prisoners' Rights

It is only in relatively recent times that an interest in prisoners' rights has developed. After World War II, the need for enforceable, international codes dealing with human rights was recognised (Treverton-Jones 1889). As a result, instruments such as the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) were drafted. The ICCPR, for example, gives some recognition to the need to treat prisoners with humanity and respect for their dignity, and identifies the essential aim of imprisonment as rehabilitation and reformation.

In the United States, interest specifically in prisoners' rights accompanied civil rights activism in the 1960s. In the 1970s after riots at Attica Prison, there was an explosion of prisoner litigation. Until this time, in the United States, a prisoner was regarded as a 'slave of the state' (*Ruffin v. Commonwealth* (1871) 62 Va 790). Similar views were held in Australia.

Not only were prisons viewed as places of punishment, where prisoners lost their civil rights, but the courts were disinclined to involve themselves in matters which encroached on prison administration. There were, and are, a number of reasons for such an approach. The function of the courts has been seen as adjudication and disposition rather than supervision of the treatment of sentenced offenders. Judicial intervention in prisons has

been regarded as interference with the executive arm of government. The courts have taken the view that lack of practical experience would make it inappropriate for them to adjudicate on the decisions of prison administrators. Furthermore, the courts have been concerned that prisoner access to judicial review could undermine prison discipline and security. Finally, the courts have speculated that granting enforceable rights would open up the floodgates of unmeritorious litigation.

Judicial attitudes to prisoner grievances have been matched by public indifference or hostility to prisoner causes. Hawkins (1986) commented that the public viewed prisons as places where rights are appropriately curtailed and that in committing their offences, prisoners could be regarded as having voluntarily surrendered their rights. There is probably, also, an inclination to regard prisoners' complaints as necessarily lacking credibility, and a tendency to accept the statements of prison authorities as inherently credible.

#### *United States cases involving HIV/AIDS*

There has been an enormous amount of prisoner litigation in the United States. An increasing amount concerns HIV/AIDS. However, while US courts are now more willing to accept the threshold issue of jurisdiction in prisoner' rights cases, they continue to be reluctant to overturn the decisions of prison administrators.

The United States AIDS Litigation Project (Gostin 1990) recently published the results of its examination of 469 legal cases relating to HIV/AIDS at federal, state and local level. Sixty-four (or 13.6 per cent), the second largest single category, concerned HIV/AIDS and prisons issues, and were brought by prisoners, their representatives, or by prison officers. The cases centre on questions of accommodation, HIV testing, the adequacy of medical treatment, failure to provide social, recreational, and rehabilitative

programs, and the adequacy of nutritional services.

The complexity of the issues and divergence of viewpoints involved in the cases are demonstrated by the outcomes sought by litigants. On the one hand, prisoners have argued for compulsory screening and the segregation of HIV seropositive inmates. Legal action is commonly precipitated by fears about casual contact with HIV infected prisoners and concerns about assaults. To date, these prisoner suits have been rejected by the judiciary on the grounds that evidence neither demonstrated a real risk of transmission, nor a diminution of risk were segregation and mandatory testing to be introduced (Gostin 1990).

On the other hand, HIV seropositive inmates have taken legal action against segregation by prison authorities, alleging denial of equal protection, due process, and the infliction of cruel and unusual punishment. They have been largely unsuccessful, although in the recent case of *Gates v. Deukmejian* a settlement was negotiated for a pilot project allowing a number of HIV seropositive prisoners to live in a separate unit but participate in prison activities (Hammett & Moini 1990).

In general, the response of United States courts has been to uphold housing practices which are in place, on the basis that such policies are based on legitimate health, safety, and security grounds (Takas & Hammett 1989).

The right to treatment has also been litigated in the United States, with suits pending in a number of jurisdictions alleging misdiagnosis, refusal to supply AZT (the drug, azidovudine, which can inhibit HIV damage to the immune system), and failure to provide azidovudine, which can inhibit HIV damage to the immune system), and failure to provide treatment for alcohol and drug dependency.

Confidentiality and notification have also been litigated. Plaintiffs have challenged access to information about HIV status. In one New York case, segregation was struck down by

a court because it consequentially violated inmates' rights to privacy (Takas & Hammett 1989).

### *Prisoners' rights in Australia*

The constitutional safeguards relied upon by prisoners in the United States which derive from the Bill of Rights are not available in Australia. Conditions in prisons are governed by prison Acts and Regulations. For the most part this legislation concentrates on administrative, security and disciplinary matters. Its language is not usually couched in terms of rights or entitlements for prisoners. The *Corrections Act (1986)* (Vic) is unusual in listing a number of prisoner 'rights' (s.47(1)). Furthermore, Australian and English courts have consistently held that such legislation does not confer justiciable rights on prisoners (*Flynn v. The King* (1949) 79 CLR 1).

Nor does international law provide much assistance to Australian prisoners. The ICCPR contains some general safeguards - for example, against inhumane treatment. However, not only are such rights qualified in the Covenant itself but the Covenant's application in Australia is limited. International and domestic guidelines specifically addressing prison conditions such as the United Nations *Standard Minimum Rules for the Treatment of Prisoners* and the *Standard Guidelines for Corrections* in Australia have no legal force.

Complaints by prisoners are sometimes lodged with the Commonwealth Human Rights and Equal Opportunity Commission or with State government anti-discrimination boards or ombudsmen. However, these authorities have limited powers and the Commission is not empowered to investigate prisoner complaints unless they originate from federal prisoners. Further, these bodies may be hesitant to become involved in difficult questions of prison administration. Thus, the New South Wales Ombudsman remarked recently on 'intractable problems that are not open to resolution, given the current overcrowding in the State's largely antiquated prison facilities'

(Ombudsman of New South Wales 1989).

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## **Prison Conditions**

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Having looked generally at prisoners' rights it is worthwhile touching briefly on some of the specific provisions in prison legislation which impact on prisoners with HIV/AIDS.

### *Medical treatment*

Most prison legislation in Australia provides that prisoners are to be given a medical examination, including medical tests, as soon as practicable after reception (for example, s.29 *Corrections Act 1986* (Vic), s.50 *Corrective Services Act 1988* (Qld), s.39 *Prisons Act 1981* (WA)). However, corrections legislation is silent about whether prisoners can request diagnostic tests, and whether they must be informed of the results of medical tests.

Most corrections legislation provides for access to medical treatment by prisoners. The provisions are variously worded. In Victoria, s.47(1)(f) of the *Corrections Act* provides that prisoners have the 'right to have access to reasonable medical care and treatment necessary for the preservation of health'. In Queensland, s.13(1) of the *Corrective Services Act* states that the Commission is 'to provide such medical services as are necessary for the welfare of prisoners'.

### *Diet*

Explicit provision may be found in prisons legislation concerning diet and dietary supplementation. Once again, there is considerable variation in the wording of legislative provisions, both in connection with basic diet and the supply of special diets to prisoners. In NSW, the *Prisons Regulations* provide that prisoners should be supplied with a daily diet in accordance with National Health and Medical Research Council specifications (r. 28(1)). Regulation 29 states that a medical officer may authorise the variation of a prisoner's diet on medical grounds. Section 15 of the

*Prison Act 1977* (Tas.) provides that prisoners shall be supplied with food of a sufficient quality and quantity to maintain health, and in Victoria, prisoners have a 'right' to special dietary food where the prison governor is satisfied that it is needed for medical reasons.

### *Refusal of medical examinations or testing*

Most prisons legislation provides specifically that prisoners must submit to medical tests or examinations. In addition, in a number of jurisdictions, medical tests may be carried out with such force as is reasonably necessary. In the legislation there may be a general power permitting prison officers to use reasonable force to compel a prisoner to obey an order, and exemptions from liability for damage or injury so caused (for example, s.23 *Corrections Act 1986* (Vic)). There may also be specific powers and exemptions from liability in respect of the taking of samples of blood or bodily substances (for example s.75 *Prisons (Correctional Services) Act 1985* (NT)). In addition, prisons legislation generally enumerates offences for failure to obey a lawful order given by a prison officer.

In New South Wales, s.50(1)(j5) of the *Prisons Act 1952* contains specific reference to the making of regulations 'requiring prisoners to undergo examinations and tests and provide specimens for the purpose of testing for evidence of exposure to or infection by Human Immunodeficiency Virus'.

### *Confidentiality*

In some States, corrections legislation contains confidentiality and penalty provisions in respect of medical and other information. These provisions are usually qualified. For example, disclosure may be permitted to the extent that it is necessary to perform official powers and duties. In New South Wales, regulations made in 1990 pursuant to the *Prisons Act*, specify the categories of person to whom information regarding HIV

status may be disclosed. However, other persons may be advised if the Executive Director or Director considers it necessary for the welfare of the prisoner or the good management of the prison (r. 14A(3)).

*Access to work, recreational programs and exercise*

Prison legislation may provide that prisoners can be directed to work, but gives them no right to do so. Little provision is made for recreation, education or exercise programs. Exceptions to this general rule include the Victorian Corrections Act which provides prisoners with the 'right to take part in educational programmes in the prison' (s.47(1)(o)).

*Accommodation*

Housing policies for HIV seropositive prisoners vary between jurisdictions. While accommodation decisions have been challenged in US courts, English and Australian courts have, traditionally, been reluctant to intervene in accommodation decisions made by prison authorities.

*Prisoners' rights and prison conditions ¾ conclusions*

The traditional view is that enforceable rights in respect of prison conditions do not exist. Further, there are common law and statutory impediments to legal action against prison authorities (provisions in NSW, Queensland and Western Australian legislation will be referred to below).

However, duties to provide for the welfare of prisoners are found both at common law and under statute. In his Second Reading Speech to Parliament on the Prisons (Medical Tests) Amendment Bill 1990 the NSW Minister for Corrective Services expressly referred to statutory and common law duties to protect the health and lives of prisoners. He continued, 'The Crown Solicitor is of the opinion that this duty extends to the detection of HIV infection, prevention of its spread and provision of appropriate medical treatment to those prisoners who have contracted

AIDS' (NSW Legislative Assembly Hansard p. 2997). Significantly, he added 'This duty . . . must be seen in the context of current medical knowledge and the availability of necessary resources' (NSW Legislative Assembly Hansard, p. 2997).

While prisoners generally lack enforceable rights, the concept of a duty of care is potentially valuable in policy development (Godwin 1991). What, for example, should be the policy response to duties to safeguard the welfare and protect the health of prisoners in the context of HIV/AIDS? It is suggested that a proper and effective response would include the provision of medical treatment to prisoners with HIV or AIDS at the same standard as that available to members of the public, the provision of continuing and relevant education about HIV transmission, provision of pre- and post-test counselling, the provision of HIV testing on request, provision of access to appropriate sterilising substances and information about their use, and access to drug treatment programs. Appropriate policy responses could also include the provision of condoms together with condom disposal systems. Many of these measures were recommended recently in a communique released by the first national conference on HIV/AIDS in prisons held in Australia (19-21 November 1990).

Existing policies can be examined in the context of this duty of care. Compulsory testing is one example. Used alone it does little to fulfil duties to protect the lives and health of prisoners. Adequate fulfilment of these duties might include the implementation of the measures detailed above. Without these measures, it is arguable that decision makers are using concepts such as duties to prisoners to enable them to legitimise and embrace politically 'easy' options.

HIV/AIDS in prisons is also significant because of the potential it creates for the use of draconian measures. Thus, the Western Australian *Report of the Select*

*Committee Appointed to Inquire into the National HIV/AIDS Strategy White Paper* (1990) revealed that all male HIV positive prisoners in that State were housed in a maximum security prison irrespective of their classification. Once in that prison, the Committee said:

*[they] are segregated in an area attached to the prison hospital where they are often interned 20 out of 24 hours. They are rarely able to take part in education programs...When attending courts, outpatient appointments or when hospitalised, they are treated as maximum security prisoners ...[they] cannot work and earn extra money which would be another prisoner's prerogative (p. 57).*

HIV/AIDS in the prison context exposes deficiencies in the treatment of all prisoners and, as we have seen, in the remedies available to them. Concern should not be confined to HIV positive prisoners. Consideration needs to be given to the need for enforceable rights for all prisoners.

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**Transmission of HIV/AIDS - Duties and Liabilities**

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In the United States a number of inmate suits have alleged contraction of the HIV virus as the result of sexual assault by another prisoner. While litigation involving prison authorities is not common in English or Australian courts, a number of cases have been decided which have possible relevance to questions of duties and liabilities in Australian prisons.

*Duties*

Duties owed to prison officers are discussed in a separate section. Common law duties to prisoners and others with whom they may come into contact are discussed below.

*Duty of care to prisoners*

In both Australia and England the courts have recognised that prison

authorities owe a duty of care to persons under their control. The rationale for this approach was put succinctly by the High Court of Australia in *Howard v. Jarvis* [1957] 98 CLR 177, a case in which a prisoner died in a police lockup. Referring to the defendant policeman the court said, 'he **was** depriving . . . [the prisoner] of his liberty, and he **was** assuming control for the time being of his person, and it necessarily followed, in our opinion that he came under a duty to exercise reasonable care for the safety of his person during the detention.' Although this case concerned a police lockup, it is equally applicable to prisons.

What of the case in which a prisoner is attacked by another prisoner? While, generally, no duty exists to control the actions of others, the courts have been prepared to make exceptions in the case of special relationships such as those existing in schools, prisons and mental institutions. In a number of cases it has been held that prison authorities have a duty to protect prisoners from attack by fellow inmates.

*L v. Commonwealth* (1976) 10 ALR 269 was such a case. Here the Northern Territory Supreme Court awarded A\$10,000 in damages to a remand prisoner assaulted by two convicted prisoners with whom he had been placed in a cell overnight. While the case was partly decided on the basis that prison authorities should have accommodated sentenced and unsentenced prisoners separately as far as possible, the court also remarked that the common law duty of care owed by prison authorities to prisoners held in their custody included taking proper care of prisoners while in their cells, and not putting the plaintiff in a cell with prisoners whom they knew or ought to have known were prone to violence.

#### *Duty of care to visitors in prisons*

The duties of care which apply to prisoners may also be applicable to visitors to correctional institutions. The duty of care to prison visitors

does not appear to have been considered by Australian or English courts. It is arguable, however, that visitors such as visiting magistrates, officials, relatives and friends of prisoners, may be owed a duty of care by prison authorities.

#### *Duty of care to persons outside the prison system*

The liability of correctional authorities for the actions of prisoners who escape from custody has rarely been adjudicated by English or Australian courts. In *Home Office v. Dorset Yacht Co* [1970] AC 1004, the House of Lords held that the Home Office could be held liable for damage caused to the appellant's yacht when seven Borstal trainees escaped from an island on which they were housed.

However, in the Australian case of *Thorne & Rowe v. State of Western Australia* [1964] WAR 147, the Supreme Court of Western Australia found no breach of duty had occurred where an escaped prisoner assaulted his wife and a person who came to her assistance. Despite the fact that the prisoner had a record of previous escapes and had communicated his intention, to a gaoler and warders, to 'get out and fix' his wife, the court concluded that neither the warders nor the gaolers had breached any duty of care to the plaintiff because, despite being aware of the threat, 'it [could not] be inferred from the fact of the threat having been made that [the prisoner] had the propensity and intention [to carry it out].'

#### *Duty to warn*

The law is hesitant about imposing duties of affirmative action and the content of a duty to warn is far from settled. In the context of HIV/AIDS some would argue a duty to warn exists and extends to parole officers, and a prisoner's known sexual partners. In South Australia, for instance, certain third parties are advised if a known HIV seropositive prisoner is to be released on leave or home detention. Such dispositions, as well as access to private visits, are

unavailable to a prisoner who objects to the notification.

#### *Liability for HIV transmission through physical or sexual assault*

The courts do regard prison authorities as having a common law duty of care to prisoners and others, and have sometimes upheld damages claims for breach of duty. However, enforcement by prisoners of such common law duties is curtailed by limited access to legal aid, and probably by their own reluctance to become involved in legal disputes with their custodians. In the case of prisoners with HIV/AIDS it may be additionally unattractive because of the stresses associated with involvement in legal proceedings (Godwin 1991).

Further, for both prisoners and other potential litigants, legal action against prison authorities is limited by statute in jurisdictions such as Western Australia, New South Wales and Queensland.

Section 111 of the *Prisons Act 1981* (WA) and s.46 of the *Prisons Act 1952* (NSW) provide that no action or claim for damages lies against any person for things done or purported to be done under the Act unless it is proved that the act was done 'maliciously and without reasonable or probable cause'. Sub-section 62(1) of the *Corrective Services (Administration) Act 1988* (Qld) provides that acts or omissions done pursuant to the Act or the Corrective Services Act, or acts done for the purposes of those Acts bona fide and without negligence, do not attract liability.

While the scope of these provisions is far from settled, their presence acts as a barrier to would-be litigants.

#### *Liability and consensual activities*

Another matter for consideration in the context of correctional authorities' liabilities is alleged transmission incidents involving consensual activity such as anal sex, needle-sharing or even tattooing. There are no known cases in Australia or the United States

where inmates have commenced legal action on this basis. While the complete defence of voluntary assumption of risk is generally in retreat (Fleming 1987, p. 276), it is suggested that the courts would look favourably on it where a prisoner commenced legal action in these circumstances.

### *Transmission of HIV/AIDS, duties and liabilities - conclusions*

It will be difficult to establish that prison authorities are liable at common law for injury or death caused by prisoners. While prison authorities' liability for HIV transmission has not yet been tested in an Australian court, it is probably safe to speculate that establishing liability will be even more problematic. It would be necessary to prove, for example, that the alleged incident led to the transmission of HIV infection, and that the transmission itself was a foreseeable risk. Where supervening statutory provisions are in place, additional and substantial hurdles exist.

However, should the matter rest there? First, it is argued that where negligence on the part of prison authorities has led to the transmission of HIV by a prisoner to someone to whom a duty of care is owed, then liability should follow. Provisions such as s.46 of the *Prisons Act 1952* (NSW) should be repealed.

Second, it is suggested that policies such as compulsory segregation and testing may not protect prison authorities against actions for damages. The decided cases indicate that a history of, or propensity for, violent behaviour may be of particular concern to the courts. Accommodation decisions should be made on this basis - separating violent or sexually predatory inmates from other prisoners. Additionally, although it may be difficult to establish liability where it is alleged that HIV transmission has occurred as the result of an assault, it has been suggested that proof may be marginally easier for the plaintiff prisoner in those

jurisdictions where compulsory testing regimes are in place.

Finally, mention should be made of the duty to warn, especially as it relates to prisoners on parole or home detention for example. As mentioned earlier, the existence and content of a duty to warn is far from settled. In addition, it must be balanced against considerations of confidentiality.

Legal considerations aside, procedures by which certain persons are advised of an offender's or a prisoner's HIV status should be examined in terms of their efficacy. The nature of the contact between prisoners and parole officers, for example, is not the sort that ordinarily results in HIV transmission. In the case of the sexual partners of prisoners, one must ask why prisoners should be treated any differently to ordinary members of the community. In addition, not only may it be impossible to identify all the sexual partners of a prisoner, but as Neave (1987) has suggested, the more important issue may be counselling and behaviour modification rather than the protection of known third parties.

A further question relates to duties which may be owed to third parties when advising them that a prisoner is HIV positive. If a prison authority has a duty to warn, does it also have a duty to provide counselling rather than mere information? And, are there any circumstances in which a warning, negligently given, and resulting in nervous shock could result in liability?

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### **Occupational Health and Safety Issues**

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Prison employees may be exposed to HIV infection as a result of assaults. Although such occupational transmissions are unlikely, in one case in NSW it has been alleged that a prison officer was assaulted by a prisoner and subsequently tested HIV positive. (Criminal charges were laid against the prisoner alleged to have committed the assault by stabbing the prison officer with a syringe containing HIV-infected blood. The

prisoner died before the case could come before the Supreme Court of NSW (*Sydney Morning Herald*, 27 April 1991, p. 9).)

In addition, prisons, like hospitals, are one of the few workplaces where employees may, through accident, come into contact with HIV-infected body fluids in the course of their employment.

Statutes, industrial awards and the common law all impose a duty to take reasonable care for the health and safety of employees.

There is a duty at common law on employers to take reasonable care to avoid exposing their employees to unnecessary risks of injury. The duty does not require employers to establish and maintain absolutely safe systems of work and, as in tort law generally, voluntary assumption of risk or contributory negligence may be raised in defence.

In *Ralph v. Strutton* [1969] Qd. R 348 the widow of a prison officer who had been killed by a prisoner wielding an iron bar brought an action alleging that prison authorities were negligent in failing to provide a safe system of work. Although the court held that the prison authorities knew or ought to have known of the violent propensities of the assailant, it found that the warder was an experienced officer who knew or ought to have known of the prisoner's past record, and that his own security lapse resulted in the assailant obtaining possession of the iron bar used in the assault.

In a number of Australian jurisdictions, the ability of employees to take common law actions against their employers has been limited or removed by workers' compensation legislation. Under such legislation, an employer may be liable where incapacity or death occurs in the workplace. While most often used in the case of incapacity or death resulting from an accident, workers' compensation legislation may also be relevant where prison staff are assaulted and contract HIV infection as a result. Where an employee is carrying out employment duties or activities incidental to his or her employment and is assaulted, then any

resulting incapacity or death will generally be regarded as occurring in the course of employment.

However, as pointed out by the Intergovernmental Committee on AIDS Legal Working Party in its report, *Employment Law and HIV/AIDS*, 'under both the common law and statutory workers' compensation schemes, a worker's access to compensation for non-economic loss where they are occupationally infected with HIV but not symptomatic, is restricted or non-existent' (p. 18). In the case of a worker infected with HIV this is particularly important given the discrimination, pain and suffering that may be experienced by that person. Adequate provision for compensation by governments in respect of non-economic loss by workers such as prison officers who are occupationally infected, should be addressed as a matter of urgency.

Yet another matter related to prison employees is occupational health and safety. Occupational health and safety legislation provides, amongst other things, that employers must take effective and appropriate measures to maintain occupational health and safety. The provision of timely and quality counselling for prison officers exposed to the possibility of HIV infection should be provided as an occupational health measure.

While there are few recorded cases of HIV being transmitted in the workplace, prison authorities should ensure that first aid cupboards are available and properly stocked, appropriate clothing is available for use by prison staff and that staff are properly trained in first aid and emergency procedures. Kits containing items such as bleach and dressings should be issued to prison officers to reduce the risks they face when conducting cell searches or dealing with body fluid spills.

The drafting and implementation of uniform and universal infection control guidelines for prisons, together with the regular monitoring of their implementation, should be a matter of priority. The Australian National

Council on AIDS, which has already drawn up guidelines for health care personnel in relation to HIV infection, may be the most appropriate body to formulate the necessary standards (Godwin 1991).

Finally, prison officers and staff should have access to a drug such as AZT or the treatment of choice when occupationally exposed to the possibility of HIV infection. HIV testing should also be available on request. The latter is particularly important in those jurisdictions where common law action for damages for work-related injuries still exists. Without knowledge of their HIV status, given the long latency period for HIV and statute of limitation periods, these workers may be precluded from pursuing legal remedies.

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### Conclusions

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What can be concluded about the law, HIV/AIDS and prisons in Australia? The attention which must be given to the needs of prison officers and staff has just been discussed. In respect of prisoners a number of matters should be mentioned.

First, prisoners may be able to sue for damages as the result of HIV transmission and succeed. However, they face substantial impediments. Second, the law is far from settled in relation to many of the issues raised by HIV/AIDS in prisons—these include liability to prison visitors and the existence and content of a duty to warn.

Third, while the law traditionally offers little assistance to prisoners seeking to challenge prison conditions, legal concepts do offer some guidance in the development of appropriate policies. The concept of duties owed by prison authorities can inform policy making (Godwin 1991) These duties should be regarded as a logical extension of the custody and control exercised over prisoners.

Fourth, legal concepts can be inappropriately or uncritically used in the development and justification of policies relating to prisons. Thus, the

use of compulsory HIV testing seems not to fulfil any duty to protect lives or health, unless it is combined with other measures such as access to proper medical treatment, counselling and education. The idea of a duty to warn third parties should be carefully considered.

Fifth, policy is not the only matter which must be addressed. While legislation may be a clumsy, and at times inappropriate mechanism in the prison context, and while the special environment of the prison necessarily involves direction and control which would not be applied to ordinary citizens, there is scope for law reform and for judicial intervention. Legal impediments to damages claims and other actions by prisoners and others should be removed. This would include the repeal of statutory liability exemption provisions. Consideration should be given to strengthening corrections legislation especially as it relates to medical treatment, diet, confidentiality, accommodation and access to educational and work programs. And, the need for and content of enforceable rights for all prisoners should be examined.

It is not suggested that changes in the law, such as those proposed will be easily accomplished or even that they will result in frequent successes for litigants against prison authorities. Experience in the United States, where there are fewer obstacles to such litigation, attests to this. However, legislative change and greater judicial intervention can have beneficial flow-on effects. It may affect policies and prison conditions and bring about 'changes in prison bureaucracies and personnel, public and political opinion, and the self-esteem of prisoners and prison officials' (Jacobs 1980).

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