

## SEXUAL ASSAULT OF PRISONERS: REFLECTIONS

DAVID M HEILPERN\*

The horrors experienced by many young inmates, particularly those who are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but it is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.

Justice Blackmun, United States Supreme Court, *Farmer v Brennan*<sup>1</sup>

### I INTRODUCTION

In 1997, I wrote the first book dealing with sexual assault of prisoners, the culmination of 10 years research in New South Wales prisons. When *Fear or Favour*<sup>2</sup> was published in 1998 it caused a minor stir: editorials were written; the usual inter-departmental subcommittees were established; and serious faces made serious promises. The purpose of this paper is to briefly revisit that research, comment on its importance a decade later, and remark on some extraordinary and exciting developments in the United States.

### II FEAR OR FAVOUR: THE RESEARCH REVISITED

Throughout 1995 and 1996, I surveyed 300 male prisoners aged 18 to 25 in New South Wales prisons. Seventy seven (26 per cent) of those surveyed stated that they had been sexually assaulted in prison at some time. Fifty per cent stated that they had been assaulted other than sexually. A greater percentage stated that they had been threatened with sexual or other assault. Younger and smaller prisoners were more likely to have been sexually assaulted. Extrapolating these figures, I estimated that there were around 25 000 incidents of sexual assault in New South Wales prisons each year. This rate of sexual assault of prisoners is broadly consistent with the limited quantitative research from the United States.

---

\* David M Heilpern LLB, LLM, is a Magistrate of the Local Court in New South Wales, having previously been an academic at Southern Cross University. This article is written in his personal capacity.

1 511 US 825 (1994).

2 David M Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (1998).

The usual pattern for a young victim is pack rape followed by a long-term protective pairing 'relationship' where sexual favours are exchanged for safety. There is no realistic opportunity to report the crime, sexual assault counselling is non-existent, and the fear and favour spiral can go on for years.

Sexual assault in prison is not about sex, sexual frustration or latent homosexuality – it is about power. Rigid hierarchical stratifications develop within the closed environment of a prison, and the penis is a weapon of control, ownership and domination. It leaves no visible bruises or scars; and shame, fear and a culture of silence mean that it is easily hidden from or denied by authorities. Viewed in this way, sexual assault in prison is not 'caused' by any single factor such as overcrowding, unofficial sanction or sexual and emotional isolation, although clearly these factors increase its prevalence. Sexual assault in prison is an inevitable result of the systemic and deliberate disempowerment of men in a closed, hierarchical world where state force quashes freedom as a means of punishment.

The short-term effects of sexual assault on prisoners include fear, shame, suicidal tendencies and the fear that one is, as a result of the assault, a homosexual. Long-term effects include greater drug use, sexual violence and an inability to form lasting relationships. Naturally, such effects regularly result in re-imprisonment following release.

### III TEN YEARS LATER

There has been no reliable independent research anywhere in Australia since my study; thus the current position is a matter for conjecture only. New South Wales Corrective Services have published their own limited surveys of prisoners that show a much lower rate of sexual assault.<sup>3</sup> What is certain is that the key factors identified as increasing the risk of sexual assault have become more prevalent in New South Wales.

First, there are more prisoners, with the rate of imprisonment growing to 153 per 100 000.<sup>4</sup> There are now over 8796 prisoners in New South Wales.<sup>5</sup> Minimum standard sentencing and a series of amendments to the *Bail Act 1978* (NSW) providing sentencing guidelines for common offences have seen the prison population increase, with a corresponding increase in the raw numbers of young vulnerable prisoners.

Second, prisoners' rights have been eroded, including the removal of access to victims' compensation, less access to civil courts and the abolition of the post of

---

3 Tony Butler and Lucas Milner, *The 2001 New South Wales Inmate Health Survey* (2003) 137–9 <[http://www.justicehealth.nsw.gov.au/areas/corrections/docs/inmate\\_health\\_survey\\_2001.pdf](http://www.justicehealth.nsw.gov.au/areas/corrections/docs/inmate_health_survey_2001.pdf)> at 30 April 2005.

4 Australian Institute of Criminology, *Australian Crime: Facts and Figures 2004* (2005) 92 <[http://www.aic.gov.au/publications/facts/2004/facts\\_and\\_figures\\_2004.pdf](http://www.aic.gov.au/publications/facts/2004/facts_and_figures_2004.pdf)> at 30 April 2005.

5 See Simon Corben, *NSW Inmate Census 2003* (2004) 3 <<http://www.dcs.nsw.gov.au/documents/research/SP25%20NSW%20Inmate%20Census%202003.pdf>> at 30 April 2005.

Inspector General of Prisons.<sup>6</sup> Further examples of this are the moves to reduce prisoners' voting rights and limit access to campaign information during elections.<sup>7</sup>

Third, younger prisoners are being transferred more readily from juvenile detention centres to prisons as part of the 'tough on crime' regime.<sup>8</sup> Indeed, one detention centre is now staffed and controlled by the adult prison service.<sup>9</sup>

On the positive side, there have been changes to classification regimes, separate prisons for younger prisoners have been built, training of prison officers on sexual assault has been introduced and condoms are now available in prisons. However, in the absence of independent, quantitative research, any reduction in sexual assault of prisoners is a matter of hope, rather than proof.

#### IV IMPORTANCE OF THE ISSUE

There are several reasons that the occurrence of sexual assault of prisoners struggles to find oxygen in the current environment. First, prisoner rights are never good press – in the never-ending 'law and order' debate where greater punishment is seen as the solution to all sorts of social ills, the 'bad' are seen to get everything they deserve. Second, seeing prisoners as victims uncomfortably blurs the dichotomy between 'good' (read: innocent victims of crime) and 'bad' (read: anyone in prison). Third, the victims are largely men, and this does not sit well with dominant gender presumptions in modern sexual/violence political discourse.

There are valid reasons why the issue ought to be given more prominence. First, all the evidence is that where people are sexually assaulted in prison, they are more likely to be violent, particularly sexually violent, on release from prison. Those who are serious about reducing sexual and domestic violence in our society could include in their agenda demands for effective outcomes from incarceration.

Second, imprisonment is meant to be the punishment imposed by the courts, not random extra-judicial sexual or other violence by other prisoners, whether sanctioned or not by prison authorities. While we all care about kittens being tortured, asylum seekers being detained indefinitely and the prisoner abuse scandals in Iraq, there is little press about those suffering additional, preventable, illegitimate punishment as a result of other prisoners exercising power through sexual abuse in our own prisons.

---

6 University of Technology, Sydney, Community Legal Centre, 'The Abolition of the Office of the Inspector General of Prisons: Legal Briefing Paper' (2005) (unpublished, copy on file with author).

7 See Justice Action: <[http://www.justiceaction.org.au/actNow/Campaigns/extras/pci\\_pn.html](http://www.justiceaction.org.au/actNow/Campaigns/extras/pci_pn.html)> at 30 April 2005.

8 See, eg. *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2003* (NSW).

9 Pursuant to the *Juvenile Offenders Legislation Amendment Act 2004* (NSW) from 10 November 2004, the Department of Corrective Services became responsible for the management of the Kariiong Juvenile Detention Centre.

Third, it debases us all, particularly those working in the criminal justice system, that such horrors are not minimised. There are no refuges, no police, and no supports in prison. We all bear responsibility to ensure that our young men come out of prison at the very least no worse than they went in.

## V RAYS OF HOPE: THE UNITED STATES<sup>10</sup>

Over the last 10 years, America has taken the ‘do crime do time’ approach to an astonishing level, with over 2 000 000 incarcerated at any one time and more than 10 000 000 separate admissions and discharges each year. America’s prisons house more mentally ill individuals than all its psychiatric institutions combined. One out of every 140 people in the United States is now behind bars, the highest rate of any industrialised nation.<sup>11</sup>

An extraordinary event in the history of penology occurred on 4 September 2003 – one that has gone unnoticed in the mainstream press and sadly ignored in the realms of academia. In the Oval Office, in the presence of ex-prisoners Tom Cahill and Hope Hernandez, President George W Bush signed into law the *Prison Rape Elimination Act of 2003*<sup>12</sup> (*PRE Act*), marking the culmination of more than 20 years’ lobbying by the micro-activist group Stop Prisoner Rape. Cahill and Hernandez are both survivors of prison rape.

Prisoner welfare and rights have not, as one would have imagined, been high on the law and order agenda of the Republican President. But a strange, some might say bizarre coalition of the Christian/evangelical right and the prisoner-rights/civil liberties left managed to convince the Republicans and Democrats to support the Bill. This alliance was so successful the Bill was passed unanimously in both houses.

A significant preliminary development was the case of *Farmer v Brennan*,<sup>13</sup> where the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the ‘cruel and unusual punishments’ clause of the Eighth Amendment to the *United States Constitution*. This, in turn, gave courts a supervisory role over the administration of prisoners with a plethora of cases seeking determination over classification, housing and supervision of prisoners.

The *PRE Act* begins with a list of ‘findings’, accepted by the Congress, the Senate and the President in passing and approving the Bill. The most startling finding is the acceptance of estimates that at least 13 per cent of the inmates in

---

10 Much of this material is directly from the *Prison Rape Elimination Act of 2003*, Pub L No 108–79, 117 Stat 972 and explanatory memoranda from the Congressional hearings. For more history and commentary see: Stop Prisoner Rape <<http://www.spr.org>> at 8 May 2005.

11 International Centre for Prison Studies, Kings College London <<http://www.prisonstudies.org/>> at 25 May 2005. The rate as at 18 May 2005 is 720 per 100 000. This compares with Iran 191, United Kingdom 142, and Australia 120.

12 Pub L No 108–79, 117 Stat 972.

13 511 US 825 (1994).

the United States have been sexually assaulted in prisons, with many inmates suffering repeated assaults. Further findings include:

- Inmates with mental illness, first time offenders and young offenders are at increased risk of sexual victimisation. Juveniles are five times more likely to be sexually assaulted in adult, rather than juvenile, facilities – often within the first 48 hours of incarceration.
- There is a lack of training for prison staff to prevent and report attacks or treat victims.
- Prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault – if they receive treatment at all.
- The rates of HIV/AIDS, Hepatitis C and other sexually transmitted diseases amongst prisoners are far greater than in the general population, and thus prison rape undermines public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims.
- Prison rape brutalises inmates and makes them more likely to commit crimes or less likely to re-integrate as valued members of the community when they are released.
- Prison rape makes prisons more dangerous and violent places for inmates and staff.
- States that do not take basic steps to abate prison rape are not entitled to the same level of federal benefits as other states.
- There are significant costs to governments at all levels due to the incidence of prisoner rape including health care, disease prevention, race relations and crime prevention.

The *PRE Act* takes the concept of zero tolerance and applies it to prison rape in the United States, making the prevention of prison rape a top priority in each prison system. Recognising that this will be a long process involving ongoing research and evaluation, the *PRE Act* ensures that there will be a national standard for the collection of data and research, including the standardisation of terminology. The *PRE Act* also recognises that part of the prevention package is to increase the accountability of prison officials who fail to detect, prevent, reduce and punish prison rape.

The *PRE Act* creates three programs in the Department of Justice: one dedicated to collecting national statistics about the problem, a second to facilitate confidential reports of prisoner rape and provide training about how to address it, and a third that will provide grants to combat the problem. The *PRE Act* also creates an investigative commission which will produce a report and new national standards to address prisoner rape. Some of the key mandatory research initiatives are as follows:

- Each year the Department of Justice must conduct a detailed statistical analysis of sexual assault in prisons which must include the common characteristics of the victims and perpetrators of prison rape, collection of

information about staff on inmate sexual assault and categorisation of prisons.

- The review and analysis must include a random sample of not less than 10 per cent of all federal, state and county prisons and a representative sample of municipal prisons.
- The selection of institutions for survey is not to be disclosed to the facility in which the prisoners are to be surveyed. Prison authorities must cooperate in the survey process and provide access to any inmates in their legal custody.
- The *PRE Act* establishes a Review Panel on Prisoner Rape which each year must conduct public hearings concerning the operation of the three prisons with the highest incidence of prisoner rape, and the two prisons with the lowest incidence. The purpose of these hearings is to collect evidence to aid in the identification of common characteristics of both victims and perpetrators of prison rape, and the identification of common characteristics of prisons and prison systems with a high incidence of prison rape, and the identification of common characteristics of prisons and prison systems that appear to have been successful in deterring prison rape.
- The panel can subpoena wardens, prisoners and administrators to give evidence.
- Each year the Department of Justice must produce a report detailing the rates and effects of prisoner rape, and rank institutions according to the incidence of prison rape in each institution.
- The National Institute of Corrections must establish a national clearinghouse for the provision of information and assistance to federal, state, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.
- The National Institute of Corrections must conduct periodic training and education programs for federal, state, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.
- A National Prison Rape Reduction Commission will be established to carry out a comprehensive legal and factual study of penological, physical, mental, medical, social, and economic impacts of prison rape in the United States and to report annually thereafter.

To ensure that the *PRE Act* is not just fine words and intentions it includes a specific appropriation of US\$20 000 000 for each of the fiscal years from 2004 through to 2010 for the research functions alone. The Act makes appropriations of US\$40 000 000 each year until 2010 for grants to prison systems for the establishment of rape reduction programs within prisons.

The import of this legislation, and its emphasis on research, cannot be overstated. Not only has the legislative arm of government recognised that sexual assault of prisoners is prevalent, it makes researching the issue a priority. This marks a milestone. Prisoner rape has been brought out of the shadows and has been given a financial base which may make reduction achievable.

## VI CONCLUSION

The developments in the United States are extraordinary and suggest a path forward for Australia. The obstacles are considerable, not least of which is the lack of a constitutional basis for judicial and thus parliamentary intervention. Nevertheless, it seems to me that this is one issue that the left and the right could agree on, and pass legislation similar to the *PRE Act*. Rather than being bogged down in statistical clashes that often devolve into trench warfare style academic debate, bipartisan legislative action is achievable and would satisfy all parties. The real question is how to break through the cloak of silence that characterises this issue.<sup>14</sup>

---

14 To this end, a group of concerned citizens is establishing a project called 'Stop Prisoner Rape in Australia'. For further information contact: [dulwich@senet.com.au](mailto:dulwich@senet.com.au).