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**'An awful state of affairs for you':¹ Reflecting of the
experiences of older detainees in the Australian
Capital Territory**

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¹ Comment made by Chief Justice Kidd in sentencing judgement of Cardinal George Pell on 13 March 2019: *R v Pell* [2019] VCC 260, 21 [122].

**'AN AWFUL STATE OF AFFAIRS FOR YOU':²
REFLECTING OF THE EXPERIENCES OF OLDER
DETAINEES IN THE AUSTRALIAN CAPITAL
TERRITORY**

by
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² *R v Pell* [2019] VCC 260, 21 [122].

I INTRODUCTION

The Australian Capital Territory's (ACT) prison population is ageing,³ a trend occurring both internationally and within Australia.⁴ Notably, the ACT's older prison population has grown at the highest rate in Australia over the last decade.⁵ Prisoners, who are referred to as detainees in the ACT (as in this paper),⁶ are incarcerated at the Alexander Maconochie Centre (AMC) which opened in 2008.⁷

Upon its opening, the AMC, which is managed by ACT Corrective Services (Corrective Services),⁸ and governed by the *Corrections Management Act 2007* (ACT) (*CM Act*),⁹ was marketed as Australia's first human rights prison.¹⁰ This attitude is logically aligned with the ACT being one of only two jurisdictions in Australia to have legislated human rights protections.¹¹ Named after Alexander Maconochie, a penal prison reformer who championed rehabilitation of detainees,¹² the AMC's operational philosophy also has a

³ This paper will use publicly available statistics from the Australian Bureau of Statistics (ABS): ABS, *Prisoners in Australia, 2018* (Catalogue No 4517.0, 11 April 2019) Table 2I: Indigenous status, sex and age by state/territory

<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02018?OpenDocument>>; ABS, *Prisoners in Australia, 2008* (Catalogue No 4517.0, 11 December 2008) Table I: Prisoners, age <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12008?OpenDocument>>.

⁴ Rachael Bedard, Lia Mertzger and Brie Williams, 'Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities' (2016) 98(3) *International Review of the Red Cross* 917, 918; Meredith Greene et al, 'Older adults in jail: high rates and early onset of geriatric conditions' (2018) 6(3) *Health and Justice* 1, 1; Brie Williams, Cyrus Ahalt and Robert Greifinger, 'Chapter 19. The older prisoner and complex medical care' in World Health Organisation, *Prisons and Health* (World Health Organisation, 2014) 165, 165; Stephen Ginn, 'Elderly prisoners' (2012) 345(7879) *British Medical Journal* 24, 24; Seena Fazel et al, 'Health of elderly male prisoners: worse than the general population, worse than younger prisoners' (2001) 30(5) *Age and Ageing* 403, 403.

⁵ ABS (n 3).

⁶ *Corrections Management Act 2007* (ACT) s 6(1) ('*CM Act*'). See also, ACT Inspector of Correctional Services, *Report of a Review of a Correctional Service: The care and management of remandees at the Alexander Maconochie Centre 2018* (Report, February 2019).

⁷ Simon Corbell, 'The New ACT Prison: What Is Planned and What Will Be Achieved' (Speech delivered at the Christians For An Ethical Society Forum on the ACT Prison, Canberra, 19 March 2008), cited in Lorana Bartels, 'The ACT Prison: Human Rights Rhetoric Verses Crowded and Bored Reality' (2015) 9 *Court of Conscience* 13, 16.

⁸ ACT Corrective Services, 'Alexander Maconochie Centre', *ACT Corrective Services* (11 July 2019) <http://www.cs.act.gov.au/custodial_operations/types_of_detention/alexander_maconochie_centre>.

⁹ *CM Act* (n 6).

¹⁰ ACT Inspector of Correctional Services (n 6) 9.

¹¹ *Human Rights Act 2004* (ACT). See also, *Charter of Human Rights & Responsibilities Act 2006* (Vic); Bartels (n 7) 16.

¹² Norval Morris, *Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (Oxford University Press, 2002) cited in, ACT Corrective Services, 'Why Alexander

strong focus on rehabilitation.¹³ Said differently by the ACT Inspector of Corrective Services, ‘prison is considered to be the punishment, not a place to send people for punishment’.¹⁴

Acknowledging that detainees are either alleged or convicted of committing a criminal offence,¹⁵ the *CM Act* clearly expresses an obligation to protect the human rights of detainees regardless.¹⁶ Further, the AMC publicly aims to adhere to the ‘Healthy Prison’ concept, which includes objectives such as, ‘everyone is and feels safe’ and ‘everyone is treated with respect as a fellow human being’.¹⁷

The motivations for this paper are twofold. First, although the AMC’s human rights approach has been celebrated,¹⁸ it has also been criticised for not achieving these aspirations in practice,¹⁹ partly due to overcrowding within a few years of commencing operation.²⁰ Second, while there are several studies on the experiences of detainees in

Maconochie?, *Custodial Operations: Types of detention* (14 September 2010)

<<http://www.cs.act.gov.au/page/view/859/title/why-alexander-maconochie>>; Bartels (n 7) 17.

¹³ *CM Act* (n 6) Preamble (4)(d); ACT Inspector of Correctional Services (n 6) 9, 13; ACT Department of Justice and Community Safety (JACS), ‘Alexander Maconochie Centre Functional Brief’ (March 2005) 15 <https://www.ics.act.gov.au/__data/assets/pdf_file/0014/1304015/37.pdf>; see also, Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) [169]; Justice and Community Safety Directorate, *Annual Report 2017-2018* (Report, October 2018) 74.

¹⁴ ACT Inspector of Correctional Services (n 6) 9; see also, *CM Act* (n 6) Preamble (3).

¹⁵ Lorana Bartels, ‘State of imprisonment: can ACT achieve a ‘human rights’ prison?’ *The Conversation* (Blog post, 17 April 2015) <<http://theconversation.com/state-of-imprisonment-can-act-achieve-a-human-rights-prison-39119>>.

¹⁶ *CM Act* (n 6) Preamble (1), ss 8(c), 9.

¹⁷ ACT Corrective Services, ‘Operating philosophy’, *Custodial Operations: Types of detention* (10 August 2010) <<http://www.cs.act.gov.au/page/view/867/title/operating-philosophy>>.

¹⁸ Knowledge Consulting, ‘Independent Review of Operations at the Alexander Maconochie Centre: Report for ACT Corrective Services’ (Report, Knowledge Consulting, 12 March 2011) 37; David Biles, ‘First-rate Alexander Maconochie Centre needs a little work’, *The Sydney Morning Herald* (Online, 12 July 2011) <<https://www.smh.com.au/opinion/first-rate-alexander-maconochie-centre-needs-a-little-work-20140711-zt483.html>>.

¹⁹ Bartels (n 7) 17; Philip Moss AM et al, ACT Legislative Assembly, ‘So Much Sadness in our Lives’: *Independent Inquiry into the Treatment in Custody of Steven Freeman* (Final Report, 7 November 2016); Anita Mackay, ‘The Road to the ACT’s First Prison (the Alexander Maconochie Centre) was Paved with Rehabilitative Intentions’ (2012) 11(1) *Canberra Law Review* 33.

²⁰ See, eg, Daniel Burdon, ‘Overcrowding at Canberra jail could lead to human rights breaches’, *The Canberra Times* (online, 21 February 2019) <<https://www.canberratimes.com.au/story/5994944/overcrowding-at-canberra-jail-could-lead-to-human-rights-breaches/>>; Jordan Hayne and Niki Burnside, ‘Canberra’s only jail is running out of cells, but the Government wants to ‘build communities not prisons’’, *ABC News* (online, 15 February 2019) <<https://www.abc.net.au/news/2019-02-15/canberra-jail-cells-at-capacity-crime-prevention/10813580>>.

the AMC,²¹ there has been no research specifically about the older prison population. This demographic is of particular interest due heightened attention on the prosecution of historical sexual offences, prompted by the Royal Commission into Institutional Responses to Child Sexual Abuse,²² which has no doubt contributed to the increase in offenders being sentenced for historic crimes at an older age.²³ Consequently, this paper seeks to introduce a focus on the experiences of older detainees at the AMC.

Evaluating the rapidly ageing prison population within this framework reveals two observations. First, older detainees have unique social and health needs compared to younger detainees. Secondly, improved symbiosis between Corrective Services and the ACT judiciary is necessary to ensure that these needs are met.

This paper will explore these observations by first characterising older detainees in more depth in Part II, followed by analysing trends in the ACT in Part III. The paper will next suggest reasons why the ACT's prison population is ageing in Part IV, before discussing the unique needs specific to older detainees in a prison environment in Part V. Part VI will evaluate the sentencing trends of the ACT judiciary with regards to older detainees, followed by Part VII which will reflect on these trends in comparison to the needs of older detainees and suggest recommendations to ensure that their human rights are being protected.

²¹ See, eg, ACT Inspector of Correctional Services, 'Critical Incident Reviews', *ACT Inspector of Corrective Services: Our Reports* (2018) <<https://www.ics.act.gov.au/our-reports/critical-incident-reviews>>; Australian Institute of Health and Welfare (AIHW) *The health of Australia's prisoners: 2018* (Report, 2019); upcoming Healthy Prison Review by ACT Corrective Services: ACT Inspector of Correctional Services, 'Healthy Prison Reviews', *ACT Inspector of Corrective Services: Our Reports* (2018) <<https://www.ics.act.gov.au/our-reports/healthy-prison-reviews>>.

²² Royal Commission into Institutional Responses to Child Sexual Abuse, 'Final Report: Terms of Reference', *Royal Commission into Institutional Responses to Child Sexual Abuse* (13 November 2014) <<https://www.childabuseroyalcommission.gov.au/terms-reference>>.

²³ Shelley Turner and Chris Trotter, 'Growing old in prison? A review of national and international research on Ageing Offenders' (Research Paper No 3/2010, Department of Justice Victoria, July 2010) II. See, eg, Melissa Davey, 'Cardinal George Pell to spend nearly four years in jail for child sexual assault', *The Guardian* (online, 13 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/13/cardinal-george-pell-to-spend-nearly-four-years-in-jail-for-child-sexual-assault>>.

II WHO ARE 'OLDER' DETAINEES?

For the purposes of this paper, 'older' detainee will be defined as persons incarcerated at the AMC aged 50 or above. Further, although this paper will include all detainees in its statistics due to the availability of public data, its discussion will primarily focus on the experiences of the non-Indigenous detainee population of the ACT.²⁴

A Age

There is a lack of consensus about the age upon which a detainee becomes an 'older' detainee.²⁵ Although 60 years and above is regarded as elderly in the community, a person aged 50 and above is generally understood as an older detainee.²⁶ If including Indigenous detainees, the age is decreased to 45 years to account for a lower life expectancy.²⁷

The reason for this disparity is accelerated ageing, 'which takes into account the high prevalence of risk factors for poor health common in incarcerated persons'.²⁸ Statistically, research indicates a ten-year biological difference between the health of detainees and their community counterparts. Detainees aged 50 and above are 'significantly more likely' to have health conditions and disabilities than people in the community.²⁹

²⁴ While it is acknowledged that Indigenous Australians are overrepresented in the Australian prison population, due to their complex experiences and needs, this paper will not explore these issues in depth. See Susan Baidawi et al, *Older prisoners – A challenge for Australian Corrections* (Trends & Issues in Crime and Criminal Justice No 426, August 2011) 3.

²⁵ Chris Angus, 'Older prisoners: trends and challenges' (E-brief 14/2015, NSW Parliamentary Research Service, October 2015) 2.

²⁶ Baidawi et al (n 24) 1.

²⁷ Ibid 3.

²⁸ Brie Williams et al, 'Addressing the Aging Crisis in US Criminal Justice Health Care' (2012) 60(6) *Journal of the American Geriatrics Society* 1150, 1151; Wiebke Bretschneider et al, 'Ageing Prisoners' Health Care: Analysing the Legal Settings in Europe and the United States' (2013) 59(3) *Gerontology* 267, 268; Joanne Brooke et al 'The impact of dementia in the prison setting: A systemic review' (2018) 9 *Dementia* 1, 2.

²⁹ Williams et al (n 28) 1151.

Accelerated ageing is attributed to lifestyle experiences and choices of detainees prior to entering prison, such as the absence of medical attention, poor nutrition, substance abuse and many detainees generally being of a lower socioeconomic status.³⁰ Once in prison, the challenges of prison life may exacerbate pre-existing medical conditions and the overall ageing process.³¹

B *Composition*

While the majority of literature on older detainees focusses on the experiences of older men,³² it is important to recognise that the older detainee population consists of men and women, of varying ethnicities.

There is limited research on the experiences of older women in prison, due to the majority of detainees being male.³³ In 2018, there were no female detainees aged 50 or older in the ACT.³⁴ Just as older female detainees often find themselves in prison for offences that differ substantially from their male counterparts, they also have unique health needs.³⁵ Consequently, although there are currently no older female detainees in the ACT,³⁶ this is subject to change in the future, so it is important to recognise that the older prison population also includes females.

³⁰ Fazel et al (n 4), cited in Violet Handtke and Tenzin Wangmo, 'Ageing Prisoners' Views on Death and Dying: Contemplating End-of-Life in Prison' (2014) 33(2) *International Journal of Geriatric Psychiatry* 252, 374.

³¹ Brie Williams et al, 'Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners' (2006) 54(4) *Journal of the American Geriatrics Society* 702, cited in Victor Chu, 'Greying Behind Bars: The Older Male Offender's Experience of Prison Life and Preparations for Resettlement' (University of Cambridge, 2016) 6.

³² Susan Baidawi et al, 'An integrated exploration of factors associated with psychological distress among older prisoners' (2016) 27(6) *The Journal of Forensic Psychiatry & Psychology* 815, 816.

³³ Anna Grant, *Elderly Inmates: Issues for Australia* (Trends & Issues in Crime and Criminal Justice No 115, May 1999) 2; Azrini Wahidin, *Older Women in the Criminal Justice System: Running Out of Time* (Jessica Kingsley Publishers, 2003), cited in Turner and Trotter (n 23) 12.

³⁴ ABS, *Prisoners in Australia, 2018* (Catalogue No 4517.0, 11 April 2019) Table 21: Indigenous status, sex and age by state/territory
<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02018?OpenDocument>>.

³⁵ Ronald H Aday and Jennifer J Krabill, *Women Aging in Prison: A Neglected Population in the Correctional System* (Lynne Rienner Publishers, 2011), cited in Chris Trotter and Susan Baidawi, 'Older prisoners: Challenges for inmates and prison management' (2015) 48(2) *Australian & New Zealand Journal of Criminology* 200, 214.

³⁶ ABS (n 34).

Further, while this paper will focus on the experiences of non-Indigenous detainees, it is important to note as expressed by Baidawi and others that despite Indigenous Australians being predominately ‘overrepresented at all levels of the criminal justice system’,³⁷ Indigenous Australians only comprise 7.5% of the older prison population in the ACT,³⁸ or 12.77% if the minimum age is adjusted for lower life expectancy to 45.³⁹ Similarly to older female detainees, the offences resulting in older Indigenous Australians becoming incarcerated and their health needs are unique. However, due to their relatively small representation in the older prison population, there is seldom research on the experiences of older Indigenous detainees in Australia,⁴⁰ let alone the ACT.

C *Criminal history*

Due to their comparatively longer life than the mainstream prison population, the reasons why an older person is incarcerated varies considerably between detainees. Turner and others recognise four types of older detainees. First, repeat offenders who have been in and out of prison for a substantial period of their life, and who have been sentenced at an older age for a recent offence.⁴¹ Second, those detainees serving a long sentence, who entered prison prior to the age of 50 and have since aged.⁴² Third, older persons sentenced for the first time for a minor offence,⁴³ and finally, older persons sentenced for the first time for a serious offence.⁴⁴ Within this last group is a particular sub-group of detainees, older men convicted for the first time in their life of historic sexual assault and related offences.⁴⁵

³⁷ Baidawi et al (n 24) 3.

³⁸ ABS (n 34).

³⁹ Ibid.

⁴⁰ See, eg, comments on older Indigenous women by Turner and Trotter (n 23) 12.

⁴¹ Prison Reform Trust, ‘Bromley Briefings Prison Factfile’, *Factfiles* (Web Document, Autumn 2016) 22 <<http://www.thebromleytrust.org.uk/files/2016factfile.pdf>>, cited in Mary Turner et al, ‘Ageing and dying in the contemporary neoliberal prison system: Exploring the ‘double burden’ for older prisoners’ (2018) 212 *Social Science & Medicine* 161, 162.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

The lifestyles differences of these groups have the potential to be substantial. For example, a repeat offender who is now incarcerated at the age of 60 may have rarely had stable accommodation, proper health care, or a nutritious diet for the majority of their life. The effects of accelerated ageing are likely to be more severe on that detainee than a 70-year-old who has been sentenced for the first time in their life, and who has enjoyed a life of proper health care and a modest standard of living.

D *This paper*

The above discussion demonstrates that older detainees are not a homogenous group, with each group's needs and reasons for incarceration differing. However, there is an absence of research on these sub-groups specific to the ACT. With this in mind, a broader definition of older detainee is adopted in this paper. As available information about the age of AMC detainees does not distinguish between sentenced and remand detainees, this paper will combine both groups, noting that their experiences could also vary considerably.

III OLDER PRISONERS IN THE AMC

Over the last decade, the older prison population in Australia has increased by 91%.⁴⁶ In December 2018, there were 492 detainees in the ACT.⁴⁷ The number of older detainees incarcerated in the ACT has increased by approximately 250%, the largest increase in Australia, and nearly three times the national average (as shown in Graph One).⁴⁸ In 2008, there were no detainees between the ages of 44 and 64 in the ACT.⁴⁹ More notably, is the 433% increase in the number of detainees aged 65 and above over

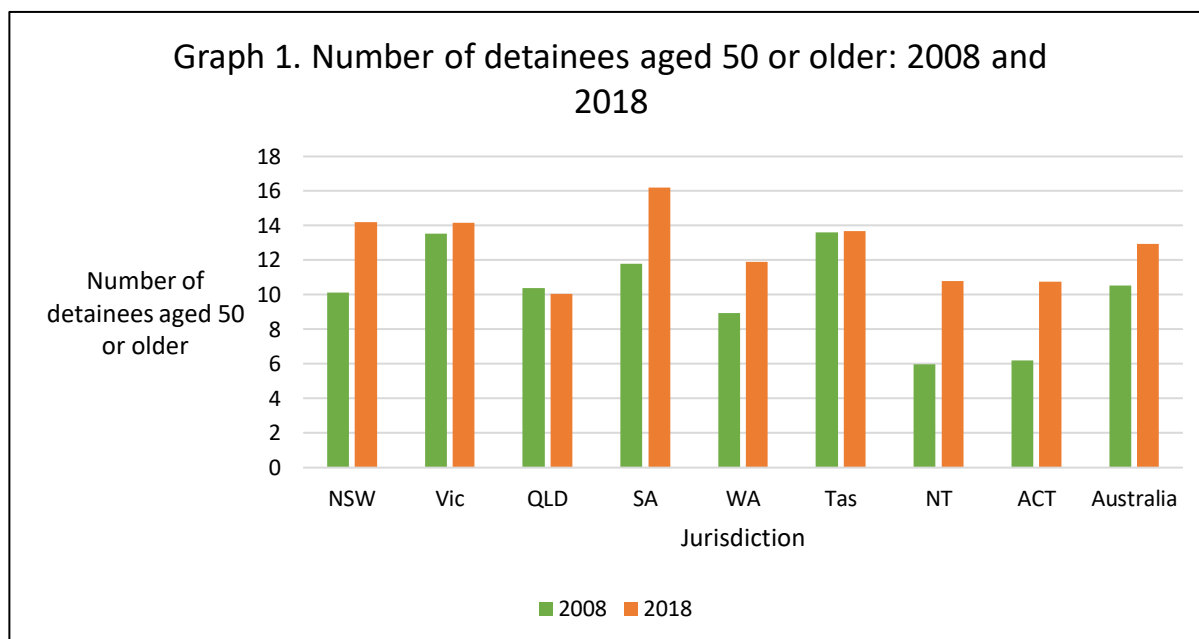
⁴⁶ ABS (n 3).

⁴⁷ ABS (n 34) Table 14: Prisoners, selected characteristics by state/territory.

⁴⁸ ABS (n 3).

⁴⁹ ABS, *Prisoners in Australia, 2008* (Catalogue No 4517.0, 11 December 2008) Table 1: Prisoners, age <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12008?OpenDocument>>.

the last decade.⁵⁰ Further data would clarify how the sub-groups recognised by Turner and others are reflected in the current older prison population.



See that while the ACT does not have the highest number of older detainees, the change in the number of older detainees from 2008 (green) to 2018 (orange) is significant compared to other jurisdictions.⁵¹

Table 1. ACT statistics: 2008-2018⁵²

	2008		2018		Change from 2008 to 2018 (%)
	Total detainees: 242		Total detainees: 492		
	Number	Proportion of total detainees (%)	Number	Proportion of total detainees (%)	
50-54	12	4.96	13	2.64	8.33
55-59	0	0	14	2.85	-
60-64	0	0	10	2.03	-
65 and above	3	1.24	16	3.25	433.33
Total	15	6.20	53	10.77	253.33

⁵⁰ ABS (n 3).

⁵¹ Data adapted from ABS (n 3).

⁵² Ibid.

IV WHY IS THERE AN AGEING PRISON POPULATION?

Due to limitations in data, it is unclear whether the significant increase in the age of the ACT prison population is due to already incarcerated detainees ageing, or more older persons being sentenced to imprisonment.⁵³

Criminal offending usually declines with age, and it is unlikely that the ageing prison population is the result of more older people committing crime.⁵⁴ In 1999, Grant suggests that the trend is the result of:

Changes in sentencing practices, combined with the adoption of more criminal sanctions, a general lengthening of sentences, and reduced mechanisms for early release.⁵⁵

More recently, the Australian Institute of Criminology also suggested the following causes:

Long prison sentences, mandatory sentencing, sentencing of historical sex offenders, reduced options for early release, and the decline of preventable deaths overtime.⁵⁶

Attention should be paid to the drastic shift in attitude in the United Kingdom (UK), United States of America (USA), Canada and Australia to historic sexual offences in recent years.⁵⁷ For the purposes of this paper, 'sexual offences' will be defined as offences involving sexual activity where the victim has not consented to the activity,⁵⁸ as governed by Part 3 of the *Crimes Act 1900* (ACT).⁵⁹ The establishment of the Australian

⁵³ Chu (n 31) 5.

⁵⁴ Grant (n 33) 3.

⁵⁵ Ibid.

⁵⁶ Baidawi et al (n 24) 2-3, cited in AIHW, *Australia's health 2018* (Biennial Report, Australia's Health Series No 16, 16 May 2018) 302.

⁵⁷ Turner and Trotter (n 23) 11.

⁵⁸ LexisNexis, *Halsbury's Laws of Australia* (online at 28 July 2019) II Assault and Related Offences, '8 Sexual Offences' [130-2000].

⁵⁹ *Crimes Act 1900* (ACT) Part 3.

Royal Commission into Institutional Responses to Child Sexual Abuse in 2014,⁶⁰ reflected ‘more aggressive policing practices and government legislative responses to public disquiet about sex offenders and so-called lenient sentencing’ and may have contributed to the ageing of the prison population.⁶¹

Statistically, in the last decade, the number of sentenced detainees whose most serious offence was sexual assault and other related offences increased by 105% in the ACT.⁶² Graph Two below demonstrates that this change is large in comparison to other states and territories, and the national average. Further, sexual assault and other related offences is the offence which the majority of the older detainee population in Australia have been sentenced.⁶³ Graph Three below shows that the number of older detainees sentenced for these offences has increased across all age groups, in particular, 65 and above, in the last five years. ACT-specific statistics are unavailable, but combined, these two trends suggest that a substantial proportion of the older detainee population in the ACT could comprise of persons sentenced for sexual assault and other related offences. Further data specific to the ACT would clarify how many of these persons have been incarcerated for the first time at an older age.

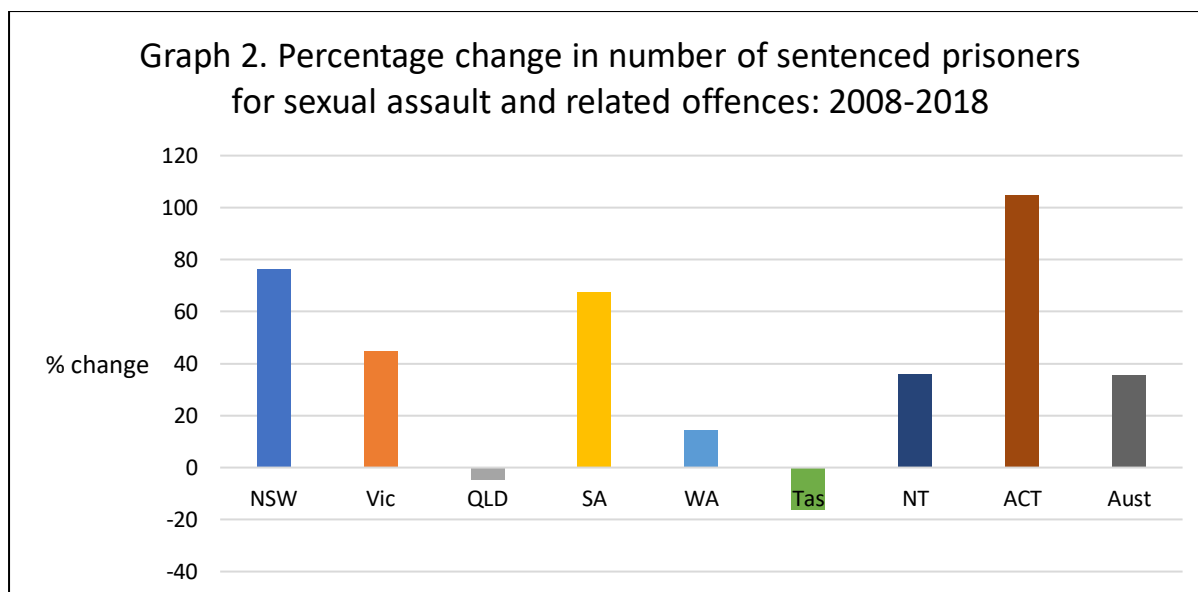
⁶⁰ Royal Commission into Institutional Responses to Child Sexual Abuse (n 22).

⁶¹ Turner and Trotter (n 23) II.

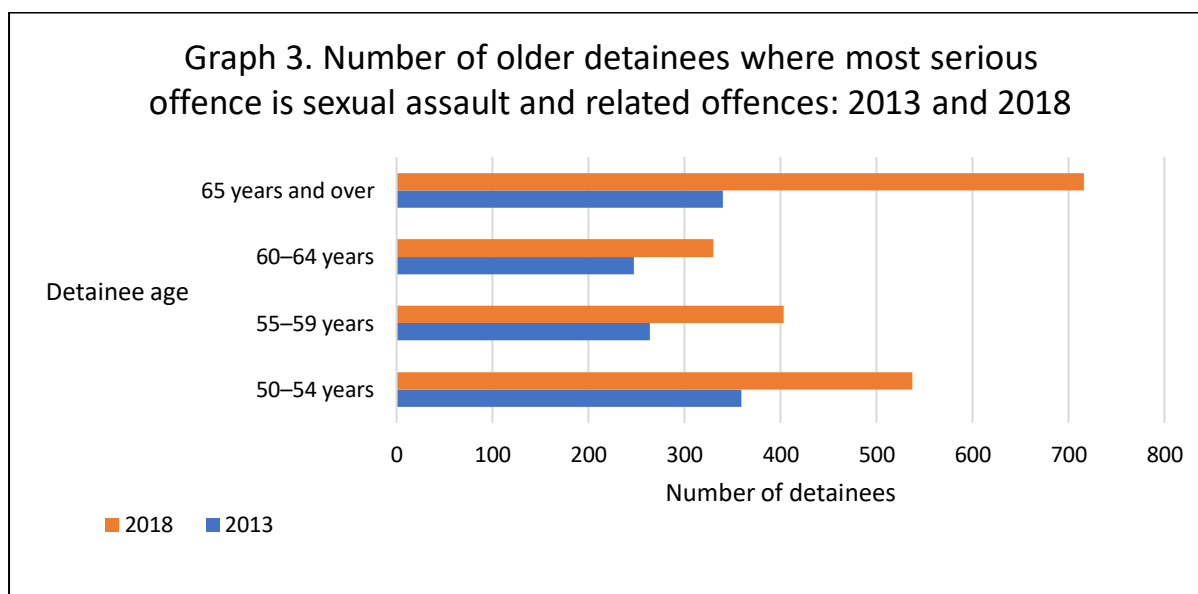
⁶² ABS (n 34) Table 23: Sentenced Prisoners, selected most serious offence by state/territory; ABS (n 49) Table 1: Sentenced Prisoners, most serious offence.

⁶³ ABS (n 34) Table 6: Prisoners, age by most serious offence/charge; ABS, *Prisoners in Australia, 2013* (Catalogue No 4517.0, 6 March 2015) Table 5: Prisoners, age and sex by selected most serious offence/charge

<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02013?OpenDocument>>.



See that the percentage change in sentenced prisoners for sexual assault and related offences in the ACT (red) is substantial compared to other jurisdictions, some of which have had a negative change.⁶⁴



See that the number of detainees in all categories has increased from 2013 (blue) to 2018 (orange), with detainees aged 65 years visibly doubling.⁶⁵

⁶⁴ Adapted from ABS (n 34) Table 23: Sentenced Prisoners, selected most serious offence by state/territory; ABS (n 49) Table 1: Sentenced Prisoners, most serious offence.

⁶⁵ Adapted from ABS (n 34) Table 6: Prisoners, age by most serious offence/charge; ABS, *Prisoners in Australia, 2013* (Catalogue No 4517.0, 6 March 2015) Table 5: Prisoners, age and sex by selected most serious offence/charge
<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02013?OpenDocument>>.

V HEALTH NEEDS OF OLDER DETAINEES

Whatever the cause, the ACT's prison population is ageing at a remarkable rate. While research has been conducted into the health needs of detainees at the AMC,⁶⁶ specific studies about the needs of older detainees is non-existent. However, a combination of national and international observations about the health needs of other older prison populations, and barriers to supporting these needs, assists in understanding the potential needs of older detainees at the AMC.

A *Physical impairments*

Accelerated ageing means that older detainees have a body which is physically approximately 10 years older than their age.⁶⁷ The most common physical issues for older detainees are those associated with the decline of the body as part of the ageing process.⁶⁸ For example, the Australian Institute of Health and Wellness (AIHW) found that in 2018, 14% of prison entrants aged 45 and over had a current cardiovascular disease, compared to 4% of the overall prison population.⁶⁹ AIHW also found that 14% of prison entrants aged 45 and over currently had diabetes, compared to 1% of entrants aged 18-24.⁷⁰ International studies from the UK, USA and Switzerland also found that older detainees are more prone to physical conditions than younger detainees.⁷¹

The prison environment itself can undermine support of these needs, or potentially worsen physical ailments. Activities of daily living under the prison regimen, for example, standing up for muster counts, walking up and down stairs, going to the bathroom, moving in and out of bed (whether this is a bunk bed or not), and merely

⁶⁶ AIHW (n 21).

⁶⁷ RG Falter, 'Elderly inmates: AN emerging correctional problem' (2006) 1(3) *CorHealth Journal* 52, cited in Glenda Reimer, 'The Graying of the U.S. Prisoner Population' (2008) 14(3) *Journal of Correctional Health Care* 202, 203.

⁶⁸ Turner and Trotter (n 23) 13.

⁶⁹ AIHW (n 21) 60 [6.4].

⁷⁰ *Ibid* 61 [6.5].

⁷¹ Fazel et al (n 4), cited in Baidawi (n 32) 816.

walking to medical attention, can be challenging for an ageing body.⁷² AIHW found that 29% of prison entrants aged 55 or older experienced limitations to activities of daily living, compared to 19% of their younger counterparts.⁷³

Further, the combination of a prison environment and ageing body worsen an older detainee's physical condition.⁷⁴ The AIHW found that 14% of detainees aged 45 and over reported that their physical health had worsened over their time in prison, compared to 5% of detainees aged 18-24.⁷⁵ Morton and Anderson suggest that:

Changes in taste, smell, salivation and dentition can lead to weight loss and increased risk of choking. Changes in touch, balance and sight can increase the risk of falls, which, given changes in elderly bones, can result in fractures, disability, and even immobility...Immune system naturally declines with age, leaving older people more vulnerable to communicable diseases, which is surely an issue in the confined space of prison.⁷⁶

There are barriers to minimising these risks using physical aids and medication. For example, aids such as walking frames and canes could be used as weapons, not necessarily by the older detainee requiring the support, 'against staff, other prisoners or the older prisoners themselves'.⁷⁷ Grab rails and similar items could act as hanging points in suicide attempts.⁷⁸ The medication required by older detainees for management of their conditions could make them targets because their medications are often 'a highly valued commodity in prison'.⁷⁹

⁷² Department of Justice & Regulation – Corrections Victoria, *Corrections Ageing prisoner and offender policy framework 2015-20* (Report, 6 July 2015) 9; Trotter and Baidawi (n 35) 203; Turner et al (n 41) 165.

⁷³ AIHW (n 21) 80 [9.1].

⁷⁴ Joann B Morton and Judy C Anderson, 'Elderly Offenders: The Forgotten Minority' (1982) 44(6) *Corrections Today* 14, 14.

⁷⁵ AIHW (n 21) 66 [7.2].

⁷⁶ Morton and Anderson (n 74).

⁷⁷ Trotter and Baidawi (n 35) 215.

⁷⁸ *Ibid.*

⁷⁹ Turner et al (n 41) 162.

B *Psychological needs*

1 *Presentation versus reality*

Turner and others argue that older detainees often need to be cared for by the prison system rather than controlled.⁸⁰ The fact that older detainees are compliant and easier to control than their younger counterparts means that there is a common misconception that they are 'better adjusted to incarceration than younger prisoners'.⁸¹ Presenting no disciplinary issues for prison staff can result in their needs being neglected,⁸² with one prison officer in the UK describing older detainees as 'no problems – old and quiet'.⁸³

In reality, research indicates that older detainees have just as much, if not more, psychological trauma and mental health issues than their equivalents in the community and younger detainees.⁸⁴ AIHW found that prison entrants aged 45 or older were least likely to self-assess their mental health as generally good or better.⁸⁵ Trepidations about the inability of prisons to adequately meet their mental and physical health needs, can exacerbate psychological distress for older detainees.⁸⁶ Of particular concern are older detainees entering prison for the first time. Chu suggested that:

⁸⁰ Ibid 164.

⁸¹ Department of Justice & Regulation – Corrections Victoria (n 72) 10; Turner and Trotter (n 23) 14.

⁸² Her Majesty's Inspectorate of Prisons, *'No problems – old and quiet': older prisoners in England and Wales – a thematic review* (Report, 14 December 2004) v, cited in Turner and Trotter (n 23) 14.

⁸³ Turner and Trotter (n 23) 14.

⁸⁴ Sabrina Haugebrook et al, 'Trauma, Stress, Health and Mental Health Issues Among Ethnically Diverse Older Adult Prisoners' (2010) 16(3) *Journal of Correctional Health Care* 220, 221, 226; Turner and Trotter (n 23) 14; James Baldwin and Jasmin Leete, 'Behind bars: the challenge of an ageing prison population' (2012) 1(2) *Australian Journal of Dementia Care* 16, 16; Baidawi et al (n 32) 816; Sophie Haesen et al, 'Substance use and other mental health disorders among older prisoners' (2019) 62 *International Journal of Law and Psychiatry* 20, 29.

⁸⁵ AIHW (n 21) 32 [3.3].

⁸⁶ Baidawi et al (n 32) 827.

The stark contrast between their former lives and their present situation was a significant pain felt during the initial months of imprisonment – a period in which prisoners are already extremely vulnerable and at risk of self-harm and suicide.⁸⁷

2 Dementia

Dementia is a particular psychological condition affecting older detainees that often goes undetected and untreated in prison, partly due to its chronic rather than acute symptoms.⁸⁸ The routine of prison life requiring minimal individual decision-making also conceals symptoms.⁸⁹ A UK study found that 15% of the surveyed older detainee population ‘showed signs of cognitive impairment, suggesting that there may be many as-yet unnoticed cases of dementia in prisons’.⁹⁰ Australian research by Susan Baidawi also indicates that older detainees are at ‘considerably higher risk of developing mental illnesses and cognitive impairment than the general population’.⁹¹

Although older detainees are generally compliant, undetected and untreated dementia can result in difficulty complying ‘with prison rules, procedures and routines. An inability to comply...may be misunderstood as defiance, which may lead to penalties’.⁹² Further, dementia increases their vulnerability and risk of victimisation,⁹³ and may prevent detainees from engaging in prison programs to keep them socially engaged, worsening their condition.⁹⁴

⁸⁷ Elaine Crawley and Richard Sparks, ‘Older Men in Prison: Survival, Coping and Identity’ in Alison Liebling and Shadd Maruna (eds), *The Effects of Imprisonment* (Taylor & Francis, 2006) 343, cited in Chu (n 31) 10.

⁸⁸ Baidawi et al (n 32) 829-830.

⁸⁹ Department of Justice & Regulation – Corrections Victoria (n 72) 6.

⁹⁰ Paul Kingston et al, ‘Psychiatric morbidity in older prisoners: unrecognized and undertreated’ (2011) 23(8) *International Psychogeriatrics* 1354, cited in Baldwin and Leete (n 84) 16.

⁹¹ Baldwin and Leete (n 84) 16.

⁹² Ibid 17; Department of Justice & Regulation – Corrections Victoria (n 72) 6.

⁹³ Department of Justice & Regulation – Corrections Victoria (n 72) 6.

⁹⁴ Trotter and Baidawi (n 35) 215.

3 *Fear of dying*

Contributing to the mental health of older detainees is their fear of dying in prison from old age.⁹⁵ Aday describes this fear as:

Dying in an institution such as prison is widely considered the ultimate defeat, the ultimate punishment. As a result many fear that dying in prison will have a negative impact on their children, grandchildren, and other family members.⁹⁶

Due to this stigma, older detainees may avoid thinking about the topic, however for those affected by several other ailments, the possibility of dying in prison is confronting and more likely.⁹⁷ Fears about the ability of prisons to provide effective palliative care, can exacerbate stress in older detainees,⁹⁸ and potentially contribute to declines in their mental health.

VI SENTENCING OLDER OFFENDERS

In order to understand how older detainees with the aforementioned and conceivably demanding health needs are finding themselves in prison, this section will now address the sentencing practices of the ACT judiciary towards older detainees. In light of the increased focus on historic sexual offences Australia-wide, as addressed in Part IV, cases involving older offenders are consistently about sexual offences.

Section 33(1)(m) of the *Crimes (Sentencing) Act 2005* requires the judiciary to consider these needs in the context of sentencing an older offender.⁹⁹ These considerations are

⁹⁵ Department of Justice & Regulation – Corrections Victoria (n 72) 10; Elaine Crawley and Richard Sparks, ‘Older Men in Prison: Survival, Coping and Identity’ in Alison Liebling and Shadd Maruna (eds), *The Effects of Imprisonment* (Taylor & Francis, 2006) 343, cited in Chu (n 31) 10; Williams, Ahalt and Greifinger (n 4) 168.

⁹⁶ Ronald H Aday, ‘Aging Prisoners’ Concerns toward Dying in Prison’ (2006) 52(3) *OMEGA – Journal of Death and Dying* 199, 208.

⁹⁷ *Ibid* 212.

⁹⁸ Aday (n 96).

⁹⁹ *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).

balanced against the sentencing purposes defined in Section 7.¹⁰⁰ Sentencing purposes include punishing the offender in a just and appropriate way,¹⁰¹ protecting the community from the offender,¹⁰² as well as recognising the harm done to the victim.¹⁰³ Deterrence, both personally deterring the offender and also generally deterring the community from committing a similar offence, is also an aim.¹⁰⁴ Promoting rehabilitation of the offender while also ensuring they are accountable and denounced for their behaviour are also factors for the court to balance.¹⁰⁵

A *The current approach in the ACT*

1 *R v Djenadija (2015)*

In *R v Djenadija*, the male offender was aged 75 when sentenced for four counts of historic indecent assault committed against victims under the age of 12 when he was between 43 and 46 years old.¹⁰⁶ At the time of sentencing, the offender suffered from conditions which mildly affected his mobility, anxiety and mild depression, and poorly-managed diabetes which predisposed him to cardiovascular issues.¹⁰⁷ Two doctors cautioned about the potential for some of these conditions to worsen were they not properly managed, which would best occur in the community.¹⁰⁸ Ultimately, the offender argued that a ‘full-time custodial sentence would have an adverse impact on his already poor health’.¹⁰⁹

Chief Justice Murrell held that there was ‘no convincing evidence that full-time imprisonment would have a significant adverse impact on the offender’s health’.¹¹⁰

¹⁰⁰ Ibid s 7(1).

¹⁰¹ Ibid s 7(1)(a).

¹⁰² Ibid s 7(1)(c).

¹⁰³ Ibid s 7(1)(g).

¹⁰⁴ Ibid s 7(1)(b).

¹⁰⁵ Ibid ss 7(1)(d) – (f).

¹⁰⁶ *R v Djenadija* [2015] ACTSC 207, 2 [4]; 4 [19].

¹⁰⁷ Ibid 4 [23].

¹⁰⁸ Ibid 4 [24].

¹⁰⁹ Ibid 4 [26].

¹¹⁰ Ibid 4 [26].

However, he acknowledged that the delay in prosecuting conduct which occurred in 1985 meant that ‘the offender now confronts the possibility of imprisonment as a man in poor health and in his declining years’.¹¹¹ Consequently, the way the sentence was served rather than the length of each sentence was impacted.¹¹² Murrell CJ sentenced the offender to a total of one year and 11 months’ imprisonment, allowing him to serve four months imprisonment upon entering a good behaviour order, suspending the remainder of the sentences.¹¹³ Importantly, Murrell CJ noted:

The health of an offender is always a relevant consideration in sentencing. However, it is the responsibility of ACT Corrective Services to provide appropriate treatment for sick prisoners.¹¹⁴

2 *R v Stone (2016)*

In *R v Stone*, the male offender was 73 at the time of sentencing for seven counts of historic indecent assault.¹¹⁵ He was in remission from lymphoma requiring monthly intravenous injections, and was prone to recurring lung infections requiring antibiotics.¹¹⁶ Additionally, the offender had severe degenerative arthritis which resulted in chronic back and hip pain, restricting his ability to move and perform simple manual chores.¹¹⁷ Burns J, reflecting on the increased burden of incarceration on the offender due to his poor health,¹¹⁸ stated that he was in a ‘conundrum’ to balance this against recognising the seriousness of the offences and general deterrence.¹¹⁹

Ultimately, Burns J sentenced the offender to a total of three years and nine months imprisonment, with nine months of incarceration and a three-year good behaviour

¹¹¹ Ibid 5 [31].

¹¹² Ibid 5 [32].

¹¹³ Ibid 7 [44]-[45].

¹¹⁴ Ibid 4 [26].

¹¹⁵ *R v Stone* [2016] ACTSC 231, 2 [6]; 1 [1].

¹¹⁶ Ibid 3 [8]; 4 [12].

¹¹⁷ Ibid 4 [13].

¹¹⁸ Ibid 5 [20].

¹¹⁹ Ibid 6 [28].

order.¹²⁰ Similar to Murrell CJ's statement in *Djenadija*, Burns J appeared to be of the view that meeting the offender's health needs was the responsibility of the AMC, despite potential issues with this, when he said:

I accept that you have a need for ongoing medical treatment. There is no evidence before me that this cannot be provided in custody but there are inevitable restrictions placed upon your access to medical treatment in custody and particularly access to those physicians and institutions which have intimate knowledge of your medical conditions and history.¹²¹

3 *CX v The Queen (2017)*

In this case the 75-year-old male offender found guilty of 13 historic sexual offences appealed his sentence of 10 years imprisonment with a five-year non-parole period.¹²² One ground of appeal was that the primary judge erred in sentencing him based on a mistakenly longer life expectancy than predicted by experts in evidence.¹²³ The offender suffered from early onset dementia, his doctor noting that both he and prison staff would find his condition difficult to manage. The offender had a life expectancy of approximately seven years due to additional medical ailments.¹²⁴

The offender argued that:

The non-parole period of five years failed to adequately recognise the hardship that he would suffer in prison because of his medical condition and “extinguishe[d] any hope or expectation” that the appellant would have “some useful period of his lifetime to enjoy”.¹²⁵

¹²⁰ Ibid 7 [30]-[38].

¹²¹ Ibid 6 [23].

¹²² *CX v The Queen* [2017] ACTSC 37, 2 [1]-[5].

¹²³ Ibid 2 [6(c)].

¹²⁴ Ibid 6 [20].

¹²⁵ Ibid 9 [38].

Ultimately, the Court held that the primary judge had appropriately taken the offender's reduced life expectancy and deteriorating health condition in assigning the specified non-parole period when balanced against other sentencing considerations, noting that the offender may 'very well die in prison'.¹²⁶

4 *R v NC (2017)*

The male offender was 74 at the time of sentencing for thirteen historic sexual offences.¹²⁷ Elkaim J considered the offender's health condition including a recent heart attack, severe osteoarthritis, emphysema, and chronic pneumonia,¹²⁸ in sentencing him to five years imprisonment, with a non-parole period of three years.¹²⁹ Each term of imprisonment was reduced by 20% partly due to 'the offender's state of health including the consequent difficulties he will face in dealing with prison life'.¹³⁰

5 *R v Trezise (2018)*

At the time of sentencing for nine counts of historic indecent assault,¹³¹ the male offender was 79,¹³² and suffered from several strokes and loss of vision in his right eye.¹³³ An expert report stated that his brain condition would worsen overtime to a dementing illness, and his medical history reduced his life expectancy to less than 9.85 years.¹³⁴

Justice Mossop noted that the delay in prosecuting the offences was relevant to sentencing, because the offender was now of 'old age and has declining health',¹³⁵ stating:

¹²⁶ Ibid 10 [42]-[43].

¹²⁷ *R v NC* [2017] ACTSC 206, 1 [1].

¹²⁸ Ibid 5 [37].

¹²⁹ Ibid 7 [52].

¹³⁰ Ibid 6 [51].

¹³¹ *R v Trezise* [2018] ACT 135, 1 [1].

¹³² Ibid 3 [8].

¹³³ Ibid 3 [11].

¹³⁴ Ibid 3 [14].

¹³⁵ Ibid 6 [30].

Not only is a sentence of full-time imprisonment a greater burden for an old person in declining health, but it is also significant that any period of imprisonment will be a more significant portion of the remaining life of the offender than if he had been sentenced at a date closer to his offending conduct.¹³⁶

Leniency was given due to the offender's age and health in the form of concurrency and imposing a period of seven-month imprisonment, following which his sentences would be suspended and a three year good behaviour order commenced.¹³⁷ In considering the offender's health, Mossop J referenced *Djenadija*:

His health conditions are not such as to demonstrate that, having regard to the obligation of ACT Corrective Services to provide appropriate treatment for his health conditions, full-time imprisonment would have a significant adverse effect upon his health.¹³⁸

6 *R v MC (No 2) (2019)*

The offender was 70 when sentenced for six historic sexual offences.¹³⁹ The delay in prosecuting the offences meaning the offender 'confronts full-time imprisonment as a man "undoubtedly in his declining years"' was taken into account by Loukas-Karlsson J.¹⁴⁰ Referencing the sentences in *CX*,¹⁴¹ *Djenadija*,¹⁴² and *Trezise*,¹⁴³ the offender was sentenced to ten years imprisonment, with a six year non-parole period.¹⁴⁴

¹³⁶ Ibid.

¹³⁷ Ibid 7 [33].

¹³⁸ Ibid 6 [30].

¹³⁹ *R v MC (No 2)* [2019] ACTSC 61, 2 [1].

¹⁴⁰ Ibid 7 [44].

¹⁴¹ Ibid 8 [51].

¹⁴² Ibid 9 [57].

¹⁴³ Ibid 9 [59].

¹⁴⁴ Ibid 11-12 [77].

B *Other jurisdictions*

Courts in other Australian jurisdictions have approached sentencing of older offenders similarly to the ACT.¹⁴⁵ Notably, in the Victorian appeal case of *R v RLP*, involving the sentencing of a 77 year old male for 29 counts of historic sexual offences, the court referred to King CJ's obiter in the South Australian case of *R v Smith*:

Ill health cannot be allowed to become a license to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Service authorities to provide appropriate care and treatment for sick prisoners.¹⁴⁶

Further, in the highly publicised sentencing of Cardinal George Pell in March 2019, who was 77 and facing five counts of historic sexual offences, Chief Justice Kidd noted the difficulty in sentencing an older offender when he said:

I am conscious that the term of imprisonment which I am about to impose upon you carries with it a real, as distinct from theoretical, possibility that you may not live to be released from prison. Facing jail at your age, in these circumstances, must be an awful state of affairs for you.¹⁴⁷

C *Analysing the current approach*

The aforementioned cases in both the ACT and other jurisdictions illustrate that the age and health of older offenders are reflected, if at all, in the way a sentence is served as opposed to the length of the sentence. In other words, judges have allowed sentences to be served concurrently, or set a minimal non-parole period that is relatively short to reduce the effective time an older detainee spends in prison. In cases such as *Dejenadija*

¹⁴⁵ See, eg, *R v PAC* [2006] QCA 327, 2; *R v RLP* [2009] VSCA 271, [39]; *DPP v Kien* (2000) VSC 376, [16]-[17]; *R v Cumberbatch* [2002] VSC 382; *GS v R* [2016] NSWCCA 266, 3 [1]-[4]; *Holyoak v R* (1995) 82 A Crim R 507, cited in *Ibid*, 20 [100]-[102].

¹⁴⁶ *R v Smith* (1987) 44 SASR 587, 317, cited in *R v RLP* [2009] VSCA 271, [36].

¹⁴⁷ *R v Pell* [2019] VCC 260, 21 [122].

and *Trezise*,¹⁴⁸ the judge has explicitly stated the responsibility and presumed ability of Corrective Services to provide the offender with the necessary supports to address their unique health needs.¹⁴⁹ However, as discussed previously in Part V, the capacity of this occurring in practice is questionable.

VII REFLECTIONS

As can be seen in Part VII, the ACT courts account for the health needs of older offenders by reducing time in prison through concurrent sentences and reduced non-parole periods. While the older offender is incarcerated, there is reliance on the ability of Corrective Services to meet any health needs.¹⁵⁰ However, given the criticisms of the AMC's ability to meet its human rights obligations,¹⁵¹ it is disputable if this reliance is misguided. Considering that an ageing prison population is hardly a new or unique issue to the ACT,¹⁵² and yet the ACT has the highest rate of growth in this population nationally in the last decade,¹⁵³ solutions are necessary to ensure the needs of this population are being addressed.

A *Changes to sentencing practices*

One solution would be changing sentencing practices so as to reduce, or further, eliminate, custodial sentences for older offenders.¹⁵⁴ In the ACT this would take the form of a good behaviour order, under which an older offender could be allowed to fulfil their

¹⁴⁸ *R v Djenadija* [2015] ACTSC 207; *R v Trezise* [2018] ACT 135.

¹⁴⁹ *R v Smith* (1987) 44 SASR 587, 317, cited in *R v RLP* [2009] VSCA 271, [36]; *R v Trezise* [2018] ACT 135, 6 [30]; *R v Djenadija* [2015] ACTSC 207, 4 [26].

¹⁵⁰ *R v Trezise* [2018] ACT 135, 6 [30]; *R v Djenadija* [2015] ACTSC 207, 4 [26].

¹⁵¹ *CM Act* (n 6) Preamble (1), ss 8(c), 9; ACT Corrective Services, 'Operating philosophy', *Custodial Operations: Types of detention* (10 August 2010)

<<http://www.cs.act.gov.au/page/view/867/title/operating-philosophy>>.

¹⁵² See, eg, Graph 1 for the growth in older detainees over the last decade. See also, Bedard, Mertzger and Williams (n 4); Greene et al (n 4); Williams, Ahalt and Greifinger (n 4); Ginn (n 4); Fazel et al (n 4).

¹⁵³ ABS (n 3).

¹⁵⁴ Frank Green, 'Growing old behind bars', *The News & Advance* (Online, 5 January 2009)

<https://www.newsadvance.com/news/local/growing-old-behind-bars/article_36b8e1e3-a015-5179-ac74-2337dd34113c.html>; Ken Howse, 'Growing Old in Prison: A scoping study on older prisoners', *Prison Reform Trust* (31 August 2011) 24-25

<http://www.prisonreformtrust.org.uk/uploads/documents/Growing.Old.Book_-_small.pdf>; Turner and Trotter (n 23) 21.

sentence in the community in compliance with conditions set by the court, while having access to support for their unique needs.¹⁵⁵

Yet the likelihood of this occurring in practice is dubious for two reasons. First, the complexities of sentencing, balancing the purposes of sentencing with subjective factors of the offender,¹⁵⁶ reduce the flexibility of the courts to always choose good behaviour orders as the appropriate punishment. The aforementioned cases suggest that in practice, the decided sentences are as accommodating for older offenders as possible, when considering the seriousness of the historic crime,¹⁵⁷ and the rights and effect on the victim(s).¹⁵⁸ Adding further to this complexity is that the ACT has the highest rate of recidivism (reoffending) in Australia.¹⁵⁹

Further, there is an associated stigma with advocating for compassionate sentencing in the context of sexual offenders, which as previously noted, a substantial proportion of older detainees are. As Turner and others explain;

Championing the rights of sex offenders will never be a popular cause, particularly in the context of how recently victims have been believed. Even for those who might critique prisons and the carceral system, there is a pull towards the idea of justice being seen to be done by the processes of prosecuting crimes and sentencing accordingly...Prisoners in general, and sex offenders in particular, are never an easy subject for discussion.¹⁶⁰

One of the sentencing purposes of the ACT judiciary is general, or community deterrence.¹⁶¹ Said differently, while the courts are independent, they must also consider what the sentences they deliver communicate to the community about what is right and

¹⁵⁵ *Crimes (Sentencing) Act 2005* (ACT) s 13.

¹⁵⁶ *Ibid* s 33(1)(m).

¹⁵⁷ See, eg, *R v MC (No 2)* [2019] ACTSC 61, 11 [76]; *R v Stone* [2016] ACTSC 231, 6 [28].

¹⁵⁸ *Baldwin and Leete* (n 84) 17.

¹⁵⁹ ABS (n 34) Table 29: Prisoners, Indigenous status, sex and prior imprisonment by state/territory.

¹⁶⁰ *Turner et al* (n 41) 166, 167.

¹⁶¹ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b).

wrong. This must follow community attitudes to a degree,¹⁶² and therefore this stigma limits the flexibility of courts to change sentencing practices with regards to these offenders.

B *Changes by Corrective Services*

In light of the suggested constraints on the judiciary, the obligation to change appears to lie with Corrective Services. However, in order to understand why there may be challenges in addressing the needs of older detainees in the AMC, and further, why the following recommendations have been made, it is first necessary to acknowledge the constraints facing Corrective Services. Although it is beyond the scope of this paper to discuss these limitations in detail, some noteworthy restrictions will be explored.

As recognised by the newly appointed ACT Inspector of Correctional Services, the AMC was the ACT's only prison and with that brought its own challenges;

The AMC was always going to be a “complicated” prison, in that it had to accommodate males and females, convicted and unconvicted people of both genders and protection prisoners (male, female, convicted and unconvicted) of different security risk classifications... one can easily identify the challenges faced by AMC management. In other jurisdictions many of these groups and sub-groups are often managed in separate prisons or specialised units within one or more prisons.¹⁶³

Said differently, the large divergence in the types of detainees which are accommodated at the AMC due it being the ACT's only prison is a unique issue to this jurisdiction, and arguably impacts on the ability of Corrective Services to address each detainee's needs.

¹⁶² Kate Warner et al, *Gauging public opinion on sentencing: can asking jurors help?* (Trends & Issues in Crime and Criminal Justice No 371, March 2009) cited in, Lorana Bartels, Robin Fitzgerald and Arie Freiberg, 'Public opinion on sentencing and parole in Australia' (2018) 65(3) *Probation Journal* 269, 271; Kate Warner et al, *Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study* (Trends & Issues in Crime and Criminal Justice No 207, February 2011) 4-5.

¹⁶³ ACT Inspector of Correctional Services (n 6) 9.

Further, according to the Australian Productivity Commission, in 2017-2018, the ACT had the third highest daily real expenditure per detainee in Australia, at \$283.48, compared to the highest cost in Victoria of \$323.82.¹⁶⁴ The Australian Productivity Commission defines this as the ‘average daily cost of providing corrective services per prisoner and per offender’, whereby ‘a low or decreasing cost is desirable in achieving efficient resource management’.¹⁶⁵ One factor that could contribute to this is the ‘composition of the prisoner population requiring different accommodation and/or management’,¹⁶⁶ suggesting that while there are many factors that could result in the high expenditure on detainees in the ACT,¹⁶⁷ the complexities of accommodating a vast demographic of detainees may contribute.

With these considerations in mind, Corrective Services are arguably doing the best they can in a uniquely complex situation. Any recommendations about changes to Corrective Services to better accommodate the needs of older detainees therefore need to reflect this. Consequently, ideas such as segregation of older detainees or the construction of nursing home-like prisons, which have been used as solutions in other jurisdictions,¹⁶⁸ especially given the current capacity issues at the AMC,¹⁶⁹ are unfeasible.

One achievable suggestion would be incorporating a case manager specifically for older detainees at the AMC. Although this would be an additional cost to Corrective Services, the benefits, in particular ensuring the AMC is fulfilling its rehabilitative and human rights aspirations, arguably outweigh the cost. The roles of the case manager could be twofold. First, to ensure that Corrective Services are aware of the reliance that a judge is placing on the AMC to administer support for an older offender’s needs, the case

¹⁶⁴ Productivity Commission, *Report on Government Services 2019* (Report, 24 January 2019) Table 8A.18; Daniel Burdon, ‘ACT prison system nation’s most expensive: Productivity Commission report’, *The Canberra Times* (Online, 24 January 2018) <<https://www.canberratimes.com.au/story/6023775/act-prison-system-nations-most-expensive-productivity-commission-report/>>.

¹⁶⁵ Productivity Commission (n 164) 8.20 [Box 8.11].

¹⁶⁶ *Ibid.*

¹⁶⁷ See, eg, Jane Andrew, ‘How do we break down a \$3.4b prisons bill? What can it tell us?’ *The Conversation* (Blog post, 19 June 2015) <<https://theconversation.com/how-do-we-break-down-a-3-4b-prisons-bill-what-can-it-tell-us-40159>>.

¹⁶⁸ Turner and Trotter (n 23) 16, 18; Chu (n 31) 13-14, 35; Angus (n 25) 13; Baidawi et al (n 32) 266.

¹⁶⁹ See, eg, Burdon (n 20).

manager could have access to the Pre-Sentencing Reports for the offender, which are often referred to in the subjective considerations of the aforementioned sentencing judgments.¹⁷⁰ These reports, and the judgments themselves, contain expert testimonies by medical practitioners about the health needs of the particular offender, how these have been addressed to date in the community, and how they could be, or what issues could arise, in addressing these needs in a correctional environment.¹⁷¹ With this knowledge, the case manager could ensure that the medical team and other prison staff are aware of the detainee's needs.

Second, the case manager would conceivably be trained to address the needs of older detainees so that they do not go undetected.¹⁷² Further, with this training the case manager could be responsible for facilitating social and educational programs for older detainees. Successful examples from other prisons include therapy dogs, the production of a play, a pedometer program to encourage movement, and establishing groups to reflect on the events of history they have partaken in.¹⁷³

C *Other recommendations*

The challenges to change by both the judiciary and Corrective Services indicates a possible role for service providers in the ACT such as Prisoners Aid ACT, Winnunga Nimmityjah Aboriginal Health Service, and the ACT Disability, Aged and Carer Advocacy Service (ADACAS).¹⁷⁴ Some organisations such as Legal Aid ACT have already recognised the unique needs of older persons in establishing the Older Persons ACT

¹⁷⁰ See, eg, *R v Stone* [2016] ACTSC 231, [6]-[14].

¹⁷¹ See, eg, *R v Djenadija* [2015] ACTSC 207, [24].

¹⁷² Mary T Harrison, 'True Grit: an innovative program for elderly inmates' (2006) 68(7) *Corrections Today* 46, 49; Ronald H Aday, 'Golden years behind bars: special programs and facilities for elderly inmates' (1994) 58(2) *Federal Probation* 47, 53.

¹⁷³ Harrison (n 172) 48.

¹⁷⁴ AustLII Communities, 'Prisoners and Community Corrections: Contacts and Resources', *Australian Capital Territory Law Handbook* (Web Directory, 29 October 2018) <<http://austlii.community/foswiki/ACTLawHbk/ACTLawHandbook>>.

Legal Service (OPALS),¹⁷⁵ and other providers involved with Corrective Services should follow this trend.

With the abovementioned recommendations in mind, further studies are required specific to the experiences of older detainees at the AMC. For example, the composition of the older prison population at the AMC,¹⁷⁶ what they feel their needs are relative to younger detainees, whether the AMC is addressing their needs and how, and their ideas for accommodating these needs.

VIII CONCLUSION

For any older offender, the prospect of incarceration coupled with their probable health needs, is as expressed by Chief Justice Kidd in the highly publicised sentencing of Cardinal George Pell in March 2019, ‘an awful state of affairs’.¹⁷⁷ Despite being a trend that has occurred both internationally and nationally over the last decade, changes in attitude and a renewed focus on historical sexual offences has resulted in the older prison population in the ACT skyrocketing.

While similar developments have occurred across Australia, the ACT, and in particular, the AMC are unique in aspiring to be Australia’s first human rights prison, with a heavy focus on rehabilitation. An exploration of the current literature on older detainees reveals their unique health needs which may not be obvious and often go undetected in a prison environment.

The current case law in the ACT reveals that the judiciary is limited in its capacity to account for these needs when sentencing older offenders, placing reliance on the ability of Corrective Services to accommodate these needs in the AMC. However, there are several restrictions on the ability of Corrective Services to do so in practice.

¹⁷⁵ Legal Aid ACT, ‘Older Persons ACT Legal Service (OPALS)’, *Legal Aid ACT* (Fact sheet, December 2018) <https://www.legalaidact.org.au/sites/default/files/files/publications/OPALS_Dec_2018.pdf>.

¹⁷⁶ See Part II(B) of this paper.

¹⁷⁷ *R v Pell* [2019] VCC 260, 21 [122].

With this in mind, this paper has made several recommendations for improving the experiences of older detainees in the AMC. Given that the ACT has had the highest increase in the number of older detainees in the last decade nationwide, these recommendations among others, should be considered by policymakers promptly.

WORD COUNT: 5,998

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