



COVID-19 and the mass incarceration of Indigenous peoples

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Abstract

Similar to experiences of Indigenous peoples globally, Māori in the nation-state known as New Zealand (NZ) have been subjected to mass incarceration by the colonial state. Places of detention are dangerous environments for the spread of COVID-19. We are deeply concerned about the potential for disproportionate impacts of COVID-19 on Māori and other Indigenous peoples within these environments as many have health conditions and/or multiple comorbidities compounding the risks of severe illness and death from COVID-19. We call for the NZ government to honour te Tiriti o Waitangi obligations and uphold Indigenous rights contained within the United Nations Declaration on the Rights of Indigenous Peoples and other international rights instruments. A whole-of-government commitment to an equitable public health approach is required to: 1) rapidly reduce the numbers of Māori in sites of detention; 2) implement effective, timely, evidenced informed measures to reduce the risk of COVID-19, in line with World Health Organization recommendations; 3) prevent the torture and cruel, inhuman or degrading treatment or punishment of detained Māori during COVID-19; and, 4) eliminate double-celling. Although focused on NZ, the themes we highlight are likely of relevance for Indigenous peoples across the globe in our collective resistance to the COVID-19 pandemic.

In the days that we call the past, and in the times when doubt or trouble confronted the Māori, wise people would seek explanation and say, “There is a story that needs to be told.”

—Moana Jackson, He Whaipaanga Hou

If you are talking over someone, you are not having a conversation with them. You are erasing them and creating an environment that will only hold your narrative. But we have been talking about our history since it was created, because to us, we are proof of that history. We are the stories we tell, and we each use what we have been given to add the next chapters.

—Ruby Solly, *The red fleck in her hair*

Similar to the experiences of Indigenous peoples globally, Māori in the nation-state known as New Zealand (NZ) have been subjected by the colonial state to mass incarceration within our own lands (Boyer, Fletcher, Sutherland & Spicer, 2019; Jackson, 2017; McIntosh & Workman, 2017; National Aboriginal and Torres Strait Islander Legal Services, Danila Dilba Health Service, Aboriginal Peak Organisations of the Northern Territory & Lachsz, 2020; Waretini-Karena, 2017). Colonisation includes “a range of practices, predominantly historical: war, displacement, forced labour, removal of children, relocation, ecological destruction, massacres, genocide, slavery, (un)intentional spread of deadly diseases, banning of indigenous languages, regulation of marriage, assimilation and eradication of social, cultural and spiritual practices” (Paradies, 2016, p. 83). Coloniality is considered an ongoing process encompassing “colonial forms of domination after the end of colonial administrations” (Grosfoguel, 2002, p. 205). Clearly, when our ancestors signed te Tiriti o Waitangi (Māori version of the Treaty of Waitangi) in 1840 alongside representatives of the British Crown, they were not signing up to colonisation, coloniality, white supremacy and racism. Nor were they signing up to the ensuing widespread executions (Ministry for Culture and Heritage, 2018) and mass incarceration of their whānau (extended family) and descendants by both the Crown and a third party (self-proclaimed) legitimate authority – the NZ government (Waretini-Karena, 2017).

As McIntosh and Workman (2017) highlight, places of detention within NZ “are largely holders of Māori flesh and blood...Mass incarceration in New Zealand is Māori incarceration” (pp. 726–727). For the year 2017, Māori made up 51 percent of the total prison population compared with only 15 per cent of the 2013 census resident population. Māori made up 56 percent of the women’s prisons, 50 percent of the men’s prisons, and 79 percent of the youth justice residences (King, 2019).

The current minimum age of ‘criminal responsibility’ in NZ is 10 years of age (Office of the Children's Commissioner, 2020). The number of Māori children, young people and adults incarcerated by the state has increased over time. Whilst the number of Māori children and young

people in the youth justice residences has grown (from 51 in 2008, to 81 in 2017), the number of non-Māori children and young people has almost halved (from 42 in 2008, to 22 in 2017) (King, 2019). This is despite reports by the NZ Ministry of Justice of falling rates of ‘offending’ by Māori and/or non-Māori children and young people over a similar timeframe (from 2010 to 2018) (Ministry of Justice, 2019). Thus, there are significant racialised inequities with regard to which children and young people the state makes the choice to incarcerate.

McIntosh (2018) points out such statistics are not news. Rather, “[t]he ubiquity of this knowledge...[means] that it has become normalised and naturalised and regarded as an intractable problem that is not amenable to change” (p. 289). Stanley and Mihaere (2019) observe that mass incarceration of Māori children, young people and adults is “carefully managed” by the state through four mechanisms. These are:

- (i) a perpetual representation of Māori as offenders; (ii) the selective endorsement of rights, such that discriminatory criminal justice operations are normalised; (iii) a pervasive human rights ritualism within UN [United Nations] reporting processes; and, (iv) the legitimisation of imprisonment and inequalities through the international rights system. (Stanley & Mihaere, 2019, p. 1)

The state’s engagement with the United Nations (UN) is described by Stanley and Mihaere (2019) as a form of “ritualism” – a “symbiotic performance” where:

[i]n the first stage, the UN records concerns. In the second, the state acknowledges that Māori over-representation in prisons is ‘a significant challenge’...Third, the state promises to act: it has ‘set ambitious targets’... Fourth, it heralds progress: the government is proud...Finally, the UN committees take an encouraging tone, noting the ‘commendable efforts’ being made, but also return to being ‘concerned at the...information that Māori remain overrepresented as offenders...and as victims’. (Stanley & Mihaere, 2019, p. 7)

In 2019, and over thirty years following the release of Indigenous leader and scholar Dr Moana Jackson’s landmark report on Māori and the justice system (Jackson, 1988), the government-appointed ‘Safe and Effective Justice Advisory Group’ published a series of recommendations outlining fundamental and transformative changes to legislation, policy and resources (Te Uepū Hāpai I Te Ora: Safe and Effective Justice Advisory Group, 2019). Although the recommendations were accepted by the Minister of Justice (Hon Andrew Little), very little has been progressed since (Walters, 2020). As the media has observed:

it’s been near-radio silence. No major policy announcements; no wholesale adoption of the recommendations born from months of talking, listening, research and shared

expertise. Aotearoa has been here before. Many times. The system hits crisis point; there's a review; recommendations are made; momentum dies away; reports sit gathering dust. (Walters, 2020)

We argue that within the context of a COVID-19 global pandemic, mass incarceration of Māori children, young people, and adults does not afford the government the luxury of privilege of resting upon its laurels for yet another thirty years.

The Serious Risks to Māori Children, Young People and Adults Incarcerated by the State

The disproportionate impacts that a COVID-19 outbreak will have on Māori children, young people and adults incarcerated by the state is of immense concern, given increased likelihood of the presence of underlying health conditions and/or multiple comorbidities compounding risks of serious illness and death from COVID-19 (Jones, King, Baker & Ingham, 2020; King, 2019; McLeod, Gurney, Harris, Cormack & King, 2020; Ministry of Health, 2006). Overseas, stark, inequitable impacts of the pandemic on Indigenous communities continue to be reported (Crooks, Casey & Ward, 2020; Indian Health Services – Department of Health and Human Services, 2020; Kaholokula, Samoa, Miyamoto, Palafox & Daniels, 2020; Markham, Smith & Morphy, 2020; Meneses-Navarro, Freyermuth-Enciso, Pelcastre-Villafuerte, Campos-Navarro, Meléndez-Navarro & Gómez-Flores-Ramos, 2020; Navajo Department of Health, 2020; Power, Wilson, Best, Brockie, Bourque Bearskin, Millender et al., 2020; United Nations Department of Economic and Social Affairs, 2020). In addition, international experience makes it clear that places of detention are particularly dangerous environments for the rapid spread of the virus to incarcerated children, young people and adults, whānau, detention staff, and communities (Alohan & Calvo, 2020; de Carvalho, Santos & dos Santos, 2020; Franco-Paredes, Jankousky, Schultz, Bernfeld, Cullen, Quan et al., 2020; Henry, 2020; Kinner, Young, Snow, Southalan, Lopez-Acuña, Ferreira-Borges et al., 2020; Lathouris, 2020; Nelson & Kaminsky, 2020; Rubin, 2020).

Unacceptable conditions including unsanitary and overcrowded environments, inadequate ventilation, poor access to healthcare and disability services, and the fact that places of detention are not closed systems (with movements of people in, around, and between places of detention), in addition to a range of other custodial requirements preventing measures to control the spread of infection, create even greater safety risks for all during a pandemic (Alohan & Calvo, 2020; Burki,

2020; de Carvalho et al., 2020; Henry, 2020; Montoya-Barthelemy, Lee, Cundiff & Smith, 2020; Rubin, 2020; Sapers, 2020; Simpson & Butler, 2020; United Nations Human Rights – Office of the High Commissioner, 2020; World Health Organization, 2020). Although there has not yet been an outbreak of the virus in the NZ youth justice residences and prisons at the time of writing, outbreaks in other infectious diseases linked to prison have been previously documented (De Zoysa, Shoemack, Vaughan & Vaughan, 2001).

Places of detention are thus critical to a public health response to the COVID-19 pandemic that is equitable. As Henry (2020) points out, “equity cannot be achieved until incarcerated people have equal access to quality prevention and treatment resources for COVID-19” (p. 537). While these conditions outline greater increased risks during a pandemic, they are unacceptable at all times.

Decarceration and Abolition During the COVID-19 Pandemic

Carceral policies enabling mass incarceration have been described as a “vector of COVID-19 transmission” (Henry, 2020, p. 536). In response to this vector risk, there have been multiple calls internationally for decarceration extending to abolition (Akiyama, Spaulding, & Rich, 2020; American Public Health Association, 2020; Franco-Paredes et al., 2020; Freshour & Williams, 2020; Inter-Agency Standing Committee – Office of the High Commissioner for Human Rights & World Health Organization, 2020; Lyons, 2020; Nelson & Kaminsky, 2020; Nowotny, Bailey, Omori, & Brinkley-Rubinstein, 2020; Oladeru, Tran, Al-Rousan, Williams, & Zaller, 2020; Rubin, 2020; Sapers, 2020; Simpson & Butler, 2020; Sivashanker, Rossman, Resnick, & Berwick, 2020; United Nations Human Rights – Office of the High Commissioner, 2020). Minkler, Griffin, and Wakimoto (2020) describe how “...decarceration policy became essential to the public health response to COVID-19” (p. 517) in the United States of America (USA).

Conditions that were accepted, or at least expected, in prisons and jails could no longer be viewed as simply the way things are. Grossly overcrowded cells, lack of proper sanitation, and many more factors also had to be recognized as a major risk to public health. That risk, no longer solely for incarcerated persons and prison staff, now demanded urgent attention to reduce the role of these facilities as major ‘hot spots’ in the community spread of the coronavirus. (Minkler, Griffin & Wakimoto, 2020, p. 517)

The American Public Health Association (APHA), for instance, has recommended “moving towards the abolition of carceral systems and building in their stead just and equitable structures

that advance the public's health". Amongst other recommendations, the APHA's policy statement advises "urgently reducing the incarcerated population [and] committing to non-carceral measures for accountability, safety, and well-being" (American Public Health Association, 2020).

In Australia, the New South Wales government passed emergency legislation with provisions for releasing people from prison due to concerns about prisons being "ripe for the rapid spread of disease" (Anthony, 2020). The UN has released specific guidance and advice to member states, recommending decarceration of "at-risk groups of prisoners, including persons with disabilities, applying early release and probation or shortening or commuting sentences and reducing the use of pre-trial detention, and promptly ensure provision of support in the community" (p. 8). Examples of decarceration have been reported including the United Kingdom, Northern Ireland, several states within the USA, Iran, Turkey, Indonesia, Colombia, Argentina, and Brazil (United Nations Human Rights – Office of the High Commissioner, 2020). On the basis of this UN guidance, Simpson and Butler (2020) recommend:

we should be releasing a sizeable proportion of prisoners based on their risk to the community and vulnerability to covid-19 (for example through older age, having chronic health conditions, and intravenous drug use). Similarly, the poor health outcomes of indigenous peoples in countries such as the US, Australia, Canada, and New Zealand make these populations an obvious priority. (p. 1)

Sivashanker et al., (2020) have critiqued the lack of urgency elsewhere with regard to recognition of decarceration as a critical public health response, stating, "instead of mobilising around sensible public health strategies, like decarceration, to prevent the spread of covid-19, we remain preoccupied with treating patients after they are already sick" (p. 1). Others have argued that failing to decarcerate Indigenous peoples "through early and temporary releases... undermines the efforts of the Aboriginal community-controlled health sector [that] has reacted swiftly and effectively to the COVID-19 outbreak" (National Aboriginal and Torres Strait Islander Legal Services et al., 2020, p. 7).

A Call to Action

There is a very short window within which to prevent an outbreak and protect Māori children, young people and adults incarcerated by the state, along with their whānau, detention staff, and communities. We have serious concerns that the fragmented approach and ad hoc actions taken to date by government agencies are far from sufficient. Government statements regarding

the lack of action on progressing required changes in carceral policies (Te Uepū Hāpai I Te Ora: Safe and Effective Justice Advisory Group, 2019) reinforce our reasons for being deeply concerned. For instance, “[w]hen asked why justice policy hasn't been on the agenda in recent months, Kelvin Davis [Minister of Corrections] says in a Covid-19 world they have to prioritise the health and economic responses. ‘And this is how it should be,’ he says” (Walters, 2020), demonstrating a critical lack of understanding that current carceral policies are the cause of significant risks to Māori children, young people and adults incarcerated, along with their whānau, detention staff, and the wider public in a COVID-19 world. The imposition of a custodial sentence for a mother of five who, subsequent to having received negative COVID-19 results for her family, and, following being declined compassionate exemption by the NZ Ministry of Health, fled quarantine so that her children could be with the body of their deceased father (Hayden, 2020), reiterates how out of touch with the reality of a COVID-19 world the NZ justice system is. Not only did the judge’s decision demonstrate an appalling lack of compassion, regardless of the circumstances, punitive, carceral approaches to public health that result in further incarceration, potentially increase public health risks at a time when we should be urgently reducing the numbers of people incarcerated.

Thus, we call for the NZ government to honour its te Tiriti o Waitangi obligations, and, rather than continuing on with a “ritualism” of “symbiotic performance” (Stanley & Mihaere, 2019), instead make a choice to respect, protect and fulfil Indigenous rights recognised within the UN Declaration on the Rights of Indigenous Peoples (United Nations General Assembly, 2007) and other international human rights instruments (United Nations General Assembly, 1948, 1966a, 1966b, 1966c, 1979, 1984 1989, 2006). This means the government works with Māori within a Tiriti-based relationship to protect the health and well-being of Māori children, young people and adults who are incarcerated, their whānau and communities. Achieving this requires a whole-of-government commitment to an equitable public health approach that:

- 1) Rapidly reduces the number of Māori children, young people and adults in sites of detention both through curtailing admissions to detention, and early release of people from detention (Inter-Agency Standing Committee – Office of the High Commissioner for Human Rights & World Health Organization, 2020; Simpson & Butler, 2020; Subcommittee on Prevention of Torture, 2020; United Nations Human Rights – Office of the High Commissioner, 2020). In decarcerating, it is important to ensure that decisions

take into account the health risk for individuals, their whānau and communities, and, release is accompanied by adequate planning. This must involve facilitated access to safe accommodation, income support, and comprehensive management of health and disability issues that ensures continuity of care with referral to appropriate community services, so that children, young people, adults and their whānau and communities are prepared and safe (Inter-Agency Standing Committee – Office of the High Commissioner for Human Rights & World Health Organization, 2020; Johnson & Beletsky, 2020; Montoya-Barthelemy et al., 2020; Mukherjee & El-Bassel, 2020). It must also include inter-departmental work (particularly from the NZ Ministry of Justice and Department of Corrections) to ensure people are not unduly (in their path to freedom) delayed due to COVID-19 restrictions on courts, court assigned programmes and community detention, amongst others.

- 2) Implements effective, timely, research-informed measures to reduce the risk of COVID-19 in places of detention, in accordance with the World Health Organization recommendations (World Health Organization, 2020), whilst maintaining comprehensive arrangements for access to non-COVID-19 related healthcare and disability services, and support programmes. This should include reviewing the current operating procedure/guidelines used by the NZ Department of Corrections to ensure they align with the aforementioned guidance.
- 3) Prevents the torture and cruel, inhuman or degrading treatment or punishment of Māori children, young people and adults incarcerated during COVID-19 (Inter-Agency Standing Committee – Office of the High Commissioner for Human Rights & World Health Organization, 2020; Subcommittee on Prevention of Torture, 2020; United Nations General Assembly, 1984 ; United Nations Human Rights Committee, 2020; United Nations Office on Drugs and Crime, 2015). Public health preventative measures and/or responses to any potential or confirmed cases of COVID-19 must be managed in ways that do not rely on solitary confinement and excessive lockdown practices. Specifically, the use of practices where people in NZ have been locked in their cells for up to 23 hours a day and all external visits (whānau and advocacy) are suspended, must be immediately discontinued (Chief Ombudsman, 2020; Cloud, Ahalt, Augustine, Sears & Williams, 2020; Gagnon, 2020; Montoya-Barthelemy et al., 2020).

- 4) Eliminates the risks to health and well-being caused by the practice of double-celling. Places of detention should immediately move to single-cell accommodation with in-cell sanitation (Gulati, Dunne & Kelly, 2020).

Conclusion

The dream riders were summoned by a nightmare, made palpable by the terrifying numbers of prisoners and prisons produced during the past generation, while we were all, presumably, awake. Just as real was the growing grassroots activism against the expanded use of criminalization and cages as catchall solutions to social problems. (Gilmore, 2007, p. 2)

The crisis caused by the COVID-19 pandemic “has recalibrated the realm of political possibilities” (Lyons, 2020, p. 2). The NZ government can make a choice to implement transformative actions that result in a justice system supporting a safe and healthy society. However, intentionally choosing not to decarcerate “is a policy decision that actively facilitates high rates of new COVID-19 infections, and ultimately deaths...By choosing confinement, policy makers are exposing incarcerated people to much higher odds of COVID-19 infection” (Henry, 2020, p. 537). They are also exposing those incarcerated to the negative health impacts that potentially result from practices used in detention during the pandemic, including from the suspension of access to programmes, the denial of access to visitors, and the use of solitary confinement. Governments around the world must respond to the public health evidence and, through equitable power-sharing with Indigenous peoples, act urgently to address the risks that mass incarceration of Indigenous children, young people and adults poses to their health and well-being. Choosing equity for all contributes to fulfilling the ethical, moral and legal imperatives we all have to uphold the individual and collective human rights of Indigenous peoples across the world.

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