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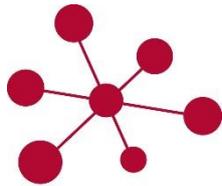
Refugee Council of Australia



PEOPLE WITH DISABILITY AUSTRALIA

OPCAT, places of detention and COVID-19

Joint submission to the Select Committee on COVID-19: Pre-Committee Version



public interest
ADVOCACY CENTRE



AUSTRALIAN LAWYERS ALLIANCE



Northern Territory Council of Social Service



Aboriginal Peak Organisations Northern Territory (APO NT)



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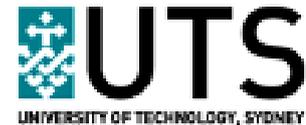


ABORIGINAL DRUG & ALCOHOL COUNCIL (SA)
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COMMUNITY LEGAL
WESTERN AUSTRALIA



27 May 2020

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1. Executive summary

Evidence from around the world is clear – once COVID-19 enters a place of detention, it will spread like wildfire. The United Nations, World Health Organization and human rights organisations across the world have sounded the alarm and called on Governments to take urgent action to protect the health and safety of people in detention and other closed facilities. This call is part of overall efforts to contain the COVID-19 pandemic across the broader community and to protect the health and lives of those in places of detention.

Places of detention are a potential disaster zone and ought to be treated as such. Governments can wait for people to get sick and die, or they may act now.¹ People in prisons and other places of detention are likely to be more vulnerable to COVID-19 due to overcrowded settings, the lack of access to healthcare, unsanitary environments and having chronic health conditions. They are also especially vulnerable to human rights violations.²

Federal, State and Territory Government responses to COVID-19 must therefore involve reducing the number of people held in places of detention by responsibly releasing people who are at higher risk of significant harm should they contract COVID-19, and by curbing admissions. Reducing numbers in detention is essential for protecting the health of people in places of detention, staff and the broader community.

This approach would be consistent with the advice of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to “[r]educe prison populations and other detention populations wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so.”³

The COVID-19 pandemic also presents an opportunity to rethink detention and sentencing policies generally, and to fully realise the vision of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**) regarding best practice in oversight and transparency of places of detention.

Australia ratified OPCAT in December 2017. Under OPCAT, Federal, State and Territory Governments must designate and/or establish independent National Preventive Mechanisms (**NPMs**) to conduct inspections of all places of detention. During the COVID-19 pandemic, it is crucial that oversight bodies, including NPMs, are guaranteed unimpeded access to all places of detention in order to ensure that solitary confinement, excessive lockdown and other practices that amount to torture or cruel, inhuman or degrading treatment, are not being utilised in places of detention as part of the response to COVID-19.

Further, in order to ensure greater transparency, Federal, State and Territory Governments must provide regular, updated and accurate information to the public and to oversight bodies on its response to the COVID-19 pandemic in relation to each place of detention. Information provided should include infection prevention and control measures, contingency plans, information relating to COVID-19 testing and results for people in detention and staff, as well as infection rates and number of deaths.

While this submission focuses on particular places of detention, namely prisons, youth detention centres and immigration detention facilities, this does not mean that OPCAT should only apply to those places. It is imperative for NPMs to be given right of access in accordance with an expansive definition of places of detention, which should also include: police cells, closed facilities where people may be involuntarily detained by law for mental health treatment or other forms of care, secure residential care facilities, aged care facilities and quarantine.

The Federal Government must take immediate steps to meet its international human rights obligations, and its obligation to stop the spread of COVID-19 through places of detention and the broader community, by adopting human rights-compliant preventative measures.

Some of the issues addressed and recommendations made in this submission – for example, in relation to prisons and youth justice centres – fall within the jurisdiction of State and Territory Governments. COVID-19 is, however, a national public health emergency, and the Federal Government has an important role to play in proactively ensuring that Governments across Australia implement the below recommendations, in order to ensure a consistent approach to protecting the health and human rights of everyone.

The Commonwealth Ombudsman, as the NPM coordinator and as the body who is responsible for inspecting places of detention under the control of the Commonwealth, including immigration detention facilities and Australian Federal Police cells, also has an integral role to play in keeping everyone safe during the COVID-19 pandemic.

2. Recommendations

1. Federal, State and Territory Governments must take immediate action to reduce the number of people held in places of detention. This should include responsibly releasing people who are at higher risk of significant harm should they contract COVID-19, including Aboriginal and Torres Strait Islander people, elderly people, people with chronic health conditions, people living with disability, people with mental health conditions, children, young people, pregnant women, primary caregivers for young children, refugees and people seeking asylum.
2. Federal, State and Territory Governments must prohibit the use of solitary confinement, and other practices that amount to torture or cruel, inhuman or degrading treatment or punishment, including isolation and quarantine measures that amount to effective solitary confinement, in places of detention.
3. Federal, State and Territory Governments must urgently designate and/or establish National Preventive Mechanisms as part of their response to the COVID-19 pandemic, to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process.

4. Federal, State and Territory Governments must guarantee all oversight bodies, including National Preventive Mechanisms, unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic. Governments and places of detention must co-operate with oversight bodies, accommodate inspections and respond to requests for information.
5. In order to ensure greater transparency, Federal, State and Territory Governments must provide regular, updated and accurate information to the public and to oversight bodies on its response to the COVID-19 pandemic in relation to each place of detention. Oversight bodies should publicly report on the information they receive through this process, at regular intervals, and ensure that the voices of people in places of detention are heard in this process.
6. Federal, State and Territory Governments must not adopt unreasonable measures that will further undermine or limit existing formal and informal mechanisms of oversight and transparency.

3. COVID-19 and risk to people in places of detention

COVID-19 in places of detention is a public health crisis

Evidence from around the world is clear – once COVID-19 enters a place of detention, it will spread like wildfire, and “COVID-19 could be allowed to act as collective death sentences.”⁴ The United Nations, World Health Organization and human rights organisations across the world have called on governments to therefore take urgent action to protect the health and safety of people in detention and other closed facilities, as part of overall efforts to contain the COVID-19 pandemic.⁵

Governments across Australia have taken steps to prevent the spread of COVID-19, significantly curtailing people’s freedom of movement, so that its impacts do not overburden our health system. Governments and health experts have recommended that we help “stop the spread” by practising physical distancing and good hygiene, which includes washing our hands regularly with soap and water.⁶

We are not out of the woods yet. At a time when restrictions are being relaxed,⁷ it is crucial for Governments to learn from the experiences of other jurisdictions – for example, the second spike of COVID-19 cases in Singapore, which were linked to migrant workers dormitories⁸ – and take preventative measures to safeguard people in places of detention against COVID-19. There have already been instances in Australia of COVID-19 spreading in closed environments, such as aged care and an inpatient psychiatric facility,⁹ and the continuing risk of COVID-19 to people held in places of detention should not be underestimated.

Places of detention are the perfect breeding ground for COVID-19

The very nature of places of detention makes physical distancing impossible, with people in close proximity to others at all times. This makes infection control challenging, because separating sick people from well people to prevent the spread of the disease is unworkable.¹⁰

Places of detention are overcrowded, unhygienic and unhealthy places at the best of times, with poor ventilation and generally poor conditions. There is also limited access to health care, and while equivalency of medical care is an obligation under international law,¹¹ this is frequently not the practice in places of detention. Additionally, Aboriginal and Torres Strait Islander people receive lower quality of health care in prisons compared to their non-Indigenous counterparts, which contributes to deaths in custody.¹²

Experts have warned that “widespread community transmission of COVID-19 within a correctional institution is likely to result in a disproportionately high COVID-19 mortality rate.”¹³

People held in places of detention are particularly vulnerable to COVID-19

People detained behind bars are a cohort particularly vulnerable to the impacts of COVID-19. For example, almost one-third of people entering prison in Australia have a chronic medical condition like asthma, cancer, cardiovascular disease, diabetes or live with disability.¹⁴

Restrictions put in place in youth detention centres have meant that children cannot have face-to-face visits and likely have limited access to face-to-face education other support services.¹⁵ Children and young people should always be supported by family and be able to access health services in the community.

As Aboriginal and Torres Strait Islander people, people with disability and people from low income backgrounds are over-represented in prisons, they will be hit hardest should there be an outbreak of COVID-19. This is consistent with evidence internationally which shows that “ethnic minority and socioeconomically disadvantaged individuals are differentially affected by both the criminal justice system and COVID-19.”¹⁶

In immigration detention, there are many people seeking asylum and refugees who have underlying health conditions that put them at higher risk of serious illness or death if they contract COVID-19.¹⁷ This includes refugees brought to Australia from Nauru and Papua New Guinea, and who have remained in detention with little or no treatment for the medical conditions that prompted their evacuation.

Places of detention must form part of the broader public health response

Places of detention are not walled off from the world when it comes to the transmission of COVID-19.¹⁸ It is increasingly being recognised that the scenario of rapid transmission of COVID-19 within places of detention will amplify the epidemic within the general public.¹⁹

Many people come and go from places of detention including staff, contractors, health professionals and educators. In prisons in particular, people churn through the system on a daily basis and return to their communities.²⁰ As a result, there is ample opportunity for COVID-19 to enter a closed environment, and for it to go back out into the community.

4. Detention conditions and treatment of people in places of detention

Governments across Australia cannot derogate from their duty to treat all people, including persons deprived of their liberty, with humanity and respect for their human dignity.²¹ People in places of detention have the right to life and health care,²² and Governments bear a heightened duty of care to those whom it detains,²³ given their lack of liberty and agency.

As a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), Australia is responsible for ensuring “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and to prevent “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”²⁴

Any attempts to prevent the spread of COVID-19, or planned response (or lack thereof) to a case of COVID-19 in a place of detention, must not amount to torture or cruel, inhuman or degrading treatment under any circumstances.²⁵

Mass use of solitary confinement must not be part of the response to COVID-19

Across Australia, Governments have deployed solitary confinement – often under the guise of less ominous labels like “protective quarantine” – as a primary response to COVID-19 in prisons and youth detention centres. Examples of solitary confinement being used in response to COVID-19 include Queensland Corrective Services’ new isolation protocols, which require all new people entering high security centres to be placed into isolation for 14 days with no time out of cell.²⁶ Similar measures have also been adopted by Corrections Victoria, with the establishment of “protective quarantine units.”²⁷ This has been coupled with broad powers in the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) to isolate children and young people for the purposes of detecting, preventing or mitigating the transmission of COVID-19 in youth justice centres,²⁸ and to separate, quarantine or isolate adults, and even establish separate cells, for the purposes of preventing, detecting or mitigating the risk of COVID-19.²⁹

These approaches are at odds with the Communicable Diseases Network Australia’s guidance, which stipulates that for new admissions, even in a declared outbreak, it “does not mean the facility has to go into complete “lock down”.”³⁰ The World Health Organization has discouraged the use of “routine intake quarantine” because of its unnecessary and negative impacts on mental health and the fact that it is more cost-effective to screen people for the virus.³¹ While measures need to be put in place to mitigate the risk of COVID-19 in places of detention, any such measures must respect human rights and any isolation or quarantine

measures must be legal, proportionate, necessary, time-bound, subject to review and should not result in de facto solitary confinement.³² The prohibition of torture, cruel, inhuman or degrading treatment or punishment must not be derogated from, even during exceptional circumstances like the COVID-19 pandemic.³³

International law on solitary confinement

Federal, State and Territory Governments must prohibit practices like solitary confinement, and other practices that amount to torture or cruel, inhuman or degrading treatment or punishment, in places of detention. The public health crisis that is COVID-19 cannot be used as a justification to resort to a practice that is “strikingly toxic to mental functioning” and causes long-term, irreversible harm to people.³⁴

The United Nations Standard Minimum Rules for the Treatment of Prisoners (**the Nelson Mandela Rules**) provide that solitary confinement should only be used in very exceptional cases, for as short a time as possible, and only as a last resort. The Nelson Mandela Rules specifically prohibit the use of solitary confinement on people with mental or physical disabilities when their conditions would be exacerbated by such measures.³⁵

The United Nations Special Rapporteur on Torture has noted that “the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.”³⁶

It is increasingly becoming accepted that the imposition of solitary confinement “of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment.”³⁷ This is because research shows that solitary confinement can cause a “severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before.”³⁸ The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has confirmed this, and recommended that solitary confinement not be used on people with mental disability.³⁹

As people with disability, particularly a cognitive or psychosocial disability, are overrepresented in Australian criminal legal systems,⁴⁰ they are likely being caught in arbitrary responses to COVID-19 in prisons, such as “protective quarantine” arrangements for all new prison entrants.

Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the “extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement” and that “it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.”⁴¹

Proactively addressing the risk that COVID-19 could pose in places of detention

Ensuring the health and well-being of people in prison must be at the heart of infection prevention and control measures, while respecting the fundamental safeguards outlined in the Nelson Mandela Rules.⁴²

In the interlocutory application heard by the Supreme Court of Victoria on 29 April 2020, evidence was given that people in Port Phillip Prison in Victoria do not have access to hand sanitiser, are only provided with one bar of soap a week and do not have access to hot water to wash their hands.⁴³ This means that people in prison are unable to take steps to protect themselves from COVID-19.

While the Court did not order the release of the person – which was the primary relief sought – the Court accepted that a duty of care is owed and ordered that an independent risk assessment examining the COVID-19-related risks to people in prison be carried out at Port Phillip Prison, and that any recommendations made as a result of that assessment be implemented. At a bare minimum, independent human rights compliant risk assessments should be conducted examining the COVID-19-related risks at each place of detention in Australia.

In order to effectively meet the challenge that a COVID-19 outbreak would pose in places of detention, Governments should urgently adopt and implement a humane and comprehensive contingency plan supported by adequate human and financial resources, done in consultation and co-operation with relevant human rights stakeholders.⁴⁴

The need for equivalent medical care

The Nelson Mandela Rules make it clear that people in prison “should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.”⁴⁵ The International Covenant on Economic, Social and Cultural Rights explicitly states that to fully realise the right “of everyone to the enjoyment of the highest attainable standard of physical and mental health,” States shall take steps for the “prevention, treatment and control of epidemic... diseases” and for the “creation of conditions which would assure to all medical service and medical attention in the event of sickness.”⁴⁶

The Office of the High Commissioner for Human Rights and the World Health Organization have issued interim advice that:

- in suspected or confirmed cases of COVID-19, all persons deprived of their liberty should be able to access healthcare, including urgent, specialised health care, without undue delay;
- suspected case(s) should be isolated in dignified conditions away from the general population and measures should be put in place to mitigate violence or stigmatization against suspected cases; and

- detention centres' administrations should develop close links with community health services and other health-care providers.⁴⁷

Places of detention have limited access to health care at the best of times and, in recognition of this, it is of paramount importance that processes are put in place for people in places of detention to access hospitals and medical services outside those places of detention.

Compounding impact of restrictions

All Australian states and territories have banned face-to-face prison visits, and people in most prisons are still being charged to make telephone calls. There are reports that people in prison in NSW will be banned from receiving letters.⁴⁸ The Federal Government has banned all face-to-face visits to immigration detention, and the Minister for Home Affairs has recently introduced draft laws which could ban the use of mobile phones in immigration detention facilities, in an effort to protect the Government from public scrutiny of conditions in detention.⁴⁹

Contact with, and visits from, family and friends increase hopefulness, social connectedness and optimism among many people in places of detention, and there is good evidence to suggest they can also influence how well people reintegrate into the community following release.⁵⁰ Limiting these opportunities to connect with the outside world have triggered unrest across Australia⁵¹ and riots overseas.⁵²

The disruptive impact of such measures should be actively mitigated, through free and enhanced access to telephones or digital communications. Some welcome efforts have been made for people to have access to video calls. In Queensland, a new service was trialled to allow people to send messages to people in prisons.⁵³ Unfortunately, costs are still involved and although it is cheaper than sending a letter; in Victoria it costs \$0.90 to send an email and \$0.75 to request a reply.⁵⁴

Restricting in-person visits and access to telephone communications will also impact on people's ability to access legal advice and freely communicate with legal representatives. Certain fundamental rights of people deprived of their liberty and corresponding safeguards, including the right to legal representation, must continue to be fully respected.⁵⁵

Recommendation

Federal, State and Territory Governments must prohibit the use of solitary confinement, and other practices that amount to torture or cruel, inhuman or degrading treatment or punishment, including isolation and quarantine measures that amount to effective solitary confinement, in places of detention.

5. Oversight and transparency

The need for NPM designation and establishment

It is disappointing that the Australian Government has declared that it is postponing the implementation of its obligations under OPCAT,⁵⁶ with the COVID-19 pandemic highlighting the need to have more transparency and oversight of places of detention as a matter of priority.

Federal, State and Territory Governments⁵⁷ must therefore urgently designate and/or establish NPMs⁵⁸ as part of their response to the COVID-19 pandemic. Governments should engage with civil society in transparent, inclusive and robust consultations regarding NPM designation and establishment.⁵⁹

NPMs must have a statutory basis, be functionally independent,⁶⁰ be accorded the necessary privileges and immunities,⁶¹ and be sufficiently and jointly⁶² funded by Federal, State and Territory Governments to effectively exercise their mandate.⁶³ NPMs should also make their findings and recommendations⁶⁴ publicly available. Similarly, Governments and detaining authorities should make public their responses and strategies for NPM recommendation implementation.

It is essential that NPMs exercise their mandate in a culturally appropriate way, particularly given the overrepresentation of Aboriginal and Torres Strait people in the criminal legal system⁶⁵ and the different cultural and linguistic backgrounds of people detained in immigration detention facilities.

Detention oversight during the COVID-19 pandemic is crucial

Robust oversight of places of detention will improve the efficacy and appropriateness of the Federal, State and Territory Governments' response to COVID-19. Well-resourced and independent oversight bodies are essential not only to facilitate transparency and accountability, but to make expert recommendations that will guide the detaining authorities in improving conditions and treatment in detention, and limiting the transmission of COVID-19.

United Nations bodies and World Health Organization positions on the need for ongoing oversight of places of detention during the pandemic, to both mitigate the risk of human rights violations and to progress public health objectives, have been consistent:

- The Subcommittee on Prevention of Torture has noted that it is “particularly important at this time that NPMs ensure that effective measures are taken to reduce the possibility of detainees suffering forms of inhuman and degrading treatment as a result of the very real pressures which detention systems and those responsible for them now face.”⁶⁶
- The Office of the High Commissioner for Human Rights has advocated that detention be “regularly monitored by independent bodies.”⁶⁷

- The Working Group on Arbitrary Detention “emphasizes the importance of independent oversight by national and international human rights mechanisms over all places of deprivation of liberty” including by NPMs.⁶⁸ It has also encouraged States that have ratified OPCAT to adhere to the advice of the Subcommittee on Prevention of Torture.⁶⁹
- The United Nations Office on Drugs and Crime, World Health Organization, the Joint United Nations Programme on HIV/AIDS and the Office of the High Commissioner for Human Rights, in a joint statement, have asserted that “the access of external inspection bodies to places of deprivation of liberty, must continue to be fully respected.”⁷⁰
- The World Health Organization has noted that “oversight and accountability mechanisms should be in place to allow individuals who are impacted to challenge the appropriateness of... restrictions. Not conforming to these safeguards not only runs the risk of a range of human rights violations of the most vulnerable but will also ultimately undermine the larger public health objectives.”⁷¹

Similarly, the International Committee of the Red Cross,⁷² Council of Europe⁷³ and civil society internationally⁷⁴ have highlighted the legal bases of, and need for, ongoing oversight during the pandemic, as has civil society in Australia.⁷⁵

The Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has highlighted that restrictions on visiting may impact on both formal oversight mechanisms and informal oversight provided by family, friends, supporters and advocates. It noted that “[w]ith the decrease of oversight comes an increase in the risk of violence, abuse, neglect and exploitation” and encouraged “governments to implement all necessary measures to protect and support people with disability in residential settings during the pandemic.”⁷⁶

This highlights the importance of having formal, independent oversight bodies operating at all times, and especially during public health emergencies.

Access of oversight bodies to places of detention must be guaranteed

In compliance with OPCAT, NPMs must have access to all places of detention,⁷⁷ information concerning the number of persons deprived of their liberty in places of detention and the number of places and their location, as well as treatment of those persons and their conditions of detention.⁷⁸ Although “temporary restrictions are permissible”⁷⁹ in response to COVID-19, all Australian oversight bodies, including NPMs, must be guaranteed unimpeded access to all places of detention throughout the duration (and beyond) of the COVID-19 pandemic.⁸⁰

United Nations bodies and the World Health Organization have called for guaranteed access of oversight bodies to places of detention during the pandemic:

- The Working Group on Arbitrary Detention emphasises that “the prevailing public health emergency cannot be used as a blanket justification to prevent all such independent oversight. The Working Group calls upon all States to allow visits of

independent oversight mechanisms to all places of deprivation of liberty during the COVID-19 pandemic and other public health emergencies.”⁸¹

- The Inter-Agency Standing Committee (Office of the High Commissioner for Human Rights and World Health Organization) has stated that “[d]etention centers’ monitoring bodies, including National Human Right Institutions and other entities with relevant monitoring mandates, should continue to have access to places of detention. If already established in accordance with the Optional Protocol to the Convention Against Torture, include the National Preventive mechanisms.”⁸²
- The World Health Organization Europe’s position is that “[e]ven in the circumstances of the COVID-19 outbreak, bodies of inspection whose mandate is to prevent torture and other cruel, inhuman or degrading treatment or punishment should have access to all people deprived of their liberty in prisons and other places of detention (including persons in isolation), in accordance with the provisions of the respective body’s mandate.”⁸³

OPCAT stipulates that NPMs must have guaranteed access to all places under the Governments’ jurisdiction and control, where persons are or may be deprived of their liberty by order of any judicial, administrative or other authority (in both public and private custodial settings).⁸⁴ Within the criminal legal system, these places include prisons, youth detention centres, police cells, court cells, correctional centres, correctional work camps, supported bail accommodation, modes of transport and places where people are temporarily detained (such as hospitals). Within the immigration detention system, these places include immigration detention centres, alternative places of detention, and other places where people are temporarily detained (such as in transit and in hospitals).

NPMs and oversight bodies should adjust their approaches to oversight

The current approach of oversight bodies in Australia

In Australia, three bodies have been designated NPMs:

- the Commonwealth Ombudsman (NPM coordinator and responsible for inspecting places of detention under the control of the Commonwealth, including immigration detention facilities and Australian Federal Police cells⁸⁵);
- the Western Australian Office of the Inspector of Custodial Services (**the OICS**) (responsible for inspecting justice-related facilities⁸⁶); and
- the Western Australian Ombudsman (responsible for inspecting mental health and other secure facilities⁸⁷).

The OICS decided to “reduce [their] routine physical presence at custodial facilities,” with inspections being undertaken on a remote basis. The OICS’ approach to monitoring currently entails relying on receiving daily reports from the Department of Justice, formal phone briefings from individual facility management and other staff, monitoring the prisons’ databases daily and contact with people in detention, families and representative bodies. Similarly, the WA Independent Visitor Service has been temporarily deferred.⁸⁸

Other oversight bodies have also suspended inspections. The NSW Inspector of Custodial Services has temporarily postponed their scheduled visits and inspections, and official visitors attending centres will focus “primarily on examining the general functioning and physical appearance of a facility.”⁸⁹ The ACT Inspector of Custodial Services has also suspended visits, but has stated that it would review its decision should there be a critical incident.⁹⁰

In immigration detention, because of concerns regarding the lack of oversight of the response to COVID-19, the Public Interest Advocacy Centre recently filed a group complaint with the Commonwealth Ombudsman calling “for an urgent inspection of immigration detention facilities and alternative places of detention, to examine the adequacy of conditions and measures being taken to mitigate and manage the danger posed by COVID-19 to people in detention and staff.”⁹¹

In contrast, other oversight bodies have opted to continue or resume inspecting places of detention, such as the South Australian Guardian for Children and Young People which has continued the “program of regular fortnightly face-to-face visits to all units in the Training Centre... (augmented by occasional visits as needed for advocacy or resolution of serious issues).”⁹²

As restrictions ease, some oversight bodies will likely start relaxing some of their COVID-19 responsive measures and, for example, the OICS in Western Australia and the Commonwealth Ombudsman have indicated that they plan to recommence limited visits and inspections shortly.⁹³

But suspending inspections in the first place raises a number of concerns, including over-reliance on remote monitoring and the accuracy of self-reporting by detaining authorities. The processes for reviewing the current methodologies of Australian oversight bodies is unclear, which is concerning given that there is a very real possibility that the pandemic may persist for a considerable period of time. This, in turn, runs the significant risk that harmful practices adopted as part of detaining authorities’ infection prevention and control measures will become normalised and continue throughout the pandemic and beyond.

The need to urgently commence inspections that observe the “do no harm” principle

The Subcommittee on Prevention of Torture has emphasised that:

whilst the manner in which preventive visiting is conducted will almost certainly be affected by necessary measures taken in the interests of public health, this does not mean that preventive visiting should cease. On the contrary, the potential exposure to the risk of ill-treatment faced by those in places of detention may be heightened as a consequence of such public health measures taken.⁹⁴

The Subcommittee on Prevention of Torture has also stated that it “is the responsibility of the SPT and of NPMs to respond in imaginative and creative ways to the novel challenges they face in the exercise of their OPCAT mandates,”⁹⁵ and to “safeguard the public, detention staff, detainees and themselves.”⁹⁶ Australian oversight bodies should heed this advice, and adjust

their methodology to ensure that they observe the “do no harm” principle when conducting their inspections during the pandemic.

Often the “do no harm” principle is considered in the context of protecting those who engage with NPMs and the Subcommittee on Prevention of Torture from reprisals and in relation to dealing responsibly with confidential information.⁹⁷ The Association for the Prevention of Torture’s guide to monitoring places of detention states that, during visits, “confidentiality, security and sensitivity should be kept in mind. Poorly planned or prepared visits... can actually do more harm than good.”⁹⁸ It states that detainees’ “safety should always be kept in mind by visitors, who should not take any action or measure which could endanger an individual or a group.”⁹⁹

In exercising their mandate while observing the “do no harm” principle, oversight bodies could modify their methodology to incorporate approaches that have been recommended or adopted by United Nations bodies and the World Health Organization (such as the use of Personal Protective Equipment),¹⁰⁰ international NGOs with expertise in this area,¹⁰¹ and NPMs in other jurisdictions. Emerging and best practices have been developed by NPMs that have implemented new monitoring frameworks, guidelines and Memorandums of Understanding, adapting their approach to oversight and inspections during the COVID-19 pandemic.¹⁰² In fact, some modified inspections have already commenced; Her Majesty’s Inspectorate of Prisons (UK) has published inspection reports of modified inspections of both places of detention where youth are held and prisons.¹⁰³

Federal, State and Territory Governments and detaining authorities should accommodate oversight bodies’ modified approaches to detention oversight, as they continue to exercise their mandates while observing the “do no harm” principle.

The need for greater transparency

United Nations bodies and the World Health Organization have emphasised the importance of transparency in relation to places of detention:

- The Subcommittee on Prevention of Torture has stated that it is “important that there is transparent communication to all persons deprived of liberty, their families and the media concerning the measures being taken and the reasons for them.”¹⁰⁴
- The World Health Organization has similarly noted that “[c]ontingency plans should be shared with all involved, including staff members and people living in prisons, in order to minimize unnecessary fear and anxiety.”¹⁰⁵
- The United Nations Office on Drugs and Crime, the World Health Organization, the Joint United Nations Programme on HIV/AIDS and Office of the High Commissioner for Human Rights have jointly stated that “all cases of COVID-19 in closed settings should be notified to responsible public health authorities, who will then report to national and international authorities.”¹⁰⁶

There should be greater transparency by Federal, State and Territory Governments in relation to places of detention. They should regularly provide updated and accurate information across each detention site. Information provided should include:

- Information relating to infection prevention and control measures and contingency plans (particularly strategies, policies and data relating to use of medical isolation, quarantine and solitary confinement, staffing, testing, health provision, personal and legal visits, programs and education);
- information relating to COVID-19 testing and results for people in detention, staff and contractors, infection rates and number of deaths, as well as incidents such as use of force, incidents of self-harm and prison disturbances such as protests.

Data should be disaggregated, in relation to gender, disability status, age and ethnicity.

An example of good practice in other jurisdictions is the Scottish Prison Service, which publishes weekly the number of people in prison who are self-isolating, confirmed COVID-19 cases in establishments and staff absences.¹⁰⁷ Another example is the USA Bureau of Prisons, which provides daily updates on the number of confirmed and recovered COVID-19 cases among people in federal prisons and staff, as well as the number of deaths of inmates and staff.¹⁰⁸

Recommendations

Federal, State and Territory Governments must urgently designate and/or establish National Preventive Mechanisms as part of their response to the COVID-19 pandemic, to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process.

Federal, State and Territory Governments must guarantee all oversight bodies, including National Preventive Mechanisms, unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic. Governments and places of detention must co-operate with oversight bodies, accommodate inspections and respond to requests for information.

In order to ensure greater transparency, Federal, State and Territory Governments must provide regular, updated and accurate information to the public and to oversight bodies on its response to the COVID-19 pandemic in relation to each place of detention. Oversight bodies should publicly report on the information they receive through this process, at regular intervals, and ensure that the voices of people in places of detention are heard in this process.

Federal, State and Territory Governments must not adopt unreasonable measures that will further undermine or limit existing formal and informal mechanisms of oversight and transparency.

6. Reducing the number of people in places of detention

In order to prevent the potential mass spread and incalculable harm that would arise should COVID-19 get into places of detention, Governments across the country must take emergency measures to reduce the numbers of people in places of detention, including people who are at higher risk of significant harm should they contract COVID-19.¹⁰⁹

This is consistent with the advice of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to “[r]educe prison populations and other detention populations wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so.”¹¹⁰

A number of international bodies have also recommended that the detention population be reduced:

- The United Nations has stated that “reducing numbers in pretrial detention, those detained for minor or political offences, near the end of their sentences, or detained unlawfully should be expedited.”¹¹¹
- The United Nations High Commissioner for Human Rights has “urged governments and relevant authorities to work quickly to reduce the number of people in detention, noting several countries have already undertaken some positive actions... Under international human rights law, States have an obligation to take steps to prevent foreseeable threats to public health.”¹¹²
- In a joint statement, the United Nations Office on Drugs and Crime, the World Health Organization, the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS have said that “efforts should encompass release mechanisms for people at particular risk of COVID-19, such as older people and people with pre-existing health conditions, as well as other people who could be released without compromising public safety, such as those sentenced for minor, non-violent offences, with specific consideration given to women and children.”¹¹³
- The United Nations Office on Drugs and Crime has also asserted that “[f]or many countries, reducing the prison population may even constitute a precondition for introducing meaningful prevention and control measures”¹¹⁴ and that “[p]reventing outbreaks of COVID-19 in prisons, including by taking affirmative steps to reduce prison populations, will be much easier than controlling outbreaks once they have occurred.”¹¹⁵
- The Chair of the United Nations Committee on the Rights of Persons with Disabilities has recommended that “States should ensure the safety and integrity of persons with disabilities and accelerate measures of deinstitutionalization of persons with disabilities from all types of institutions.”¹¹⁶

- The Inter-Agency Standing Committee (Office of the High Commissioner for Human Rights and World Health Organization) has highlighted the importance of considering “possible opportunities for release and/or non-custodial alternatives to detention.”¹¹⁷
- The World Health Organization’s Office for Europe has recommended that overcrowding be addressed by release of individuals.¹¹⁸
- The Joint United Nations Programme on HIV/AIDS has advocated that “where it is not possible to assure the health of prisoners within the prison itself, steps should be taken (before the epidemic is in the prisons) for the early/temporarily release of prisoners.”¹¹⁹
- The International Committee of the Red Cross has also recommended reducing numbers in prison.¹²⁰
- The Council of Europe has identified that a “decrease of the prison population is indispensable.”¹²¹

Health experts around the world have also advocated for release of people from places of detention as an essential feature of COVID-19 containment strategies by governments.¹²² In Australia, health experts have also called for release of people from immigration detention.¹²³ Reducing the numbers of people in places of detention is essential for protecting the health of people in places of detention, staff and the broader community.

In prisons and youth detention centres, a decrease in population can be achieved by:

- Releasing people, by granting bail to those on remand, granting early and/or temporary release and parole to people;
- Curbing new admissions, by looking at non-custodial sentencing alternatives, encouraging police to rely on summons and bail rather than arrest,¹²⁴ and raising the age of criminal responsibility.¹²⁵ COVID-19-related offences such as breach of quarantine or social distancing regulations should also be decriminalised.¹²⁶

In NSW¹²⁷ and the ACT¹²⁸ legislation has been passed to provide for the early release of people from prison, but these laws have not yet been utilised.¹²⁹ In other jurisdictions, such as Western Australia, there appear to be no plans for release.¹³⁰ Whether releases have actually taken place remains unclear in some jurisdictions, such as in Queensland and the NT.¹³¹ This is despite extensive advocacy efforts that have been undertaken by civil society in Australia, particularly by Aboriginal and Torres Strait Islander organisations,¹³² and the fact that overseas jurisdictions have already begun the early release of people from prisons.¹³³

People in detention who are most vulnerable to COVID-19, and the impacts of measures implemented to prevent transmission in detention, should be prioritised for release. This includes: Aboriginal and Torres Strait Islander people,¹³⁴ elderly people and people with chronic health conditions, people living with disability and mental health conditions, children, young people, pregnant women, refugees and people seeking asylum.¹³⁵ Improved oversight and transparency can assist in identifying suitable candidates for release from detention.

Other people who should be prioritised for release are those who are primary caregivers for young children, who are close to the end of their sentences, who are detained due to

conditional breaches of bail, sentence or parole, or who have been convicted of minor offences.¹³⁶

Civil society in Australia has also advocated for the release of those who are detained in immigration detention.¹³⁷ In relation to people seeking asylum and refugees in immigration detention, a decrease in population can be achieved by:

- Releasing people from immigration detention into safe housing, where they can comply with the public health advice recommended by the Federal Government and health experts (for example, practicing physical distancing). This could be achieved by granting bridging visas to allow people to live in the community, making “residence determinations” to allow people to live in community detention and expediting the processing of detainees’ existing visa applications.
- Transferring people, with their consent, held in Nauru and Papua New Guinea to Australia before there is a widespread outbreak.¹³⁸

Those who are released from detention must be provided with appropriate medical, housing, financial and other support.¹³⁹

Recommendation

Federal, State and Territory Governments must take immediate action to reduce the number of people held in places of detention. This should include responsibly releasing people who are at higher risk of significant harm should they contract COVID-19, including Aboriginal and Torres Strait Islander people, elderly people, people with chronic health conditions, people living with disability, people with mental health conditions, children, young people, pregnant women, primary caregivers for young children, refugees and people seeking asylum.

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