# 2 Australia

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**Abstract**

This chapter presents an overview of the threat of COVID-19 and responses to the pandemic in Australian adult and youth prisons. It considers the rates of transmissibility and ongoing risks of disease, which are particularly acute for First Nations people. The primary government response to containing the pandemic has been restrictions on the rights of people in prisons, including curtailed personal visits, activities, employment and programmes. The authors discuss advocacy to curb these threats, including calls for decarceration of people in prison, improved health services in prison and better human rights protections and monitoring. It analyses the pandemic as an opportunity for reducing the number of people in prisons through bail, sentencing and parole decisions. The authors propose that, while some institutional responses were welcome, especially court decisions to increasingly order bail and non-custodial sentences, there must be systematic and sustained attempts towards decarceration and ultimately prison abolition. This is due to the adverse impact on the health and human rights of prisoners, which has been brought into sharp relief during the pandemic, and the need for alternative human services and stronger social bonds based on inclusion rather than exclusion.

## 1 Introduction

In the general Australian population, COVID-19 has been contained to a greater degree than in many other parts of the world. As of 21 December 2020, there have been a total of 28,168 cases, averaging at 1,099 per 1 million population. There have been 908 COVID-related deaths, averaging 35 per 1 million population (Worldometer, 2020). These rates are a small fraction of Western European, North American and South American rates. According to Worldometer (2020), Australia is ranked 152nd for COVID-19 infections per 1 million population out of a total of 219 countries.

Australia is a federation, with six states (New South Wales (NSW), Victoria, Queensland, Western Australia, Tasmania and South Australia) and two territories (Northern Territory and Australian Capital Territory (ACT)). To minimise the spread of the virus across Australia, there have been border closures between these states and territories at various times during 2020. As a

result, the impact of COVID-19 infections has fallen primarily on the second most populous state, Victoria, which has accounted for 74% of cases and 90% of deaths, and the most populous state, NSW, which has seen 16% of the cases and 6% of the deaths (Australian Government, 2020). The virus has also been concentrated in these two states' capital cities. The remainder of Australia has had very few infections and deaths, although outbreaks (and consequent lockdowns in the community) continue to emerge sporadically.

It follows that the infection rate of COVID-19 in prisons has also been significantly lower in Australia than in most other countries (Rapisarda and Byrne, 2020). As of 20 December 2020, there had only been several dozen COVID-19 infections reported in adult prisons and/or youth detention centres in NSW, Victoria, Queensland and South Australia. Many of these infections involved staff. There have been no reported COVID-19-related deaths in prisons.

As has been the case internationally, however, prisons in Australia are at risk of rapid spread of COVID-19 and consequent fatalities if there is an outbreak. Prisons have severe overcrowding, often operating at over 100% of design capacity (Productivity Commission, 2020). There are increasingly dormitory prisons in Australia (Justice Action, 2017), of the style commonly seen in the United States, where the potential for any virus to spread is heightened.

In relation to other diseases, such as Hepatitis C, there is evidence that the spread of infection in Australian prisons is significantly higher than in the general population (see, for example, Hepatitis Australia, 2017). 25% of people in prisons have Hepatitis C, compared with a prevalence of less than 1% in the general Australian population (Australian Institute of Health and Welfare (AIHW), 2019). There is also inadequate access to healthcare in prisons (Public Health Association of Australia, 2017).

The risk of contracting COVID-19 in prisons is especially high for First Nations people. Despite accounting for only 3% of the general Australian population, First Nations people constitute 28% of the prison population, have higher levels of chronic health conditions, are less likely to receive access to healthcare and more likely to experience neglect (Australian Law Reform Commission, 2017). These factors can be traced to historic and systemic racism in the health and law enforcement systems. First Nations organisations in Australia and families who have lost loved ones due to deaths in custody have highlighted the disproportionate impact that COVID-19 would have on First Nations people if there were major outbreaks in prisons (National Aboriginal and Torres Strait Islander Legal Services, NATSILS, 2020a, 2020b). There are also concerns that the return of First Nations people infected with COVID-19 from prisons to their communities could threaten vulnerable First Nations communities (Anthony, 2020a), undermining the successful efforts of the First Nations community-controlled health sector to exclude COVID-19 from First Nations communities (NATSILS, Danila Dilba et al., 2020).

### 1.1 Legal rights and responsibilities for the health of people in prisons

International bodies have identified the need to protect the health of people in prisons. The World Health Organization (WHO) (2020b: 1) warned that incarcerated people and detainees are likely to be "more vulnerable" to COVID-19 than the general population. It recommended the release of people from prisons as a COVID-19 control measure. The United Nations (UN) High Commissioner for Human Rights has called on governments to take urgent action to protect the health and safety of people in detention (Bachelet, 2020).

The UN Committee on Economic, Social and Cultural Rights (CESCR) has long recognised that "[h]ealth is a fundamental human right indispensable for the exercise of other human rights" (2000: 1); in other words, that health *is* life. A population's health is central to its survival and

makes the enjoyment of all other rights possible. Australia is a signatory to the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR).

In relation to the COVID-19 outbreak, the right to health obligates the State to take positive measures "to prevent, treat and control epidemic and endemic diseases" (CESCR, 2000: 44). Accordingly, a State is in violation of its obligations under the ICESCR if it fails to "take all necessary steps" to provide conditions for health (2000: 52). It follows that Australia's responses to controlling COVID-19 in the community were necessary for protecting good health. However, maintaining people in restrictive and unhealthy prison environments is arguably at odds with the general tenor of Australia's COVID-19 management strategies.

Australia has acceded to treaties which incorporate explicit references to a "right to health" (for example, *International Convention on the Elimination of All Forms of Racial Discrimination 1965*: Art 5(e)(iv)*; ICESCR:* Art 12.1; 12.2; *Convention on the Elimination of All Forms of Discrimination against Women 1979*: Art 12; *Convention on the Rights of the Child 1989:* Art 24). However, there is no explicit right to life or health in the Australian Constitution (*Commonwealth of Australia Constitution Act 1900* (Cth)). In the absence of a national Bill of Rights, three jurisdictions have enacted state or territory human rights legislation (*Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld)), requiring that all statutory provisions are interpreted in a way that is compatible with human rights and imposing an obligation on public authorities to act in a way that is compatible with human rights. If we take the Victorian Charter as an example, it does not give rise to a cause of action in and of itself. However, a breach of the Charter can be litigated alongside an existing cause of action. The main power of the Charter is to exert normative

influence on public authorities to consider human rights (*Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129).

Under its federated structure of government, all Australian states and territories are signatories to the *National Health Security Agreement* (2011: cl 21(b)), which recognises that state and territory governments have "primary responsibility for the public health response, and other emergency situations, within their jurisdictions in accordance with their own public health and emergency legislation and plans". Further, state emergency legislation in Australia generally contains specific provisions in relation to proportionality (for example, *Public Health and Well Being Act* (Vic) s 9).

In the context of COVID-19, accepting that some rights are not absolute (ICCPR Art 4(1)), rights are restricted to protect public health, including those of incarcerated people. However, restrictive measures must be necessary, proportionate and non-discriminatory. According to the UN Human Rights Committee, "necessity" relates to the relationship between the limitation of the right and addressing the emergency (2001: [3]); "proportionality" relates to the duration and scope of the measures taken (2001: [4); and non-discrimination relates both to how the measures are crafted and to how they affect sections of society (2001: [8]). In prisons, this means that quarantine, isolation, dispersal and lockdown, which can have significant effects on mental and physical health, must be thought through, not a knee-jerk response, particularly as prisons commonly have high levels of people from minority groups, individuals with disabilities and individuals with specific vulnerabilities (AIHW, 2019).

Aside from human rights obligations, there is a general acceptance that States, in their control of detention facilities, have a duty of care to incarcerated people. This was seen in the case of Mark Rowson, an incarcerated person who sought orders to be released from Port Phillip Prison in

Victoria, on the basis of the risk of COVID-19, in light of his pre-existing health issues. In *Rowson v Department of Justice and Community Safety* [2020] VSC 236, Ginnane J reaffirmed the State's duty to take reasonable care for incarcerated people's health and ordered an independent COVID-19 risk assessment, the recommendations of which were to be implemented by the government. However, Judge Ginnane's judgment was only a preliminary order, and there was no final finding as to whether the state had breached the National Guidelines promulgated by the Communicable Diseases Network Australia (2020) for controlling COVID-19. This is despite it being widely accepted that places of detention in Australia are chronically overcrowded, inadequately serviced with healthcare personnel and facilities, and contain people with unique vulnerabilities that make them susceptible to COVID-19 and more serious consequences if they become infected.

The controlled release of incarcerated people, as recommended by the WHO, took second place to the maintenance of "law and order" in Australia. State and territory governments and their agencies were more concerned to restrict the rights of people in prisons and facilitate the entry of new people into prisons. In most jurisdictions, prison penalties attached to specific breaches of COVID-19 lockdown measures. Within prisons, isolation and lockdown have been key tools for managing COVID-19.

Essentially, the effort seems to have been directed at keeping COVID-19 out of prison, rather than preparing for contagion or committing to healthcare. This approach was not wholly successful, since COVID-19 did penetrate some facilities (Boisvert and Morse, 2020; Rendall, 2020; Russell, 2020). Notably, by late August, 48 people who lived or worked in prison in Victoria had tested positive (Rapisarda and Byrne, 2020).

The fact that there have not been more cases of COVID-19 in prisons is doubtless due in large part to national lockdown and some good luck, due to the concentration of the virus in relatively few parts of Australia and low rates overall. Yet, with many new COVID-19 outbreaks in states, whether it be in Victoria in July or South Australia in November 2020, prisons have been among the first sites to report cases. Therefore, we know that if Australian governments lose control of the management of COVID-19, disease in prisons is an inevitable consequence where overcrowding and vulnerability are the norm. In the event of wide community spread in Australia, the risk of uncontrolled prison outbreaks remains.

The fact that there have been relatively few cases of COVID-19 in Australian prisons does not mean that people incarcerated have escaped unscathed. Lockdowns in prison have included the isolation of vulnerable adults and children. This is highly likely to have compromised their health and well-being and to exacerbate existing vulnerabilities (Anthony, 2020c citing Deadly Connections mental health survey). Access to evidence and resources to challenge these conditions are limited. For First Nations people, the harm is exacerbated by a colonial history of trauma arising from imprisonment and a lack of community and cultural input or contact (Australian Law Reform Commission, 2017).

As our analysis in this section highlights, in the context of health, even in a pandemic, there is a rights-based framework that continues to be legally enforceable. However, Australian policy and operational responses to COVID-19 risks to prisons were issued in an ad hoc fashion without a holistic plan for the health and well-being of people inside, accountability or transparency. Following the imposition of restrictions on prisons in March 2020, the Australian Government in April 2020 endorsed adherence to the Communicable Diseases Network Australia (CDNA) (2020) guidelines for prisons. Although the CDNA guidelines were subsequently updated,

including with reference to releasing people from prison to mitigate against COVID-19 risks, the Federal Government has not updated its guidelines accordingly.

To date, there has not been a systematic audit of the effects of restrictions on incarcerated people, despite state responsibilities for already overcrowded prisons and the health of vulnerable people in prisons, nor has there been robust human rights analysis of necessity and proportionality of ongoing use of restrictions by detaining authorities or governments. The long-term implications on the well-being of people who have been incarcerated during this period, with the effects of lockdown, dispersal and isolation, remain to be seen, but are likely to be significant and may last far beyond their time in custody. Indeed, the Deadly Connections survey cited below demonstrates the emerging deterioration of mental and emotional well-being for First Nations people inside.

## 2 Penal policy during COVID-19

In Australia, the COVID-19 response has been coordinated by a National Cabinet. This is a body comprising Federal, state and territory political leaders who, in the main, have agreed upon the COVID-19 policies and practices in each jurisdiction, which are proportionate to the COVID-19 risks in each state and territory at any given time. This has been necessary, given that health policy is primarily in the domain of the states and territories. As mentioned above, the Federal commitment to the first iteration of CDNA guidelines on prisons reflects this unified response in April 2020. Even before then, however, there was substantial consistency across Australia to the COVID-19 restrictions imposed on prison environments.

A critical aspect of the COVID-19 government response in Australia has been law enforcement. The use of policing and penalties to assure public health compliance during COVID-19 has been a “pivotal” enforcement tool (Goldworthy and Lincoln, 2020). This has included enforcement of

lockdown, social distancing and state/territory border controls. A notable exception is the ACT, which has refrained from prescribing criminal sanctions for COVID-19 breaches (Jervis-Brady, 2020). It has constrained procedural fairness within the justice system. In Victoria, the *Omnibus (Emergency Measures) Act 2020* (Vic) (*Omnibus Act*), enacted on 23 April 2020, increased punitive powers and suspended jury trials until November 2020. There have also been tough measures for regulating COVID-19 quarantine, with facilities overseen by police, military officers and private security.

Although the National Cabinet has provided leadership on health policies and practices, enforcement has been a matter for the states and territories. Australia's six state and two territory governments have plenary power over criminal justice. The Federal Government determines a small range of Federal offences and penalties (e.g. relating to human trafficking and terrorism). Consequently, people incarcerated in Federal prisons only account for about 2% of all people in prisons (Australian Bureau of Statistics, 2019). The overwhelming majority are locked up in prisons for state and territory offences on remand and sentence. State and territory differences in law enforcement and the management of prisons under the pandemic have largely been a matter of degree.

Prior to the pandemic, all Australian states and territories had seen increases in the imprisonment rates over the past decade. However, there is a vast discrepancy in imprisonment rates, varying from 135 per 100,000 population in the ACT, to 913 per 100,000 population in the Northern Territory (Australian Bureau of Statistics, 2019). It should also be noted that, with a pre-COVID-19 adult incarceration rate of 223 per 100,000 (Australian Bureau of Statistics, 2020) and a total incarceration rate of 172 per 100,000 (Institute for Crime & Justice Policy Research, 2020), Australia is a comparatively high incarcerating country, relative to other Western nations. These

rates are more than ten-fold for the First Nations peoples, who are the most incarcerated people on Earth (Anthony, 2017).

With an increasing prison population, crowding increases, as does the level of health vulnerability. As set out above, this poses particular challenges for First Nations people to retain good health, and indeed life, in such circumstances. An open letter by First Nations families (2020) whose loved ones died in prison stated:

> We know that our people are more vulnerable to contracting and dying from COVID-19. We fear that a Black COVID-19 death in custody is only a matter of time: the risk is compounded by the mass incarceration of our people and the high rates of Aboriginal deaths in custody.
>
> Far too often, our people have died in custody because their health issues have not been taken seriously due to racism. Prisons are not safe. Consequently, our people are 'at risk' during this pandemic and must be released.

Australia's pandemic response for prisons has emphasised isolation and lockdown (ACT Inspector of Correctional Services, 2020b). This concern adds to existing grievances relating to the isolation of children in detention centres (Victorian Ombudsman, 2019). At the same time, governments recognised the problems of a large prison population for the spread of COVID-19, following advocacy for the rights of people in prisons. Early in the pandemic, hundreds of academics, legal practitioners and justice advocates signed open letters, calling for a rights-based approach to prison arrangements, including the release of vulnerable incarcerated people (Bartels, Anthony and Fletcher, 2020), released on 20 March. This was followed by a second open letter (Gerry, Anthony and Bartels, 2020) on 9 April and third open letter (NATSILS, Anthony and Gerry, 2020) on 13 August 2020. Open letters were supplemented by the individual and combined lobbying of community legal services, law societies and institutes, First Nations

organisations (e.g. Aboriginal legal services and Change the Record), First Nations families (2020), non-government organisations and other professionals. They advocated for the rights of people in prison and decarceration (Federation of Community Legal Centres Vic and Law Institute Victoria, 2020).

One significant policy shift was the passage in March 2020 of the NSW emergency laws to release people convicted of minor offences from prisons (*COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW); for comment, see Anthony, 2020b; Rapisarda and Byrne, 2020). To similar effect, the ACT also passed legislation to provide for the early release of certain incarcerated people in limited circumstances (*COVID-19 Emergency Response Act 2020* (ACT) and *COVID-19 Emergency Response Legislation Amendment Act 2020* (ACT)). However, neither jurisdiction has used the legislation and it quickly emerged that it would only be used reactively, rather than as a proactive decarceration measure, as part of a responsible preventive health response to a pandemic. For example, the NSW Corrections Commissioner stated that:

> although he had special powers to release low-risk, vulnerable prisoners in the event of a coronavirus outbreak, he had not seen any need to use them as yet. "I am very pleased that the opportunity is there if I ever need to use it – I hope I won't have to".
>
> (Farquhar and Scully, 2020)

The inference is that the "need" would only arise once the contagion had breached the prison estate, which defies the logic that decarceration should be directed to preventing outbreaks. Beyond the policy realm, the judiciary and parole boards have been more proactive during the pandemic with respect to using their existing powers to bail, order community-based sentences and release people on parole to reduce prison populations (Anthony, 2020c).

Across Australia, the prison population declined by between 3% and 8% between March and June 2020 (Australian Bureau of Statistics, 2020), with a 17% decline in the number of new prisoners. More recent data from NSW indicate that the size of the population in prisons remained steady in the following quarter (Bartels, 2020; NSW Bureau of Crime Statistics and Research, 2020; Rapisarda and Byrne, 2020). The decline has been marked for First Nations people, at 5% of the total population and a 19% reduction in the number of people received into custody, compared with the previous quarter (Australian Bureau of Statistics, 2020). Reductions have been especially significant in the remand (unsentenced or untried) population, which comprises over one-third of the Australian prison population (Australian Bureau of Statistics, 2020; Sarre, Bartels and Makkai, 2020). Community corrections orders have also declined, with 78,843 people subject to community-based corrections in June 2020, compared with 83,377 in the March 2020 quarter (Australian Bureau of Statistics, 2020).

Perhaps the most significant issue is that most correctional officers are not medically qualified and, outside of a pandemic, health treatment and management in prisons are reactive, rather than proactive. Aside from an argument that justice systems and corrections facilities should more generally take an evidence-based healthcare approach to incarceration/decarceration, in a pandemic it is necessary to ensure that people are assured the highest attainable standard of physical and mental healthcare, which must necessarily include reducing the risk of contagion through reducing the numbers of people in prison so that those remaining can, for example, be socially distanced but also able to interact, work and exercise safely within prison and to maintain relationships with those outside. Queensland has come under the spotlight for not allowing quarantined incarcerated people any, or insufficient, out-of-cell time, both in its youth justice (Hurley, 2020) and in adult (Smee, 2020b) facilities.

# 3 Restrictions on contacts with the outside world

Between March and June 2020, prisons across Australia restricted personal visits and other support programmes. NSW and Victoria reinstituted visits in prisons and youth detention facilities from 23 November and 11 December 2020, respectively, with options for virtual visits continuing. Visits have continued to be suspended during periods when there is community transmission. Contact with people outside is vital to the well-being of people in prisons, for emotional comfort and for material support (Penal Reform International, 2016: 1). It is also critical for the well-being of family members in the community, such as young children whose mothers are in custody.

# 4 Restrictions inside prisons

## 4.1 Restrictions for people arriving in prison

In most Australian prisons, there is a mandatory 14-day quarantine period for people arriving at prisons, including children accompanying sentenced parents. In April 2020, following a correctional centre officer testing positive to COVID-19 while off-duty, Queensland Corrective Services (2020) introduced isolation protocols to all its facilities. The protocols required all newly incarcerated people entering high-security centres to be placed into isolation for 14 days with no time out of cell. Commissioner Peter Martin APM acknowledged the move as "a significant departure" from usual procedures, but justified it by highlighting that "overseas prisons are seeing the terrible impact this pandemic can have within a prison environment" (Queensland Corrective Services, 2020). Such a general response is axiomatically not based on the particular needs of individuals in prisons or the capacities of specific institutions.

On 28 March 2020, quarantine measures were also adopted by Corrections Victoria, with the establishment of "protective quarantine units" at five prisons (out of 16 prisons in Victoria) (Corrections Victoria, 2020). Comparable measures were also put in place by Corrective Services NSW (2020) and Tasmania (Elise Archer, Minister for Corrections, 2020; )Tasmanian Prison Service (2020)).

The CDNA (2020) guidance on routine intake quarantine for new admissions remained silent on the topic until its third iteration, on 24 July 2020. The CDNA guidance is that:

> new inmates/detainees to the facility, who have been in geographic areas with elevated risk of community transmission within the past 14 days, should be quarantined until 14 days from when they were last in the area with community transmission, prior to being allowed to mix with other inmates/detainees.
>
> (2020: 15) (emphasis added)

The WHO (2020a) has issued guidance discouraging the use of "routine intake quarantine", noting that unnecessary medical isolation has negative impacts on mental health. The WHO Regional Office for Europe (2020: 21) has recommended that "[a]ny detainee who has (a) travelled from or lived in an identified high-risk area, or (b) had contact with a known case of COVID-19, should be placed in quarantine, in single accommodation, for 14 days from the date of travel or last possible day of contact". It should be noted that, as at 21 December 2020, there would be very few areas in Australia which would likely be characterised as high risk areas, such as hotel quarantine in which overseas travellers are currently quarantined. Governments have not been regularly reviewing the need for protective quarantine to exclude COVID-19 from places of detention, and whether it is a proportionate response, in line with developments in the community. The UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or

Degrading Treatment or Punishment (2020: 3) has also suggested that, if such restrictive measures are used, they must be "on the basis of an independent medical evaluation, proportionate, limited in time and subject to procedural safeguards".

A positive development in Victorian youth detention has been that, as of 30 November 2020, "the 14-day admission isolation process ceased and youth are placed in isolation on admission only for the minimum period necessary to return a negative test result" (Victorian Department of Justice, 2020). Unfortunately, the same cannot be said of prisons, which continue to impose 14-day quarantine on people entering the prison system (Victorian Department of Justice, 2020: 2–3) despite there being no locally acquired cases of COVID-19 in Victoria. Justice advocates have continued to protest the practice as disproportionately harsh and more recently, E-mails obtained under Freedom of Information have demonstrated these arrangements to seemingly be based on publicly available advice from the United States Centers for Disease Control and Prevention website rather than being informed by health expertise.[1]

### 4.2 Restrictions to employment and programmes

In many prisons, opportunities to undertake work have been significantly curtailed due to COVID-19. There have been some new roles relating to COVID-19 cleaning that have raised concerns about health risk and exploitation among First Nations legal services (Victorian Aboriginal Legal Service, 2020a). There are also restrictions to programmes due to the lack of capacity or unwillingness of providers to enter prisons.

## 5 Compensatory measures: access to AVL with families

Many prisons have for the first time introduced audio-visual link (AVL) contacts between people in prisons and their families. Technology to link people in prison with their family has been a

long-standing demand of advocates for people in prisons, such as Justice Action (2012) since 1998. A survey conducted by Corrective Services NSW indicated that people in prison valued the opportunity to communicate with their families through this medium; 90% of respondents were reportedly satisfied with the family video visit experience and 85% wanted family video visits to continue once COVID-19 restrictions are lifted (Anonymous, 2020). However, an independent survey of 63 First Nations people in NSW prisons and their families by Deadly Connections found that they were suffering from the lack of personal contact under COVID-19 restrictions (Anthony, 2020c).

A study commissioned for SHINE for Kids, a non-government organisation that supports the families of people in prison, surveyed 84 carers of children with a family member (usually a father) in prison (Flynn et al., 2020). It revealed that video conferencing and phone calls were not seen as particularly suitable for young children at home, as they were too short or were offered at times which were not appropriate for children. However, there were a number of positives, including the opportunity for parents to read a story to their child and participate in the bedtime routine. Nevertheless, respondents described the negative impact of visiting restrictions on the emotional well-being of both the person in prison and their child(ren). This progress to communication developed against a background of mobile communication as a sanctioned conduct.

# 6 Legal basis for restrictions and relaxations of the prison regime

## 6.1 An absence of safeguards

The implementation of restrictive regimes, including quarantine and lockdowns in prisons, has not been matched with the legislated safeguards, policies, procedures and practices crucial to

ensuring that people in prison are not subjected to conditions or treatment that amount to a health risk, including through cruel, inhuman or degrading treatment. For example, the Victorian Aboriginal Legal Service (VALS) has raised concerns that, under the *Omnibus Act*, "there is a broad discretion to place a young person in isolation, which may be abused. There does not appear to be additional guidance, directives or training for staff on when and how to exercise their discretion under the Act", that "children who are placed in isolation for 14 consecutive days may not be allowed time out of isolation on the basis of security concerns", and that the Act permits "effectively extending isolation [of children] beyond the 14 days by having back-to-back periods of isolation" (Victorian Aboriginal Legal Service, 2020b: 20).

### 6.2 A lack of transparency by governments and detaining authorities

Similarly, there has consistently been a lack of transparency in relation to the treatment and conditions of people detained in prisons and youth detention facilities, as highlighted by NGOs such as VALS. It highlighted concerns in relation to "protective quarantine" and a lack of safeguards (Victorian Aboriginal Legal Service, 2020b: 5, 7, 8). There are difficulties with publicising private health data, but this does not prevent an audit of the health of people in prisons and transparency of arrangements for people in categories of health vulnerability.

### 6.3 External visits and monitoring: legal basis and realities

COVID-19 has limited, but not wholly prevented, external oversight of Australian correctional facilities. In NSW, for example, the importance of maintaining oversight was enshrined in the emergency powers legislation, ensuring that the NSW Inspector of Custodial Services and Ombudsman were exempt from any visitor restrictions (*Crimes (Administration of Sentences) Act 1999* (NSW) s 275(3)). In August, the ACT Inspector of Correctional Services (2020a)

indicated that it would visit both the adult and youth facilities during the pandemic and was "very conscious of the further restrictions that are being placed on those who are deprived of their liberty in response to COVID-19". In Victoria, however, there was less certainty, with emergency measures legislation granting the Secretary or the Governor the ability to prevent any "visitor" (as defined by s 33 of the *Corrections Act 1986* and including "an independent prison visitor" or "an Ombudsman officer" from entering a prison (see *Corrections Act 1986* (Vic) s 112G).

Legal uncertainty aside, as an early response to COVID-19, most external monitoring bodies across all Australian jurisdictions made the decision themselves to cease their visits, to mitigate the risk of staff introducing the virus into centres (Caruana, 2020). South Australia's Training Centre Visitor, appointed under *Youth Justice Administration Act 2016* (SA), was a notable exception, continuing to undertake a programme of regular fortnightly face-to-face visits to all units in the Adelaide Youth Training Centre by one or two staff members.

Inspectorates adjusted to a "virtual/remote" visiting model. These adjustments included daily briefings from departmental leaders, telephone briefings from centre managers, monitoring prison databases remotely and/or contacting incarcerated people and their representative organisations. In the face of strict travel restrictions to regional Western Australia, the Western Australian Inspector of Custodial Services (2020), for example, inspected a regional prison through an assessment of documentation, surveying staff and incarcerated people, conducting telephone interviews with prison staff and managers, interviewing community groups and contractors, and analysing its own information from over a dozen monitoring and liaison visits to the facility in the preceding three years.

The NSW Inspector of Custodial Services has stated that "[p]hysical visits and inspections of custodial centres will only take place at the direction of the Inspector",[2] the ACT Inspector of Custodial Services affirmed on 25 August 2020 that "during the COVID-19 pandemic where it is safe to do so consistent with ACT Chief Health Officer advice",[3] and the WA Inspector of Correctional Services returned to normal operations in October 2020.[4]

In contrast, in Queensland, where there have been prison disturbances (Richardson, 2020), and conditions akin to solitary confinement (Smee, 2020b), the government has been severely criticised for its inaction in establishing an independent external monitoring body (Smee, 2020a). In the NT, no changes were made to the location of detained children, already locked in a prison condemned for adult occupation.

In Tasmania, the Custodial Inspector postponed all scheduled inspection between March and June 2020; however, no public information was made available on how COVID-19 has impacted its operations. Incarcerated people are still able to write or phone the Inspector and the Official Visitor programme. In the NT, where a regular programme of independent monitoring does not exist, the Office of the Children's Commissioner (OCC) of the Northern Territory (2020) published inspection reports for pre-COVID-19 visits to NT's youth detention facilities in June. Neither the OCC nor the NT Ombudsman has made public comment about correctional or youth detention facilities since restrictions came into force.

Reflecting on the impact of COVID-19 on external oversight and complaints handling through 2020, the NSW Ombudsman reported that it is critical that oversight and complaint handling be consciously considered, and if necessary, designed at the outset and alongside other crisis response planning activities. The Ombudsman further noted that if a National Preventive

Mechanism (NPM) had been operating in NSW in accordance with OPCAT during the COVID-19 pandemic, this would likely have had significant implications for oversight.[5]

### 6.4 Judicial measures to manage prison environments: COVID and human rights risks

While policymakers have been reluctant to enact and implement prison release programmes, courts and parole boards have been increasingly cognisant of the health risks in prison. Generally, courts have recognised that prisons are susceptible to the spread of COVID-19, people in prisons are adversely impacted by onerous restrictions and that First Nations people are especially vulnerable (Public Defenders, 2020). This probably accounts for the statistical reduction in prisoner numbers due to courts recognising the consequent harm, but must be seen against a background of significant case delays in some states while there was a moratorium on jury trials in the pandemic.

## 7 Returning to normal – easing of COVID-19 prison restrictions in late 2020

Although Australian governments eased COVID-19 community restrictions in most states and territories by mid-2020, corrective services agencies responded more slowly. In NSW, personal visits did not resume until 23 November 2020 and in Victoria personal visits recommenced as late as 6 March 2021. Furthermore, prison visits continue to be suspended periodically in response to community transmission.

In Victoria and NSW, prisons continue to use 14-day protective quarantine as of March 2021. This is highly concerning in the detention context, as there is no certainty when COVID-19 will cease to be a threat to health in Australia. Governments and detaining authorities cannot and should not persist with the strategies currently being employed to exclude and contain COVID-

19, given the significant and potentially permanent deleterious health effects on individuals and the ever-increasing risk of current restrictive practices, which breach human rights, becoming normalised. There must be short-, medium- and long-term plans developed and executed, to ensure that Australia, at this crucial juncture, improves the justice and penal systems to ensure the highest attainable standards of health via significant reforms (Federation of Community Legal Centres Vic and Law Institute Victoria, 2020), to include a decarceration policy.

There should be benchmarks for lifting restrictions on people in prisons, guided by human rights and evidence-based health advice, which can contribute to improved health and well-being outcomes for detained people in the long term. This includes reform to reduce high levels of anxiety, despair and feelings of powerlessness, which may precipitate protests in Australian prisons (and the accompanying, often violent, put down responses). Overall, a rights-based approach requires short-term and long-term evidence-based healthcare. It must be coupled with a human rights model that moves us in the direction of prison abolition and cultures of social inclusion.

### 7.1 What can be learned

Lessons from Australia relate primarily to the need for decarceration to enable people to acquire physical and mental health support and treatment in the community. Prisons, by contrast, are not structurally poised to cope with the health needs of people inside, nor equipped with services and an ethical framework to enable appropriate healthcare. While it is difficult to draw conclusions about the effectiveness of COVID-19 prison restrictions, as Australian prison environments have not been systematically tested for COVID-19 and community transmission rates in Australia have remained relatively low, there have been deleterious impacts on the human rights and mental well-being of the people inside prisons and youth detention centres. The crucial lesson,

we suggest, is that diminishing prison populations can be highly effective in protecting rights and prioritising the human needs of individuals over punitive policies not just during a pandemic but for the realisation of commitments to rights to health and life for people in prisons. These lessons should inform a decarceration agenda that promotes a society based on the provision of services and supports rather than silos of exclusion from social relationships, healthcare and human rights.

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