

COVID RECOVERY: PEOPLE IN PRISON

People in Victoria's prisons are acutely vulnerable to the physical health risks of COVID, but also to adverse wellbeing and human rights consequences of COVID-related restrictions. As Victoria progresses into the recovery period, and restrictive measures remain in place, Government must take proactive steps to fulfil its duty of care towards those in its custody. This includes ensuring that people in prison can remain connected with loved ones and legal assistance, and that restrictions are not disproportionately severe compared to the actual level of COVID risk.

Ultimately, the best way to mitigate the health and wellbeing risks posed to people in the prison system is to reduce the prison population. The second-best way is to ensure that conditions within prison are carefully monitored to protect against unnecessarily punitive or harmful measures. Both pathways are an essential part of a just and equitable recovery and transition to COVID Normal in the corrections context.

The serious health risks posed by the possibility of COVID-19 entering corrective facilities led to the imposition of Protective Quarantine and other restrictive health measures for people in custody. While this was no doubt successful in avoiding the spread of COVID-19 through Victoria's prison population, it is crucial to ensure that use of the new powers does not unacceptably infringe on the human rights of people in prison and remains proportional to the risk as it changes. At the same time, innovations to maintain connections between the prison population and their loved ones and legal assistance have been successful and should be retained and enhanced over the COVID recovery period and beyond.

Ultimately, decarceration is the best way to reduce the level of COVID-related risk inherent to the prison environment, both to people inside and outside prison walls. The prison population has already been declining in recent months, partly as the courts have accepted that COVID-19 and other factors combine to create 'exceptional circumstances' and 'compelling reasons' sufficient to rebut the presumptions against bail under the *Bail Act 1977*. There are actions government can and should take to safely build on and sustain this trend.

PROTECTING THE WELFARE AND HUMAN RIGHTS OF PEOPLE IN PRISON

The COVID response has seen the restriction of in-person visits to people in prison, as well as the creation of new opportunities for social connection through digital technologies. The introduction of Protective Quarantine, meanwhile, undeniably mitigated the risk of a COVID-19 outbreak in the prison system, but has also threatened the legal and human rights of people entering prison. The use of Emergency Management Days to recognise the increased restrictiveness of time spent in prison is a welcome safeguard against injustice, but it is important that this measure is used consistently, transparently and fairly to achieve this objective.

As we enter the recovery period, there are immediate actions that can and should be taken in relation to these prison processes to preserve prisoner welfare, human rights and access to justice.

VISITS

In-person visits have been restricted across the prison system, as a necessary measure to prevent the transmission of COVID between people in prison and the community. At the same time, legislative amendments were introduced to allow people who had been prohibited from visiting prisons to communicate with people inside prison in other ways. Corrections Victoria has made videoconferencing and telephone facilities available to prisons for remote visits, and being able to stay in touch with their friends and family has been crucial to the wellbeing of people in prison during this period. CLC lawyers have also been able to speak with clients through remote visit technology.

The Federation has welcomed the efforts made by Corrections Victoria to enable people in prison to remain in contact with people outside prison, and supports the continued facilitation of remote visits during and after the COVID recovery period. People in prison have been able to connect with loved ones in regional areas, overseas or interstate in new ways, and the improvements to prisoner welfare created through these changes should be retained into the future.

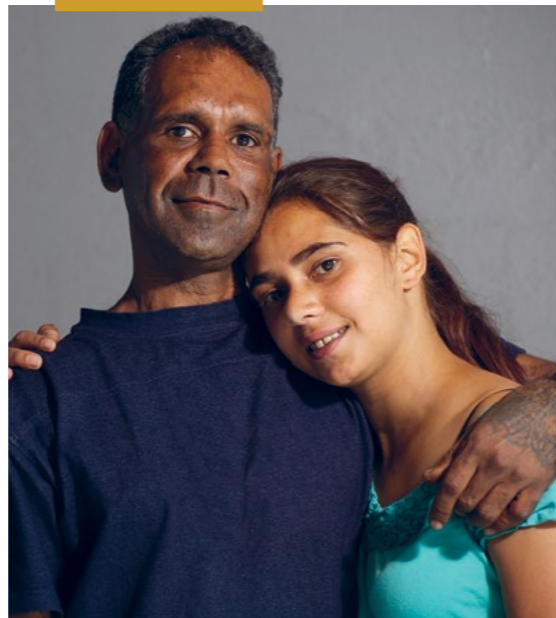
At the same time, it can be more difficult for people in prison to receive legal advice remotely, especially when legal appointments are competing for the use of limited video link facilities, and when priority must be given to those requiring access to video links for remote court attendance. In this context, the Federation recommends that Corrections Victoria invest in technology to improve connectivity and increase access to devices and video links to ensure that everyone in prison has fair and sufficient access to legal assistance and remote visit capabilities.

It can also be challenging for people in prison to remain meaningfully connected with their children through remote visits, especially babies and young children who have less ability to use and understand digital communication technologies. This may also be true for people in prison with elderly relatives or loved ones or those with complex communication needs. The Federation recommends the resumption of in-person visits as soon as it is safe to do so.

Recommendation: Retain digital visit technologies to allow people in prison to remain connected with family, friends and community

Recommendation: Corrections Victoria invests in technology to improve connectivity and increase access to devices and video links to ensure that everyone in prison has fair and sufficient access to remote visit capabilities.

Recommendation: In-person visits resume as soon as possible under medical guidance.



PROTECTIVE QUARANTINE

The response to the risk of COVID-19 entering prisons has included the introduction of Protective Quarantine at all prisons in Victoria, in which everyone entering prison custody is placed in isolation units for 14 days. The Federation acknowledges that Protective Quarantine is a necessary measure to separate people at risk of carrying COVID from the rest of the prison population.

However, the enforced isolation of people in the prison context can quickly evolve into detention that infringes upon human rights and negatively affects the mental health of those detained. If Protective Quarantine is to remain a feature of Victoria's prisons into the new COVID Normal, in order to avoid unacceptable human rights contraventions now and into the future Protective Quarantine must be tailored to the public health risk as it evolves, only used when medically necessary, and not constitute solitary confinement.

Solitary confinement comprises the confinement of people in prison for 22 hours or more a day without meaningful human contact,¹ and is one of the most serious forms of punishment available in the Victorian justice system, given the profound impacts involuntary and constant isolation can have on people's mental and physical wellbeing. The Royal Commission into Aboriginal Deaths in Custody recommended three decades ago that Aboriginal and Torres Strait Islander people should never be held alone in rooms or cells, and for the estimated 90% of women in prison who are victim-survivors of family violence, confinement can replicate prior experiences of surveillance and control – compounding their trauma even further.

Protective Quarantine must not operate as de facto solitary confinement, and must remain a proportional response. All efforts must be made to ensure that people in Protective Quarantine are able to have out-of-cell hours and can still access services and programs they may need.

The Federation recommends that the policies and procedures implementing Protective Quarantine be aligned to the following principles, developed by medical staff working in correctional contexts in the United States:²

Oversight by, and access to, medical staff;

- ▼ Equivalent access to media and entertainment as other people in the same level of corrective custody;
- ▼ The means to communicate with people outside prison, including legal representatives;
- ▼ Regular updates from medical staff about the ongoing need (or otherwise) for quarantine; and
- ▼ Appropriate ventilation, furniture and temperature.

It is also vital that people in prison, and their families and legal representatives, are kept informed of policies and procedures relating to Protective Quarantine. New powers introduced with the COVID Omnibus legislation allow corrections staff to issue directions to people in their custody that are necessary to medically examine, assess, test or treat the person, if the person gives informed consent to the procedure. As with COVID-19 health restrictions more broadly, rules in Protective Quarantine are subject to frequent alteration. CLC clients have reported that the procedures around COVID-19 testing and release from quarantine have been unclear, creating anxiety and uncertainty for themselves and their families. Ensuring the provision of up-to-date and easily accessible information about Protective Quarantine policies and procedures, and the medical basis for restrictions, would help to alleviate these worries while enabling people to give the required consent to medical directions.

Recommendation: The use of Protective Quarantine must be necessary and proportionate to the risk of contracting or spreading COVID-19

Recommendation: Ensure that Protective Quarantine aligns to best practice principles for correctional quarantine and does not constitute solitary confinement or punishment

Recommendation: Provide accessible, up-to-date information about Protective Quarantine restrictions to prisoners, families, and legal representatives

EMERGENCY MANAGEMENT DAYS

People in prison can apply for 'Emergency Management Days' ('EMDs'), which allow for days spent in unusually restrictive or disrupted environments to be counted towards their sentences at an increased rate. People who can demonstrate good behaviour while suffering deprivation or disruption during an emergency can apply for up to four EMDs for each day or part of a day they spend in the emergency situation, or up to 14 days 'in other circumstances of an unforeseen and special nature'.³

Corrections Victoria has accepted applications for EMDs based in COVID restrictions, including time spent in Protective Quarantine, which are granted on a fortnightly basis. This has been an important way of ensuring that the impact of the COVID-19 restrictions is as fair and minimal as possible, and the Federation has welcomed the proactive application of EMDs by Corrections Victoria. The Federation is also pleased that this measure has been extended to people on remand.

In order to ensure that EMDs are as fair as possible, it is important that applications are processed in a timely, transparent way so that eligible prisoners are granted EMDs in time for release at the correct date. In addition, people being held on remand and subject to quarantine or otherwise in lock-down should have EMDs applied immediately, rather than fortnightly, so that they do not lose the opportunity to have these credited against their sentence. EMD calculations should also be provided to a person as soon as possible, to ensure that the most up-to-date information on the time they have served can be provided to the court when their legal matter is heard.

There have been reports that applications for EMDs by people who are eligible have been rejected on the basis that the applicant has transitional needs – that is, they require support to find housing or other support services when they leave prison. This is an unfair outcome that only serves to further disadvantage people in need after they have served their sentence. If necessary, additional resources should be allocated to ensure that the lack of housing and other support pathways does not force people to stay in prison longer.

Recommendation: Process Emergency Management Day applications quickly and fairly

PROGRESSING TOWARDS DECARCERATION AND A SAFER PRISON SYSTEM

The risks posed by COVID to the prison population will persist until a vaccine is developed and widely available. To mitigate the health, wellbeing and human rights risks posed by COVID through recovery and into the 'new Normal', government must embed legal reforms to safely and sustainably reduce the prison population, and to ensure that conditions within prison are carefully monitored for compliance with human rights standards.

BAIL REFORM

Victorian courts have recognised the impact COVID-19 is having on the prison system and those in the system who have been impacted by increased restrictions. They have also recognised the impact on the administration of justice, such as delays to trials and the likelihood of people being on remand for an extensive period of time.

The number of people in the prison system across Victoria has declined due to COVID-19. At 17 July 2020, there were 7,030 people in Victorian prisons, compared with 8,067 on the same date in 2019 - a reduction of 12.9 per cent.⁴ This is partly due to an increase in bail being granted to persons caught by the reverse onus provisions. The courts have found that COVID-19, in combination with other factors, poses "exceptional circumstances" or "compelling reasons" to rebut the presumptions against bail under the *Bail Act 1977* (Vic) ('Bail Act').

The presumptions against bail are new and stand in direct contradiction to the long-standing legal principle that bail should be granted as the default, with only limited circumstances justifying refusal. Since the introduction of the amendments in 2018, remand rates in Victoria have risen steeply, with women and Aboriginal and Torres Strait Islander people featuring disproportionately in the increase. Given the high rates of underlying, chronic health conditions among Aboriginal and Torres Strait Islander people entering custody – and amongst the prison population generally – a reduction in the number of people on remand is an essential

element of the COVID-19 recovery. Therefore, the Federation recommends that the reverse onus provisions in the *Bail Act* should be repealed, and all bail decision-making should be based on a single test – unacceptable risk – as was the case prior to the amendments. There should be a presumption in favour of bail, except in circumstances where there is a specific and immediate risk to the community or individual.

This approach not only simplifies bail decision-making which will alleviate pressures on court time and resources, but it also avoids the breach of legal principle involved in reverse onus provisions (which impose responsibility on the person applying for bail to satisfy the court as to why they should not be detained in custody). The reverse onus provisions can apply to people accused of relatively minor and non-violent offending where the offence is committed while on bail, a community corrections order or adjourned undertaking. This means that many people are captured by the reverse onus provisions and are refused bail that do not pose a real risk to community safety.

The Government must also ensure that a person is not remanded in custody for an offence that is unlikely to result in an immediate sentence of imprisonment or for longer than their likely sentence.

The decline in Victoria's prison population due to COVID presents an opportunity for the Government to critically assess its restrictive bail laws and how reducing the flow of people into the corrections system can be sustained through recovery, in order to make the criminal justice system work more fairly and effectively.

Recommendation: Repeal the reverse onus categories in the *Bail Act*, and all bail decision-making should be based on a single test – unacceptable risk. There should be a presumption in favour of bail, except in circumstances where there is a specific and immediate risk to the community or individual.

Recommendation: A person should not be remanded in custody for an offence that is unlikely to result in a sentence of imprisonment or for longer than their likely sentence.

THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Australia made a commitment to implement the Optional Protocol to the Convention against Torture ('OPCAT') in 2017, but a National Preventative Mechanism ('NPM') to prevent the ill-treatment, torture and death of detained people has not yet been instituted. The correctional system's responses to COVID have highlighted the vulnerability of people in prison to unfair, disproportionate and harmful treatments. The Federation considers that the creation of an NPM for the Victorian prison system would bring a vital independent source of oversight to Victoria's correctional (and other detention-based) facilities, and should be implemented as soon as possible. The NPM would play a particularly valuable role in assessing the ongoing justification of COVID-based restrictive measures.

The Federation supports the position of member CLC the Victorian Aboriginal Legal Service ('VALS') that the Victorian Government must undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community on the implementation of OPCAT. Aboriginal people are over-represented in the Victorian criminal justice system, including in police custody and especially in the youth justice context, and the operations, policies, frameworks and governance of the oversight body must be culturally appropriate and safe for Aboriginal people.

Recommendation: Institute a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture in consultation with the Victorian Aboriginal community to monitor detention conditions

REFERENCES

- 1 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015) Rule 44
- 2 AMEND, The ethical use of medical isolation – not solitary confinement – to reduce COVID-19 transmission in correctional settings (9 April 2020) <https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf>.
- 3 *Corrections Act 1986*, s 58E, and *Corrections Regulations 2019*.
- 4 Data provided by Corrections Victoria as at 17 July 2020.