

## Guideline submission on the relevance of COVID-19 to bail applications. <sup>1</sup>

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**Introduction:** This document is drafted to assist practitioners in putting uncontentious material before the court on bail applications. It is not meant to be a comprehensive submission, but rather to point practitioners to factors they might consider in individual circumstances. For those practitioners who may be called upon to appear in bail applications without experience in the area, we remind you that the rules of evidence do not apply in bail applications and that the court may take account of “any evidence or information that the bail authority considers credible or trustworthy in the circumstances...”: *Bail Act 2013, section 31*.

### Guideline submission:

1. COVID-19 may be relevant in bail applications under the *Bail Act 2013* in the following ways:
  - a. Firstly, in relation to the matters to be considered in section 18:
    - i. Section 18(a) – The accused’s circumstances (i.e. whether they have been exposed to COVID-19), family connections (i.e whether they are a primary carer of children));
    - ii. Section 18(h) – length of time in custody (particularly if the person has a special vulnerability and/or there is to be a delay in any trial, see below);
    - iii. Section 18(1)(i), the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;
    - iv. Section 18(1)(k), any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment.
  - b. Secondly, in relation to subsequent bail applications pursuant to s 74(1), particularly where a person falls within a ‘special vulnerability’ category in s 18(1)(k).
2. In relation to the above two categories, the following evidence is relevant:
  - a. As a broad principle, it is well-established that the spread of disease, including respiratory diseases, is higher in prison. For instance, the World Health

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<sup>1</sup> Version 2, 30 March 2020.

Organisation noted the rate of tuberculosis in prisons in the Europe in 2002 was 84 times higher than in the general population.<sup>2</sup>

- b. It is also well established that Aboriginal and Torres Strait Islander people suffer disproportionately from diseases of the respiratory system, particularly pneumonia.<sup>3</sup>
- c. On 15 March 2020, the World Health Organisation produced an interim guidance paper: “*Preparedness, prevention and control of COVID-19 in prisons and other places of detention*”. Critical points which arise from that paper include:
  - i. the fact of being deprived of liberty implies that people in prisons and other places of detention live in close proximity with one another, which is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19. People in prisons typically have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders;<sup>4</sup>
  - ii. The WHO recommends that “Enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages. Priority should be given to non-custodial measures for alleged offenders and prisoners with low-risk profiles and caring responsibilities, with preference given to pregnant women and women with dependent children”. It also recommends “refined allocation procedures should be considered that would allow prisoners at highest risk to be separated from others in the most effective and least disruptive

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<sup>2</sup> [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0017/231506/Good-governance-for-prison-health-in-the-21st-century.pdf](http://www.euro.who.int/__data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21st-century.pdf)

<sup>3</sup> Williams, Gracey, Smith; “Hospitalisation of Aboriginal and non-Aboriginal Patients for Respiratory Tract Diseases in Western Australia, 1988 – 1993.” *International Journal of Epidemiology*, Vol 26, Np 4, pg 797

<sup>4</sup> [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1), “Preparedness, prevention and control of COVID-19 in prisons and other places of detention - Interim guidance, 15 March 2020”, page 2. Accessed 29 March 2020.

manner possible and that would permit limited single accommodation to remain available to the most vulnerable”.<sup>5</sup>

d. As at 30 March 2020, NSW Health states the following:

- i. coronaviruses (including COVID -19) are spread from someone infected with COVID-19 virus to other close contacts with that person through contaminated droplets spread by coughing or sneezing, or by contact with contaminated hands, surfaces or objects.<sup>6</sup>
- ii. ways to prevent COVID-19 transmission include avoiding close contact with people who display flu-like symptoms, to maintain a distance of 1.5 metres from others as much as possible and to avoid crowded places. <sup>7</sup>
- iii. The following people are most at risk of COVID-19 infection:
  - “people with compromised immune systems (e.g. cancer)
  - people with diagnosed chronic medical conditions
  - elderly people
  - Aboriginal and Torres Strait Islander people, as they have higher rates of chronic illness
  - very young children and babies

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It is important to remember that even healthy young adults can have severe disease caused by COVID-19.

People living in group residential settings are at greater risk of being exposed to outbreaks of COVID-19 if a case is diagnosed in a resident or staff member. This includes:

- people living in residential aged care facilities and disability group homes

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<sup>5</sup> [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1), “Preparedness, prevention and control of COVID-19 in prisons and other places of detention- Interim guidance, 15 March 2020”, page 4. Accessed 29 March 2020.

<sup>6</sup> <https://www.health.nsw.gov.au/Infectious/alerts/Pages/coronavirus-fags.aspx#1-3> “How is the virus spread”, accessed 20 March 2020

<sup>7</sup> <https://www.health.nsw.gov.au/Infectious/alerts/Pages/coronavirus-fags.aspx#1-3> “How is it prevented”, accessed 20 March 2020

- people in detention facilities

...

People living in some group residential settings are also more likely to have conditions that make them at greater risk of serious COVID-19 infection.”<sup>8</sup>

- e. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG), the peak body for obstetrics and gynaecology and women’s health in Australia and New Zealand, considers that pregnant women should be considered a vulnerable or at-risk group of becoming infected with COVID-19. During pregnancy, changes to a woman’s body include reduced lung function, increased cardiac output, increased oxygen consumption, and changes to the immune system. Due to these changes, pregnant women have an increased risk of severe complications from influenza. While information regarding the impact of COVID-19 infection on pregnant women and their babies is limited by the recency of the disease emergence, RANZCOG’s pregnancy advice is based on learnings from influenza infection, and also the medical response to the SARS epidemic in 2003.<sup>9</sup>
3. The increasing presence of COVID – 19 in the Australian community is therefore relevant to s 18(1)(i) *Bail Act*, in that the bail authority is to consider whether any eventual sentence is likely to be custodial or non-custodial, taking account of factors such as special circumstances and the full range of subjective considerations: (in the current situation including whether the accused fits within a high risk category: *R v Simpson* (2001) 53 NSWLR 704 at [46], [60], whether the person has family or other caring relationships for other vulnerable people such as children)
  4. More generally, consideration should be given to the applicability of the above official Government information if the accused suffers from a ‘special vulnerability’ in that they fall within one of the high-risk categories identified by NSW Health. Consideration should also be given to the impact of compromised immunity that may arise from an accused’s drug and/or alcohol issues, although they do not explicitly fall into a high-risk

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<sup>8</sup> <https://www.health.nsw.gov.au/Infectious/alerts/Pages/coronavirus-fags.aspx#1-5>, “Who is at risk” accessed, 29 March 2020.

<sup>9</sup> <https://ranzocg.edu.au/statements-guidelines/covid-19-statement> “Coronavirus (COVID-19), accessed 29 March 2020.

category. Finally, consideration should be given to whether extended periods of isolation in custody or lockdown will exacerbate symptoms of mental illness.

5. This is particularly the case where the trial date may be delayed, meaning a longer period in custody waiting for trial. Delay is a relevant consideration in a release application: see *R v Kirby* NSWSC (unreported, Garling J, 2 February 2015); *R v Kugor [2015] NSWCCA 14* at [35]).
6. Finally, where an accused person has had a prior release application that was unsuccessful, and falls within a high risk category listed by NSW Health (particularly an Aboriginal client), the increasing presence of COVID-19 in the Australian community would form a basis for a further release application pursuant to s 74(1) *Bail Act*.

### **Public Defenders Chambers**

**30 March 2020**