COVID-19: Risks and Impacts on Prisoners and Communities

This document collates published research, government and parliamentary committee reports, and academic commentary in relation to COVID-19 which may be relevant to sentence and bail proceedings, law reform and policy decisions. The purpose of this document is to collate and complement the growing number of resources available which address the risks and impact of COVID-19 on prisoners and the community.

The NSW Public Defenders website provides a comprehensive resource collating updated COVID-19 material for practitioners, including case law:
http://publicdefenders.nsw.gov.au/Pages/c19resources.aspx

Introduction

1 COVID-19 is a respiratory illness with symptoms including fever, coughing, a sore throat and shortness of breath.[1] It is highly contagious and is a fatal disease for a small proportion of people infected. Its serious and critical symptoms are especially pronounced for people with pre-existing conditions and the elderly.[2]

2 On 30 January 2020, the World Health Organization ('WHO') declared the novel coronavirus outbreak a public health emergency, and on 11 March 2020 it deemed COVID-19 a pandemic due to its spread across all regions of the world.[3] Three weeks after Australia confirmed its first case of COVID-19 on 25 January 2002, the Australian Government activated the Emergency Response Plan for COVID-19 and on the 18 March it declared a Bio-Security Emergency from COVID-19.[4] Current numbers of confirmed cases and deaths can be accessed at the Australian Government Department of Health website.

3 WHO notes that:

> Although the current outbreak of COVID-19 is still evolving, infection may present with mild, moderate or severe illness and can be passed from human to human, primarily (as in other respiratory viruses) by droplet spread. While about 80% of cases manifest as a mild illness (i.e.

[1] Department of Health (Cth), 'What You Need to Know About Coronavirus (COVID19)' (Web Page, 22 April 2020).

[2] Department of Health (Cth), 'COVID-19 – Frequently Asked Questions' (Fact Sheet, 30 April 2020) 4.

[3] World Health Organization, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)' (Web Page, 30 January 2020); World Health Organization, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Web Page, 11 March 2020).

[4] Department of Health (Cth), 'Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)' (22 April 2020); Howard Maclean and Karen Elphick, 'COVID-19 Human Biosecurity Emergency Declaration Explainer', *FlagPost — Parliamentary Library Blog* (Web Page, 19 March 2020).

non-pneumonia or mild pneumonia), approximately 20% progress to a more severe illness, with 6% requiring specialist medical care, including mechanical ventilation.[5]

4 According to the Australian Government Department of Health's COVID-19 Frequently Asked Questions web page, people who are, or are more likely to be, at higher risk of serious illness if they contract COVID-19 are:

- Aboriginal and Torres Strait Islander people 50 years and older with one or more chronic medical conditions;
- people 65 years and older with chronic medical conditions;
- people 70 years and older; and
- people with compromised immune systems.[6]

5 According to WHO, there are two main routes by which COVID-19 is spread:

- infection can be spread to people who are nearby (within 1 metre) by breathing in droplets coughed out or exhaled by a person with the COVID-19 virus; and
- people may become infected by touching contaminated surfaces or objects (fomites) and then touching their eyes, nose or mouth.[7]

6 The wider community is now subject to significant restrictions which are enforceable under state legislation.[8] Pursuant to the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW), individuals in NSW must not leave their homes without a reasonable excuse.[9] Other states and territories have similar legislation.[10]

Responses by Corrective Services and Juvenile Justice Departments

7 The Communicable Diseases Network Australia ('CDNA') has published National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia.[11]

8 Corrective Services NSW has made general information available on its website, however its more detailed policy response is not yet available online.[12]

---

[5] World Health Organization, Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention (Interim Guidance, 15 March 2020). Similarly, in a report titled *Report on Coronavirus and Immigration Detention* (17 March 2020), Emeritus Professor of Public Health Professor Richard Coker indicated that '[m]ost cases of COVID-19 are not severe. But many patients with COVID-19 suffer critical illness': 4. **Note:** Emeritus Professor Coker has since published a report on the novel coronavirus in prisons in England and Wales, dated 31 March 2020 and available here. A forthcoming update to this chapter will contain references to this report.

[6] Department of Health (Cth), 'COVID-19 – Frequently Asked Questions' (Fact Sheet, 30 April 2020) 4.

[7] World Health Organization (n 5) 11.

[8] See, eg, *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) which introduced amendments to the *Criminal Procedure Act 1986* (NSW) and various other Acts.

[9] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW), cl 5.

[10] Updates from each jurisdiction may be accessed on the Law Council of Australia website.

[11] Communicable Diseases Network Australia, *National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia* (31 March 2020).

Prevalence of COVID-19 in NSW Prisons

9 On 25 March 2020, the NSW Justice Health and Forensic Mental Health Network ('Justice Health') confirmed that two of its employees had tested positive for COVID-19 at its Forensic Hospital, located within the Long Bay Correctional Complex.[13] NSW Corrective Services has stated that, on 28 March 2020, 'the first case of COVID-19 in a NSW prison was confirmed, a health care worker at Long Bay Hospital'.[14]

10 On 30 July 2020, media reported that an inmate at Parklea Correctional Centre had tested positive for COVID-19.[15] The positive case was subsequently confirmed in a media statement issued by the Department of Communities and Justice.[16] On 31 July 2020, the Justice Health website was updated to state:

> There has been one confirmed cases (sic) among those in custody in NSW, diagnosed on 29 July 2020. The asymptomatic patient was identified on entry to custody through existing COVID-19 screening and testing protocols, and immediately placed in isolation.[17]

11 Professor Thalia Anthony considers that prisons have become increasingly unsafe environments due to an increase in unrest related to COVID-19 restrictions, and prisoners' anxiety about contracting the disease.[18] Reports of unrest have included cell fires at Cessnock prison,[19] and alleged riots at Goulburn[20] and Wellington[21] correctional facilities.

Higher Risk of Infection in Prisons

12 Legal Aid NSW has commissioned an expert report which addresses issues relating to the spread of COVID-19 in prisons and the potential impacts of the infection and change to conditions for prisoners.[22]

---

[12] Corrective Services NSW, 'COVID-19 (Coronavirus) Response' (Web Page, 22 April 2020).

[13] Thalia Anthony, 'Explainer: How Will the Emergency Release of NSW Prisoners Due to Coronavirus Work?', *The Conversation* (online, 25 March 2020).

[14] Corrective Services NSW (n 12).

[15] See, eg, 'Parklea inmate positive, 18 NSW cases', *Australian Associated Press* (online, 30 July 2020).

[16] Department of Communities and Justice (NSW), 'Fresh Custody Inmate in Isolation with COVID-19' (Media Statement, 31 July 2020).

[17] Justice Health, 'COVID-19 (Novel Coronavirus)' (Web Page, 31 July 2020) under heading 'Confirmed COVID-19 cases in our settings'. The Justice Health website indicates that there are no other confirmed cases.

[18] Anthony (n 13); Thalia Anthony, 'Coronavirus is a Ticking Time Bomb for the Australian Prison System', *The Guardian Australia* (online, 26 March 2020).

[19] Liz Farquhar and Anthony Scully, 'Coronavirus Restrictions Spark Unrest in Prisons as Cell Fires Confirmed in NSW', *ABC News* (online, 3 April 2020).

[20] Phoebe Looms, 'Inmates Riot at Goulburn Supermax over Coronavirus Restrictions', *News.com.au* (online, 9 April 2020).

[21] Hannah Sparks, 'Prisons in Lockdown under Coronavirus Restrictions', *Wellington Times* (online, 15 April 2020).

[22] Tony Butler et al, *Report on COVID-19 and the Impact on New South Wales Prisoners* (Report, 16 April 2020).

13 Research suggests that COVID-19 places people in prisons and youth detention centres at high risk.[23] As noted by Penal Reform International:

> Where widespread community transmission of COVID-19 is occurring, there are legitimate concerns of this spreading to prisons. The outbreak of any communicable disease presents particular risks for prisons due to the vulnerability of the prison population and not least because of the difficulties in containing a large outbreak in such a setting. People detained are vulnerable for several reasons, but especially due to the proximity of living (or working) so closely to others – in many cases in overcrowded, cramped conditions with little fresh air.[24]

14 WHO states that '[p]eople in prisons and other places of detention are not only likely to be more vulnerable to infection with COVID-19, they are also especially vulnerable to human rights violations.'[25]

Higher Rates of Spread of Infection in Prisons

15 The World Health Organization identifies overcrowding as a structural problem that contributes to the spread of infections in prisons. It acknowledges that an outbreak of disease in prisons threatens people outside prisons.[26]

16 Research indicates that the spread of infections of other diseases is higher in the prison population compared to the general community:

- The rates of infection of tuberculosis (TB), among incarcerated populations are up to 100 times higher than outside of prisons.[27]
- In Australian prisons, the prevalence of Hepatitis C is up to 30%.[28]
- Overall, communicable diseases are a much more significant issue in prisons than in the general population.[29]

Risks to Prisoners' Health

17 The Australian Government Department of Health identifies correctional centres and detention facilities as 'high risk settings'.[30]

---

[23] World Health Organization (n 5); United Nations Office of the High Commissioner for Human Rights, 'Urgent Action Needed to Prevent COVID-19 "Rampaging through Places of Detention" – Bachelet' (Web Page, 25 March 2020); Coker (n 5); Anthony (n 13); Stuart A Kinner et al, 'Prisons and Custodial Settings Are Part of a Comprehensive Response to COVID-19' (2020) *The Lancet Public Health* 188.

[24] Penal Reform International, 'Coronavirus: Healthcare and Human Rights of People in Prison' (Briefing Note, 16 March 2020) 2.

[25] World Health Organization (n 5) 8.

[26] World Health Organization, Prisons and Health (2014).

[27] World Health Organization, 'Tuberculosis in Prisons' (Web Page).

[28] NSW Government Agency for Clinical Innovation, 'Elimination of Hepatitis C in a Prison Setting' (Web Page, 21 June 2018).

[29] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 30 May 2018).

18 A report by experts affiliated with the Kirby Institute for infection and immunity in society at UNSW indicates that, as the COVID-19 pandemic progresses in the wider community, the risks of a case entering a correctional centre will be high, and correctional centres with high levels of spatial density will likely be challenged in containing a COVID-19 outbreak.[31]

19 Research suggests that people in prison are at a greater risk of contracting serious cases of COVID-19 due to:

- overcrowding in detention centres and the consequent lack of capability to enforce protective measures such as physical distancing;[32]
- prisoners' heightened vulnerability as a result of underlying health conditions; [33] and
- lack of access to public health screening and treatment.[34]

Overcrowding in prisons

20 Professor Richard Coker outlines the environmental factors that would increase the likelihood of COVID-19 spreading in prisons:

> Overcrowding, unsanitary conditions, poor ventilation in a detention centre would likely increase the speed with which an epidemic unfolded even if the number of cases cumulatively remained unchanged. Poor access to health care facilities, slow procedures to diagnose, isolate, and treat patients, or quarantine contacts would further reduce the time to peak incidence.[35]

21 The Kirby Institute's Report on COVID-19 and the Impact on New South Wales Prisoners notes that COVID-19 poses a threat to overcrowded NSW prisons and prison cells, with acute risks for prison dormitories.[36] The observations also relate to youth detention.[37] It states that 'crowding and prison cell spatial density are relevant to COVID-19 transmission as they have been linked to adverse health outcomes, including the transmission of infectious diseases.'[38]

22 The Report on Government Services 2020 indicated that prisons are operating at over 100 per cent of design capacity.[39]

23 Despite the introduction of the Prison Bed Capacity Program in 2016, the Auditor-General's Performance Audit concluded that '[t]he prison system is crowded and

---

[30] Department of Health (Cth), 'COVID-19 – Frequently Asked Questions' (Fact Sheet, 30 April 2020) 3.

[31] Tony Butler et al, *Report on COVID-19 and the Impact on New South Wales Prisoners* (Report, 16 April 2020) 7.

[32] Ibid 12.

[33] Ibid 6.

[34] Australian Institute of Health and Welfare (n 26) 111.

[35] Coker (n 5) 13.

[36] Butler et al (n 28) 14.

[37] Ibid 7.

[38] Ibid 8.

[39] Productivity Commission (Cth), *Report on Government Services 2020* (29 January 2020) table 8A.14.

operating close to available capacity.'[40] It listed a number of consequences of overcrowding, including inadequate bed space, excessive movements, 'doubling up', unorthodox lockdown procedures and lack of quality in facilities.[41]

24 Professor Richard Coker states:

> Overcrowding in congregate settings should be avoided if possible. The virus spreads in congregate settings and, where poor sanitation, poor ventilation, and overcrowding exist the virus can overwhelm a population, particularly a population with co-morbidities or that is elderly.[42]

25 Butler et al note that '[s]tatistics indicate a clear trend towards increased numbers of older prisoners in Australian prisons.'[43]

Increased vulnerability of prisoners due to underlying conditions

26 It is well established that co-morbidity is an additional risk factor that heightens the severity of COVID-19. As noted by WHO:

> Around one out of every five people who are infected with COVID-19 becomes seriously ill and develops difficulty breathing. Older people, and those with underlying medical problems such as high blood pressure, heart problems or diabetes, are more likely to develop serious illness.[44]

27 Professor Richard Coker explains that:

> Severe disease necessitating hospital admission is associated with comorbidity, with hypertension being the most common, followed by diabetes, and coronary heart disease, chronic obstructive airways diseases (this refers to chronic asthma, chronic bronchitis, and emphysema), carcinoma (cancer), and chronic kidney disease.[45]

28 The Australian Institute of Health and Welfare notes that '[p]eople in the prison system are some of the most vulnerable in our society, and often experience these risk factors to a higher degree than people in the general population.'[46] The 2018 National Prisoner Health Data Collection (NPHDC) survey found that '[a]lmost one-third (30%) of prison entrants said they had a history of at least 1 of the following chronic physical health conditions – arthritis, asthma, cancer, cardiovascular disease, or diabetes.'[47]

29 The World Health Organization notes:

---

[40] NSW Auditor-General, *Managing Growth in the NSW Prison Population* (Report, 24 May 2019) 9.

[41] Ibid.

[42] Coker (n 5) 15.

[43] Butler et al (n 28) 8.

[44] World Health Organization (n 5) 10.

[45] Coker (n 5) 5.

[46] Australian Institute of Health and Welfare (n 26) 57.

[47] Ibid vi.

> In addition to demographic characteristics, 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.[48]

General health access and hygiene

30 According to the Australian Institute of Health and Welfare, in 2018 '[a]lmost 3 in 10 prison entrants reported they did not see a health professional in prison in the previous 12 months, despite needing to.'[49] The report concluded that the 'health of people in prisons is much poorer compared with the general community.[50]

31 The 2015 report of the NSW Inspector of Custodial Services found that '[t]he inmate population has a much poorer health profile than that of the general population'.[51] The growth of NSW's inmate population has increased pressure on the custodial health system, resulting in longer wait times and lack of individual attention.[52] The report noted that inmates recall a lack of health care as the biggest issue in all three of the inspected correctional centres.[53]

32 In a recent briefing note, Penal Reform International noted that, in detention centres, '[h]ygiene standards are often below that found in the community and sometimes security or infrastructural factors reduce opportunities to wash hands or access to hand sanitizer'.[54]

Impacts on Prisoners Resulting from Changes to Conditions of Detention

33 In a psychiatric report prepared for Legal Aid NSW, forensic psychiatrist Dr Andrew Ellis opines that the COVID-19 pandemic 'will have mental health effects [on persons in custody] by two main mechanisms':[55]

> The first will be direct contribution to development of new psychiatric conditions in individuals by infection with a virus. The second will be the effects of social changes such as isolation or quarantine used to combat population wide infection, which may effect a wider group.[56]

---

[48] World Health Organization (n 5) 2.

[49] Australian Institute of Health and Welfare (n 26) 117.

[50] Ibid vi.

[51] Inspector of Custodial Services (NSW), *Full House: The Growth of the Inmate Population in NSW* (Report 2015) 11.

[52] Ibid.

[53] Ibid.

[54] Penal Reform International (n 21) 2.

[55] Andrew Ellis, COVID-19 and Mental Health Issues for NSW Prisoners: Report to Legal Aid NSW (Expert Report, 9 April 2020) 2.

[56] Ibid.

34 In its interim guidance dated 15 March 2020, the World Health Organization recommended that correctional centres consider either locking down their centres and/or restricting personal and legal visits.[57]

35 The Corrective Services NSW 'Response to COVID-19' web page confirms that the following measures have been implemented to date:

- all social visits in NSW prisons are suspended from 16 March 2020;
- Corrective Services NSW is looking into the potential to utilise AVL for family visits; and
- Legal Aid will take in-person legal visits by exception only and other contact will be via telephone, AVL and JustConnect, with Corrective Services NSW anticipating that private practitioners will also follow suit.58

36 Butler et al note:

> Both government measures and CDNA guidance appears to accept that COVID-19 is containable through the identification of prisoners with clinical signs or symptoms. This overlooks the issues of asymptomatic cases … with one Japanese study indicating that for every confirmed case there may be up to 10 mild or asymptomatic cases.[59]

Restrictions on family visits

37 Prohibitions on family and social visits can adversely impact prisoners' mental health and welfare.[60]

38 In its 2018 report on prisoner health, the Australian Institute of Health and Welfare noted:

> Maintaining and improving family relationships results in a better transition from prison to the community, reduced reoffending, and better health and welfare outcomes for the person in the prison system and their children and families.'[61]

39 The same report elaborates:

> Transitioning from prison to the community can be challenging, and people released from prison make a more successful transition if they have culturally appropriate psychosocial support. Strong and supportive relationships with family, friends or elders in the community can help with the

---

[57] World Health Organization (n 5) 9, 21–22.

[58] Corrective Services NSW (n 12).

[59] Butler et al (n 28) 15.

[60] Australian Institute of Health and Welfare (n 26) 14; World Health Organization, Preventing Suicide in Jails and Prisons (Report, 2007) 7, 16; Alison Liebling, 'Suicides in Young Prisoners' (1993) 17 *Death Studies* 381, 393; Samantha Brown and Andrew Brown, 'The Role of Loneliness in Prison Suicide Prevention and Management' (2008) 47 *Journal of Offender Rehabilitation* 443; Alison Liebling, 'Prison Suicide and Prisoner Coping' (1999) 26 *Crime and Justice: A Review of Research* 283; Kathryn C.Monahan, Asha Goldweber and Elizabeth Cauffman, 'The Effect of Visitation on Incarcerated Juvenile Offenders: How Contact with the Outside Impacts Adjustment on the Inside' (2011) 35 *Law and Human Behaviour* 143; Julie Poehlmann, 'Incarcerated Mothers' Contact with Children, Perceived Family Relationships, and Depressive Symptoms' (2005) 19 *Journal of Family Psychology* 350, 355.

[61] Australian Institute of Health and Welfare (n 26) 14.

> transition. Men and younger people are particularly vulnerable compared with women and older people transitioning from prison, with typically lower levels of social support in the community.[62]

40 A 2007 World Health Organization report states:

> Poor social and family support, prior suicidal behaviour (especially within the last one or two years), and a history of psychiatric illness and emotional problems are common among inmate suicides.
>
> Family visits may also be used as a means to foster social support, as well as a source of information about the risk for suicide of an inmate.[63]

41 A 2008 study on the role of loneliness in prison suicide emphasised the importance of visits and contact with family to protect against suicide and mental health issues:

> Protective factors are vital components of the pathway model, especially for prisoners who may be vulnerable and are experiencing prison induced stress. Visits and contact with family, support from inmates, Samaritans, staff and prison visitors are examples of contacts that may be protective, although it is likely that it is perceptions of loneliness and social support that are most important. It appears that family members are one of the most important forms of support available to prisoners.[64]

42 A 2005 study reported that incarcerated mothers suffered more symptoms of depression when they had less face-to-face contact with their child:

> Consistent with relational developmental theory and previous research, mothers' early relationship disconnections, loss, and trauma were associated with elevated maternal depressive symptoms. However, even after controlling for early trauma and relationship disconnections, less frequent face-to-face contact with children during maternal incarceration was associated with mothers' symptoms of depression, highlighting the importance of current relationship processes for women's psychological well-being.[65]

Extended lockdowns

43 Extended lockdowns may affect the mental health and welfare outcomes for prisoners.[66]

---

[62] Ibid (citations omitted).

[63] World Health Organization, Preventing Suicide in Jails and Prisons (Report, 2007) 7, 16 (citations omitted). See also Alison Liebling, 'Suicides in Young Prisoners' (1993) 17(5) *Death Studies* 381, 393. This study reported that prisoners who had attempted suicide had less contact with the outside world than the control group.

[64] Samantha Brown and Andrew Brown, 'The Role of Loneliness in Prison Suicide Prevention and Management' (2008) 47 *Journal of Offender Rehabilitation* 443.

[65] Julie Poehlmann, 'Incarcerated Mothers' Contact with Children, Perceived Family Relationships, and Depressive Symptoms' (2005) 19 *Journal of Family Psychology* 350, 355 (citations omitted).

[66] World Health Organization, Preventing Suicide in Jails and Prisons (Report, 2007) 16, 28; Alison Liebling, 'Suicides in Young Prisoners' (1993) 17 *Death Studies* 381, 393; Paolo Roma at al, 'Incremental Conditions of Isolation as a Predictor of Suicide in Prisoners' (2013) 233 *Forensic Science International* e1; Jo Nurse, Paul Woodcock and Jim Ormsby, 'Influence of Environmental Factors on Mental Health within Prisons: Focus Group Study' (2003) 327(7413) *BMJ* 480, 481; Senate Select Committee on Mental Health, Parliament of Australia, *Inquiry into the Provision of Mental Health*

44 Butler et al identify potential adverse mental health impacts from extended cell confinement due to COVID-19 and related fears:

> [T]he reduction of opportunities for meaningful and structured activities for prisoners such as exercise, education, training, work, informal socialising, and the real or perceived chance of being subject to long term cell confinement ('lockdowns') will impact on prisoner's mental health and well-being. The idea of a new 'deadly virus' entering the prisoner population will also not sit well for many prisoners. These factors increase the likelihood of expressions of prisoner resistance, including riots as has been witnessed internationally and locally.[67]

45 In a 2007 report on preventing suicide in jails and prisons, the World Health Organization reported that levels of self-harm and suicide are higher in solitary confinement:

> Three main factors are inherent in all solitary confinement regimes: social isolation, reduced activity and environmental input, and loss of autonomy and control over almost all aspects of daily life. Each of these factors is potentially distressing. Together they create a potent and toxic mix.
>
> The rich body of literature that has accumulated since that time on the effects on health of solitary confinement largely echoes these observations and includes anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis among other symptoms resulting from solitary confinement. Levels of self-harm and suicide, which are already much higher among prisoners than in the general population, rise even further in segregation units.[68]

46 In a 2013 study, suicide rates were reported to have increased as a function of increasing isolation measures:

> The suicide rates of prisoners were, respectively, 239% and 439% higher in short-term isolation and in maximum-security isolation than in communality detention … However, the results are of importance because they indicate that imprisonment involving greater deprivation and loss of control over personal autonomy (dehumanizing effects) increases the risk of prisoners committing suicide.[69]

47 In 2006, the Senate Select Committee on Mental Health received evidence that prisoners who already present with mental health issues will be further distressed by seclusion and isolation:

> Seclusion of prisoners who have been assessed as being at risk of suicide, self-harm or as a danger to others raises greater concerns.
>
> […]

Services (First Report, 30 March 2006) [13.108]–[13.110], citing Dr Tracy Schrader, *Submission 396* to Senate Select Committee on Mental Health, Parliament of Australia, *Inquiry into the Provision of Mental Health Services* (May 2005) 4.

[67] Butler et al (n 28) 12.

[68] World Health Organization (n 63) 28 (citations omitted).

[69] Paolo Roma at al, 'Incremental Conditions of Isolation as a Predictor of Suicide in Prisoners' (2013) 233 *Forensic Science International* e1. See also Jo Nurse, Paul Woodcock and Jim Ormsby, 'Influence of Environmental Factors on Mental Health within Prisons: Focus Group Study' (2003) 327(7413) *BMJ* 480, 481; Alison Liebling, 'Suicides in Young Prisoners' (1993) 17 *Death Studies* 381, 393.

> The process of isolating such persons and placing them in seclusion appears effectively to prevent suicide and may prevent disruption to other inmates but is hardly therapeutic for people who are mentally ill. A former visiting general practitioner to the BWCC, Dr Schrader, made the following observations about the use of the isolation cells at the Centre:
>
> The treatment is the opposite of therapeutic. The use of seclusion is inappropriate for those of risk of self-harm and suicide. Observation alone does little to help the woman overcome her distress and suicidal or self-harming feelings and is alienating in itself ... A key element in suicide prevention is the presence of human interaction.[70]

Restrictions on in-person visits with lawyers

48 A 2008 report by the Law and Justice Foundation of New South Wales found that 'communication with external providers of legal services can be disrupted by lockdowns' in prisons,[71] and that lockdowns can have substantial impacts 'on inmates meeting their legal needs as they cannot attend the prison library, make telephone calls, and, at times, not be able to meet with their legal representatives during lockdown.'[72]

49 Although audio-visual links ('AVL') may be available in place of face-to-face legal visits, Carolyn McKay reports that virtual meetings may not be as effective:

> Without doubt, video links offered a level of convenience for prisoners and lawyers. Yet prisoners also revealed strong preferences for face-to-face meetings and a number of important drawbacks of AVL compared with face-to-face interactions …
>
> An increased concern about the use of AVL for communication between lawyers and incarcerated clients is the dearth of studies evaluating the efficacy of AVL legal assistance, particularly for disadvantaged populations with complex needs. AVL has been found to be functional and acceptable for legal conferencing; however, the existing (albeit limited) literature in this area reveals an overwhelming preference for in person legal meetings. AVL inherently alters the means by which lawyers obtain instructions from their clients, and the loss of face-to-face communication may have a greater impact on Indigenous and non-English-speaking prisoners (Kluss 2008). The physical dislocation affects opportunities for privileged discussions and restricts non-verbal communication, blocking the lawyer's assessment of the client's emotional and psychological state. As such, the technology presents challenges in establishing empathy.[73]

---

[70] Senate Select Committee on Mental Health, Parliament of Australia, *Inquiry into the Provision of Mental Health Services* (First Report, 30 March 2006) [13.108]–[13.110], citing Dr Tracy Schrader, *Submission 396* to Senate Select Committee on Mental Health, Parliament of Australia, *Inquiry into the Provision of Mental Health Services* (May 2005) 4

[71] Anne Grunseit, Suzie Forell and Emily McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (Report, July 2008) 192.

[72] Ibid 163.

[73] Carolyn McKay, 'Face-to-Interface Communication: Accessing Justice by Video Link from Prison' in Asher Flynn, and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury Publishing, 2017) 103, 111.

Risks to Protection of Community

Interaction between prisons and community

50 Kinner et al (2020) highlight the connection between prisons and the broader public health response:

> Infections can be transmitted between prisoners, staff and visitors, between prisons through transfers and staff cross-deployment, and to and from the community. As such, prisons and other custodial settings are an integral part of the public health response to coronavirus disease 2019 (COVID-19). With an estimated 30 million people released from custody each year globally, prisons are a vector for community transmission that will disproportionately impact marginalised communities.[74]

51 The Australian Institute of Health and Welfare in a 2018 report identified that

> the prison population is fluid, with people constantly entering, and being released from prison. With more than 65,000 people cycling through prison each year, the health concerns of people in prison are also the health concerns of the general community.[75]

52 According to the Australian Bureau of Statistics, in September 2019, 42,987 adults were in Australian prisons, with 13,660 prisoners in NSW.[76] Of the national total, 33% were unsentenced.[77] At the end of the March 2020 quarter, 9,014 prisoners in adult custody in NSW were serving sentences while 4,511 were on remand.[78]

53 In the June quarter in 2019, there were 949 young people and children in detention on an average night across Australia.[79]

54 The Australian Institute of Health and Welfare (2018) noted that prisoners are at a greater risk of homelessness than the general population, finding that '[m]ore than half (54%) of prison discharges expected to be homeless, or didn't know where they would stay, once released',[80] and observed that homelessness 'is far more common among people in contact with the prison system than among people in the general community.'[81]

---

[74] Stuart A Kinner et al, 'Prisons and Custodial Settings Are Part of a Comprehensive Response to COVID-19' (2020) *The Lancet Public Health* 188, 188.

[75] Australian Institute of Health and Welfare (n 26) 4.

[76] Australian Bureau of Statistics, *Corrective Services Australia December Quarter 2019* (Catalogue No 4512.0, 12 March 2020).

[77] Ibid.

[78] NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics 2020* (Report, March 2020).

[79] Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2019* (Bulletin No 148, February 2020).

[80] Australian Institute of Health and Welfare (n 26) 13.

[81] Ibid vi.

55 Homelessness and COVID-19 guidelines published in March 2020 by the Department of Communities and Justice (NSW) state:

> People experiencing homelessness may be at particular risk of contracting COVID19 due to crowded accommodation and potential lack of access to hygiene facilities such as showers and laundries, as well as stressed immune systems, and close contact with highly transient persons.[82]

Risks to Aboriginal and Torres Strait peoples and communities

56 Aboriginal and Torres Strait Islander people living in remote communities and Aboriginal and Torres Strait Islander people over the age of 50 who have pre-existing medical conditions have been identified as being at a higher risk of serious infection from COVID-19 than the rest of the population.[83]

57 As a group, Aboriginal and Torres Strait Islander people experience poorer health outcomes than non-Indigenous people, including lower life expectancy[84] and higher rates of child mortality.[85]

58 The *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*, developed by the Aboriginal and Torres Strait Islander Advisory Group on COVID-19 and endorsed by the Australian Health Protection Principal Committee (AHPPC) states that 'Aboriginal and Torres Strait Islander people are at a higher risk from morbidity and mortality during a pandemic and for more rapid spread of disease, particularly within discrete communities':[86]

> Aboriginal and Torres Strait Islander peoples experience a high burden of chronic disease and are susceptible to infectious diseases other than non-COVID-19 that require ongoing high quality primary health care and, in some cases, specialist services, to manage … A high prevalence of co-morbidities place some individuals and communities at risk of contracting more severe cases of COVID-19. In addition, older Aboriginal and Torres Strait Islander people (over 50) and children who have experienced reduced quality of nutrition may also present as immunocompromised. This underscores why Aboriginal and Torres Strait Islander peoples are highly vulnerable, necessitating dedicated response and preparedness planning.[87]

59 The plan adopts, and emphasises the importance of, the principle that 'all Aboriginal and Torres Strait peoples have access to the care they need when they need it. This

---

[82] Department of Communities and Justice (NSW), *Guidelines: Homelessness Accommodation and COVID-19* (Report, March 2020) 3.

[83] Department of Health (Cth), 'Coronavirus (COVID-19) Advice for Aboriginal and Torres Strait Islander Peoples and Remote Communities' (Web Page, 30 April 2020).

[84] Department of the Prime Minister and Cabinet, Commonwealth of Australia, *Closing the Gap Report 2020* (12 Februar 2020). In 2015–2017, life expectancy at birth was 71.6 years for Indigenous males (8.6 years less than non-Indigenous males) and 75.6 years for Indigenous females (7.8 years less than non-Indigenous females): 75.

[85] Ibid. Key findings of the report include that, in 2018, the Indigenous child mortality rate was 141 per 100,000 – twice the rate for non-Indigenous children; and that, since the 2008 target baseline, the Indigenous child mortality rate has improved slightly, by around 7 per cent. However, the mortality rate for non-Indigenous children has improved at a faster rate and, as a result, the gap has widened: 15.

[86] Department of Health (Cth), *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19): Management Plan for Aboriginal and Torres Strait Islander Populations* (March 2020) 4.

[87] Ibid 7.

requires that all government agencies and institutions provide appropriately informed, culturally safe care.'[88]

60 The Foreword to the 2015 *Network Patient Health Survey (NPHS) – Aboriginal People's Health Report* acknowledges that the report 'makes for disquieting reading in many places and shows that Aboriginal patients come from more disadvantaged backgrounds and suffer from poorer health than their non-Aboriginal counterparts.'[89]

61 The 2015 NPHS found that the 'majority of participants reported having been diagnosed with a mental illness by a clinician. A higher proportion of Aboriginal participants (men, 66.3%; women, 80.5%) had a diagnosis compared to non-Aboriginal participants'.[90]

> This report clearly illustrates that the health needs of Aboriginal and non-Aboriginal patients can be markedly divergent. It is consistent with research from across the country which shows Aboriginal people are particularly vulnerable to range of diseases and experience an enduring social and economic disadvantage.[91]

International Human Rights

62 International instruments provide protection for health standards for prisoners.

63 Article 12 of the *International Covenant on Economic, Social and Cultural Rights* provides that everyone has a 'right to the highest attainable standard of physical and medical health'.[92]

64 The 2003 report of the United Nations Special Rapporteur on the Question of Torture stated that the right to the highest standard of health protection extends to 'persons deprived of their liberty'.[93]

65 Rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners prescribes that prisoners should 'enjoy the same standards of health care that are available in the community.'[94] This non-discriminatory right is similarly stated in Rule 9 of the Basic Principles for the Treatment of Prisoners.[95]

---

[88] Ibid 6.

[89] Justice Health and Forensic Mental Health Network, *Network Patient Health Survey – Aboriginal People's Health Report* (November 2017) x.

[90] Ibid xiii.

[91] Ibid 41.

[92] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

[93] Theo Van Boven, *Report of the Special Rapporteur on the Question of Torture*, UN Doc E/CN.4/2004/56 (23 December 2003).

[94] GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016) r 24.

[95] GA Res 45/111, UN Doc A/RES/45/111 (14 December 1990) r 90.