

Corrective Services (Emerging Technologies and Security) and Other Legislation Amendment Bill 2022

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**Committee Secretary
Education, Employment and Training Committee**

**Corrective Services (Emerging Technologies and Security)
and Other Legislation Amendment Bill 2022 (Qld)**

Submission by Prisoners' Legal Service

10 January 2023

Thank you for the opportunity to comment on the *Corrective Services (Emerging Technologies and Security) and Other Legislation Amendment Bill 2022* (the Bill).

PLS is a community legal centre that has operated for over 30 years. We provide legal advice and representation to people in prison about matters arising from imprisonment. PLS has significant expertise regarding the impact of incarceration on the most vulnerable members of our society.

PLS conducts prison visits, operates a telephone advice line, provides community legal education and responds to mail from people in prison in Queensland. PLS also provides legal representation to people in prison, in relation to parole decisions and prison matters. The majority of people who receive legal representation from PLS are First Nations people and people with disabilities.

On 7 November 2022, PLS provided verbal submissions to the Legislation Group within Queensland Corrective Services about an earlier version of the Bill, through a targeted consultation process. We acknowledge and welcome the amendments that have been made following that consultation. Nevertheless, we have outstanding concerns about several aspects of the Bill.

Due to the short time available to respond to the Bill, PLS is unable to prepare comprehensive written submissions on the topics that we consider require further attention. To ensure these concerns are ventilated, we would appreciate the opportunity to appear at the Parliamentary Committee hearing.

In summary, our concerns relate to the following topics and clauses within the Bill:

- The extended time frame for reviewing prisoner's security classifications. Clause 13 of the Bill proposes to extend the review period for high security classifications from 1 year to 3 years.
- The need for robust medical safeguards around the use of body scanning technologies in prison and ensuring that prisoners receive an opportunity to provide informed consent and access to alternative methods for searches. Clause 20 introduces a power for prisoners to be subjected to imaging searches.
- The additional powers granted to the Chief Executive of Queensland Corrective Services during a declared emergency. Clause 28 introduces new emergency powers for different types of emergencies that can occur within correctional centres. Due to PLS' experience of the way restrictions were implemented in correctional centres during the height of the Covid-19 pandemic, we are particularly concerned about the scope of additional powers proposed within s271C of the Bill. We draw the Committee's attention to the following documents which provide background information on some of our concerns:
 - Keim, Tony (2022) [Prisoners need access to lawyers urgently](#). Proctor. **Attachment A.**
 - Blaber, Helen, Walsh, Tamara and Cornwell, Lucy (2021). [Prisoner isolation and COVID-19 in Queensland](#). Griffith Journal of Law and Human Dignity, 8 (2), 52-69. **Attachment B.**
 - Queensland Human Rights Commission (2021). [Prisoner Isolation](#). Unresolved complaint under section 88 Human Rights Act 2019, Final Report. **Attachment C.**
 - Blaber, Helen and Walsh, Tamara (2020). [Imposed isolation plagues Queensland prisons during pandemic](#). Proctor. **Attachment D.**

Thank you for your consideration of these submissions.

Yours faithfully,



Helen Blaber
Director / Principal Solicitor

Prisoners need access to lawyers urgently

9 February 2022

By Tony Keim

Queenslanders are unnecessarily being left to languish in prison, often for days on end in solitary confinement because they have extremely limited access to legal advice, according to the state's peak prisoner legal advocate.

Prisoners' Legal Service (PLS) Director and Principal Solicitor Helen Blaber today (9 February 2022) said the restrictions on freedoms and risk of transmission due to the global COVID-19 pandemic are taking a toll on all Queenslanders, but have been far worse for people in prison.

Ms Blaber said inmates are currently being subjected to severe conditions such as solitary confinement, loss of family contact and overcrowding, without access to basic technology such as mobile phones or the internet to help maintain wellbeing.

She also said many current prisoners were serving unnecessary time locked behind bars simply because they are unable to make contact with their legal representatives.

"PLS acknowledge the significant challenges faced by authorities in managing COVID-19 in prison," Ms Blaber said.

"But, for someone in prison, access to a lawyer is an essential service which cannot be compromised."

She said the current crisis of limited telephone contact facing locked down inmates in Queensland was addressed by corrective services authorities in

the United Kingdom at the start of the pandemic, and that a similar program should be adopted here.

“There are ways and means this can be achieved while maintaining safety and security,” Ms Blaber said.

“Almost two years ago, prisoners in the United Kingdom were provided with secure mobile phone handsets containing locked SIM cards to enable them to maintain contact with others during COVID-19 lockdowns.

“In that jurisdiction, many prisons already had in-cell telephones and continued installation of in-cell telephones occurred. This is a stark contrast to the technology available to prisoners in Queensland who generally need to leave their unit and attend a designated area within the prison to receive a legal call.”

Throughout the pandemic, PLS has consistently raised concerns about the health risks and control measures faced by people in prison.

“As one would expect, the criminal justice system has continued to operate despite the recent surge of COVID-19 cases in Queensland,” she said.

“If the mechanisms required to arrest, imprison and prosecute people can function, the safeguards within our legal system to protect their rights must be given equal priority.

“Delayed access to a lawyer can result in people spending longer in prison. For example, PLS representation often results in a person being released from custody on parole.

“Preventing criminal lawyers from taking instructions results in people’s charges being adjourned and bail applications being delayed. This raises serious concerns about arbitrary restrictions on people’s liberty.”

The statement comes after Queensland Community and Corrective Services Commissioner Paul Stewart APM on Monday published an open letter which acknowledged working in prisons was an incredibly challenging job, and that added stress placed on the system by COVID-19 had made it even more difficult.

“There are just over 9100 adults in custody in Queensland,” Commissioner Stewart said.

“At the time of writing this, 454 prisoners were COVID-19 positive.

“Internationally, prisons are recognised as vulnerable facilities, due to the confined nature of the accommodation and the generally poorer health of prisoners than the general community.

“Of course, our officers are working in the same environment, and keeping them safe while they continue their vital frontline work is an absolute priority for us.”

Ms Blaber said Section 29 of the *Human Rights Act 2019* (Qld) provides that a person who is arrested or detained on a criminal charge must be promptly brought before a court and has the right to be brought to trial without unreasonable delay.

Section 32 of the *Human Rights Act 2019* (Qld) further provides that a person charged with a criminal offence is entitled, without discrimination, to a range of minimum guarantees, including, but not limited to:

- having adequate time and facilities to prepare the person’s defence and to communicate with a lawyer or advisor chosen by the person
- being tried without unreasonable delay.

“PLS is concerned these human rights are being unreasonably restricted for those prisoners who are not being provided timely access to legal conferences,” Ms Blaber said.

PRISONER ISOLATION AND COVID-19 IN QUEENSLAND

HELEN BLABER, TAMARA WALSH AND LUCY CORNWELL*

'Medical segregation' is being used extensively to limit the possibility of infection and spread of COVID-19. However, there is a real risk that medical segregation may amount to 'de facto solitary confinement.' Research around the world has demonstrated that placing prisoners in solitary confinement, even for short periods of time, can cause serious psychological harm which may be irreversible. It is also a serious encroachment on prisoners' human rights. Queensland's Human Rights Act has recently come into effect and this has legal implications for COVID-related responses in correctional settings. We argue here that the incursions on prisoners' human rights that have occurred in Queensland during COVID have, at times, been disproportionate to the risks posed.

* Helen Blaber is a Director and Principal Solicitor at Prisoners Legal Service (PLS); Tamara Walsh is a Professor of Law at the University of Queensland; Lucy Cornwell is a LLB student at the University of Queensland.

CONTENTS

I	INTRODUCTION.....	53
II	LEGISLATIVE POWERS TO DECLARE A ‘STATE OF EMERGENCY’ AND ISOLATE PRISONERS.....	54
III	COVID-19 AND QUEENSLAND PRISONS IN PRACTICE.....	56
	A <i>Case Study 1: New Admission</i>	57
	B <i>Case Study 2: Returning from a Temporary Absence</i>	58
	C <i>Case Study 3: COVID-19 Contact</i>	58
	D <i>Case Study 4: Vulnerable People</i>	59
IV	WERE PRISONER’S RIGHTS REASONABLY LIMITED?.....	60
	A <i>Solitary Confinement and Human Rights</i>	60
	B <i>Conditions in Isolation are not Consistent with Basic Legal Protections</i>	61
	C <i>Extreme Social Isolation and Lack of Access to Services</i>	62
	D <i>Release from Prison as an Alternative to Isolation</i>	64
V	CONCLUSION.....	66

I INTRODUCTION

COVID-19 created an emergency situation unprecedented in our lifetimes. Pandemic conditions pose particular challenges in closed environments such as prisons. Since social distancing is not practicable in over-crowded prison settings, ‘medical segregation’ is being extensively used to limit the possibility of infection. However, there is a real risk that medical segregation may amount to ‘de facto solitary confinement,’¹ and research around the world has demonstrated that placing prisoners in solitary confinement, even for short periods of time, can cause serious psychological harm that may be irreversible.²

¹ ‘Coronavirus: Healthcare and human rights of people in prison’, *Penal Reform International* (Briefing Note, 16 March 2020) 8.

² Stuart Grassian, ‘Psychiatric Effects of Solitary Confinement’ (2006) 22 *Washington Journal of Law & Policy* 325, 332; Terry Kupers, ‘What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement’ (2008) 35(8) *Criminal Justice and Behaviour* 1005, 1006.

In this paper, we present a series of case studies to illustrate the conditions experienced by Queensland prisoners who were placed in medical isolation during COVID-19. We argue that the incursions on prisoners' human rights that occurred during this time were sometimes disproportionate to the risks posed, and that less restrictive alternatives are available.

II LEGISLATIVE POWERS TO DECLARE A 'STATE OF EMERGENCY' AND ISOLATE PRISONERS

In Queensland, legislative powers exist under the *Corrective Services Act 2006* (Qld) to enable restrictions on prisoner movement to be imposed, and visits and access to privileges to be limited, in response to COVID-19. Under Section 263 of the *Corrective Services Act 2006* (Qld) (*Corrective Services Act*), the Chief Executive (that is, the Commissioner) is made responsible for 'the security and management of all corrective services facilities' and 'the safe custody and welfare of all prisoners,' and is given the power to 'do all things necessary or convenient' in the performance of these functions. Section 268 of the *Corrective Services Act* allows the Commissioner to 'declare that an emergency exists' in relation to a prison in circumstances where the security, good order or safety of a person in the prison is threatened. The declaration may restrict activity in or access to the prison, and order the withdrawal of privileges.

The Commissioner made a series of declarations that an emergency exists in relation to all prisons in 2020. In his first declaration in March, the Commissioner stated that all visits would cease, although visits by certain professionals could still occur subject to approval.³ The restriction on personal visits was lifted in July but was then re-introduced for South-East Queensland prisons following new recorded cases of COVID-19 in the community. Initially, a separate declaration was made in respect of Wolston Correctional Centre because a staff member had tested positive to COVID-19, so higher level restrictions were imposed, involving the suspension of 'all activities in the prison' and the withholding of all prisoner privileges unless the Commissioner approved otherwise. Contact tracing was undertaken and no prisoners tested positive, so three days later it was announced that Wolston Correctional Centre would be brought into line with the other prisons.

³ Specifically, visits from accredited visitors, government visitors, commercial visitors, religious visitors, professional visitors (health and psychological), and cultural visitors (elders, respected persons and spiritual healers).

In April 2020, Queensland's corrective services facilities began implementing 'medical segregation' measures — that is, certain prisoners were isolated to limit the risk of COVID-19 infection.⁴ Between April and June 2020, there were four different groups of prisoners in Queensland who were subjected to COVID-19 isolation measures:

1. New admissions: People who entered prison from a police watch house.
2. Transfers/returns: People who were transferred between prisons or who had returned from a temporary absence from prison, such as a hospital appointment or court appearance.
3. COVID-19 contact: People who were identified as having contact with a correctional officer who tested positive to COVID-19 at a particular prison.
4. Vulnerable prisoners: Defined by the Australian Health Protection Principal Committee (AHPPC) as:
 - a. Aboriginal and Torres Strait Islander people 50 years and older with one or more chronic medical conditions;
 - b. people 65 years and older with chronic medical conditions;
 - c. people 70 years and older; and
 - d. people with compromised immune systems.

New policies relating to the medical segregation of prisoners have been introduced, adapted, withdrawn and re-introduced over time in response to the assessed risk of transmission. For example, the 'Managing Prisoner Receptions and Transfers' policy, which was introduced on 8 April, required that all new admissions and transferred prisoners be subjected to health and temperature checks and held in isolation in high security centres for 14 days. Transfers between centres were only to occur where essential, however transfers from reception and remand facilities to placement facilities continued to take place. Queensland Corrective Services (QCS) reported that isolated

⁴ 'High Level Summary of QCS Management of COVID-19 within Correctional Centres: Current 23/04/2020', *Queensland Corrective Services* (Summary, 23 April 2020) <https://corrections.qld.gov.au/wp-content/uploads/2020/04/QCS-Stakeholder-information_lr.pdf>.

prisoners would be provided with access to medical assessment and treatment, including specialist mental health services, and would receive activities such as books, drawing and writing materials. In addition, access was to be provided to normal mail processes, calls with legal representatives and facilitated telephone calls and/or videoconference connections with families.

Initially, prisoners were required to restart their isolation period if they were transferred between centres or required to leave their cell to attend an essential appointment during their 14 days of isolation. From 2 May, this policy changed and isolation periods became cumulative: prisoners who were transferred between centres or required to leave their cells would not be required to restart their 14 day isolation period unless they were transferred into police custody, a court or watchhouse, or they undertook a leave of absence. Vulnerable prisoners were grouped together in accommodation areas to minimise their contact with the broader prisoner population and staff, but they were no longer isolated in their cells.

QCS acknowledged that these policies significantly departed from usual procedures but all measures were described by QCS as ‘responsive and proportionate’ to the goal of preventing COVID-19 from entering Queensland prisons.⁵ Of course, policy documents are not always reflective of actual practice, and during the COVID-19 lockdown, lawyers and family members received reports from prisoners that isolation measures were being conducted in a manner that seemed unduly restrictive and sometimes illogical.

III COVID-19 AND QUEENSLAND PRISONS IN PRACTICE

Reporting on the current circumstances within prisons is challenging in Queensland. Section 132 of the *Corrective Services Act 2006* (Qld) states that a person must not interview or obtain a written or recorded statement from a prisoner without written approval from the Chief Executive.⁶ In light of this, our analysis draws on a series of hypothetical case studies based on lawyers’ observations in the course of their work between April and June 2020. Each case study describes the conditions experienced by

⁵ Queensland Government, ‘Changes to Isolation Policies for New and Transfer Prisoners’, *Queensland Corrective Services* (Media Release, 1 May 2020).

⁶ Prisoner is defined to include people subject to parole orders: *Corrective Services Act 2006* (Qld) sch 4; see further Tamara Walsh, ‘Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK’ (2007) 33(1) *Monash University Law Review* 72.

prisoners held under the four different categories of isolation listed above: newly admitted prisoners; prisoners who have returned or been transferred from somewhere external; prisoners who had contact with an officer who was diagnosed with COVID-19; and vulnerable prisoners.

A Case Study 1: New Admission

'David' was placed into isolation immediately upon his admission into prison. He was told by correctional staff that he was being isolated for 14 days because of COVID-19, however he was not given any documents relating to his isolation or confirmation of when his 14 days would expire. When David needed to leave his cell for an appointment, his isolation period had to recommence and he spent a total of 20 days in isolation. During his isolation, David was locked in his cell for 24 hours each day. His cell contained a bed, bedding, toilet, sink, shower, dustpan, and television. The toilet could only be flushed six times a day. At times, there was human waste sitting in the toilet because the flush allowance had been used.

David did not receive any access to exercise or fresh air and could not go outside. He was provided with a small number of photocopied pages of puzzles (including crosswords and word searches) to occupy his time. Several times a day, correctional staff would walk past the cell and call out asking if he needed anything. They would write down if he needed essentials, such as soap, which was later delivered through a hatch that opened in the door of the cell.

David was offered one telephone call on his admission to prison but was not able to make any telephone calls to friends or family during his isolation. He did not have access to the prison Arunta telephone system⁷ so he could not call professional agencies such as Legal Aid or Prisoners Legal Service. The lack of access to a lawyer meant that David's criminal charges were delayed for a period of two weeks because he was not able to arrange legal representation or apply for bail. He was not offered the opportunity to talk to an external

⁷ The Arunta Prisoner Telephone System is a prisoner telephone system that operates in prisons around Australia. It allows prisoners to place calls to up to 20 nominated phone numbers free of charge including Legal Aid and other legal services (including Prisoners Legal Service), ombudsmen and other independent monitors.

agency or an official visitor.⁸ The Cultural Liaison Officer came and spoke to him once but the conversation was brief and perfunctory. David did not see or speak to a doctor, psychologist or counsellor while he was in isolation. He was not provided with access to the medication he had been taking in the community prior to his incarceration.

B Case Study 2: Returning from a Temporary Absence

'Jess' was placed in isolation after she returned to prison from an external appointment. She was told by correctional staff that she was being isolated for 14 days because everyone who temporarily leaves the prison must isolate because of COVID-19, but she was not informed as to when this period would end. During her isolation, Jess was locked in her cell for 24 hours each day. She had no access to fresh air.

A psychologist employed by the prison came to speak to her every day to do a welfare check. Her lawyer attempted to arrange a telephone link but was informed by correctional staff that this would require Jess to exit her cell and restart her 14-day isolation period. As such, her lawyer waited to arrange a telephone link until the isolation period ended. This caused delays in Jess providing instructions to her lawyer about her criminal charges. Jess was given access to a headset in her cell to call her family two times while she was in isolation, but the calls were limited to approximately 15 minutes each.

She was not offered the opportunity to talk to an external agency or an official visitor. She was not offered a test for COVID-19.

C Case Study 3: COVID-19 Contact

'Peter' was placed in isolation after it was discovered he had come into contact with a correctional officer who had tested positive for COVID-19. Medical staff came to his unit and took his temperature along with a number of other prisoners. He was tested for COVID-19. The following day, he was told that he needed to be isolated because he had come into contact with a correctional officer who had tested positive, but he was not informed as to when this period would end.

⁸ Official visitors are members of the community appointed under the *Corrective Services Act* for the purpose of visiting prisoners to investigate, manage and resolve complaints.

Peter was moved from the residential unit to the secure unit within the prison, together with approximately 20 other prisoners. The secure unit is a more restrictive area than the residential unit and it is perceived by many sentenced prisoners as the 'punishment unit'.

During his isolation, Peter was doubled up in a cell with another prisoner who had also been in contact with the correctional officer who tested positive. They were locked together in the cell for 24 hours each day. Peter did not receive any access to exercise and could not go outside during his isolation. He had difficulty getting access to sufficient food and drink.

Peter was not provided access to any telephone calls in isolation. He was not offered the opportunity to talk to an external agency or an official visitor. Peter did not see or speak to a doctor, psychologist or counsellor while he was in isolation. After several days of isolation, he received test results stating that he was negative for COVID-19. The following day, he was released from isolation and returned to the residential unit.

D Case Study 4: Vulnerable People

'James' falls into one of the categories of vulnerable prisoners who is at a higher risk of serious illness if infected with COVID-19. In mid-April 2020, he was moved into medical isolation with several other prisoners who also fall into the one of the categories of vulnerable prisoners, but he was not informed as to when this period would end.

During the first 11 weeks of isolation, James was locked in his cell for 22 hours each day. There was a window in his cell but it did not open, so he had no access to fresh air in the cell.

James received access to two hours of exercise outside of his cell each day. All of the medically vulnerable prisoners in the unit were able to access an outside exercise area at the same time. The exercise area has a concrete floor, exercise equipment and access to the Arunta telephone system. However, not everyone was able to telephone friends and family as it depended on whether they had money on their telephone account and the time of day they were permitted exercise (for example family members with commitments that conflicted with the exercise yard time could not be contacted).

After approximately six weeks of isolation, James and the other medically vulnerable prisoners were provided with weekly access to an iPad to have scheduled video calls with family.

After approximately 11 weeks, James was removed from isolation. He remained in the same unit with other vulnerable prisoners, some of whom came in and out of the unit without being tested for COVID-19.

IV WERE PRISONERS' RIGHTS REASONABLY LIMITED?

A Solitary Confinement and Human Rights

Prisoners in medical isolation in Queensland are being held in effective solitary confinement. United Nations agencies have defined solitary confinement as being locked down in a cell for at least 22 hours a day with limited or no association with other prisoners and limited access to privileges.⁹ It is well-established that placement in solitary confinement conditions can result in serious psychological harm which may be irreversible. Recent research of ours suggests that people in solitary confinement can display symptoms of psychosis after only a short period of time.¹⁰ They also frequently engage in disordered and obsessive behaviour as well as acts of self-harm.¹¹

Courts around the world have found conditions in solitary confinement to breach prisoners' human rights to life, liberty and security of person, humane treatment when deprived of liberty, and freedom from cruel, inhuman and degrading treatment.¹² Each of these rights is protected in Queensland's new *Human Rights Act 2019* ('*Human Rights Act*').¹³ The *Human Rights Act* came into effect in January 2020. Under this Act, public entities, including QCS,¹⁴ are required to act and make decisions in a way that is

⁹ United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 44 ('*The Nelson Mandela Rules*').

¹⁰ Tamara Walsh et al, 'Legal Perspectives on Solitary Confinement in Queensland', *University of Queensland School of Law* (Report, 2020) 45-50; See also Juan Mendez, Special Rapporteur, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/66/268 (5 August 2011) 16.

¹¹ Walsh et al (n 10) 45-50.

¹² *Ibid*.

¹³ *Human Rights Act 2019* (Qld) ss 16, 17, 30, 37. Of course, cultural rights of Aboriginal and Torres Strait Islander peoples and the right to non-interference with family may also be relevant: *Human Rights Act 2019* (Qld) ss 25, 28.

¹⁴ *Human Rights Act 2019* (Qld) s 9(1).

compatible with human rights, and in making decisions, give proper consideration to relevant human rights.¹⁵ The Act recognises that rights may be limited, but only where they are reasonable and demonstrably justified.¹⁶ When deciding whether or not a limit is reasonable and justified, factors to be considered include the nature and purpose of the limitation, whether there are any less restrictive ways of achieving the purpose, and the importance of both the limitation and the right.¹⁷

Of course, in the context of COVID-19, certain limitations on human rights may well be reasonable and justifiable. There is clearly a legitimate purpose in preventing the spread or risk of infection, so some degree of segregation may be justified on medical grounds. However, in order to be human rights compliant, QCS is required to turn its mind to whether any less restrictive alternatives exist to achieve the same purpose. The WHO has stated that medical isolation should only occur as a matter of ‘medical necessity’ and that, even in the context of COVID-19, human rights protections still apply.¹⁸ Based on the case studies above, we argue that options for less restrictive limitations on human rights were available and total isolation was not always a proportionate response to the risk of infection.

B Conditions in Isolation are not Consistent with Basic Legal Protections

The *Corrective Services Regulation 2017* (Qld) establishes certain minimum requirements for prisoners subjected to separate confinement. Prisoners in solitary confinement must have access to reticulated water, a toilet and shower facilities, and they must be given the opportunity to exercise in fresh air for at least two daylight hours a day, unless a doctor or nurse has advised otherwise. As our case studies demonstrate, these minimum requirements were not always met in respect of medically isolated prisoners in Queensland. Some prisoners had limited access to food and drinking water, and restrictions on the number of toilet flushes. Neither of these conditions would seem consistent with the goal of limiting the spread of COVID-19.

¹⁵ Ibid s 58(1).

¹⁶ Ibid s 13(1).

¹⁷ Ibid s 13(2).

¹⁸ World Health Organisation, ‘Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance’, *World Health Organisation Regional Office for Europe* (Report, 15 March 2020) 5.

Failing to provide prisoners with two hours out of cell time cannot be considered reasonable or demonstrably justified. Indeed, locking a prisoner down in their cell for 24 hours a day with no opportunity for fresh air or exercise may amount to cruel, inhuman and degrading treatment.¹⁹ Further, access to fresh air is vital in light of medical advice suggesting that COVID-19 is spread not only by droplets but also by aerosols.

Prisoners in isolation were often not provided with information or documentation regarding when their medical segregation period would end. *The Nelson Mandela Rules* state that a person should never be placed in indefinite solitary confinement.²⁰ The Supreme Court of British Columbia has found that not knowing when they would be released was often ‘the worst part’ of solitary confinement for prisoners.²¹

Australian courts have reduced prisoners’ sentences on the basis of the harshness of conditions in solitary confinement. For example, in *Callanan v Attendee X*,²² *Callanan v Attendee Y*,²³ and *Callanan v Attendee Z*,²⁴ Justice Applegarth stated that a sentencing judge ‘can make allowance for the fact that a person has spent part of their time in custody in unusually harsh circumstances’.²⁵ It has been confirmed in Victoria that prisoners will be able to apply for their sentence to be commuted by four days for each day spent in isolation,²⁶ and in *Scott v R*, the New South Wales (NSW) Court of Criminal Appeal reviewed the sentence of a prisoner as a result of the ‘onerous’ conditions he experienced during COVID-19 medical segregation.²⁷ Yet, the Queensland Government has made no commitment to commuting prisoners’ sentences as a result of the time they spent in medical isolation during COVID-19.

C Extreme Social Isolation and Lack of Access to Services

The WHO has acknowledged the likelihood of prisoners reacting to further restrictions differently to other members of the population, in light of the restrictions on their liberty

¹⁹ Walsh et al (n 10) 64-65.

²⁰ *The Nelson Mandela Rules* (n 9) rule 43; Mendez (n 10) 16.

²¹ *British Columbia Civil Liberties Association v Canada (Attorney-General)* [2018] BCSC 62, [159], [545].

²² [2013] QSC 340.

²³ [2013] QSC 341.

²⁴ [2014] 2 Qd R 11.

²⁵ *Callanan v Attendee X* [2013] QSC 340, [25]; *Callanan v Attendee Y* [2013] QSC 341, [25]; *Callanan v Attendee Z* [2014] 2 Qd R 11, [24].

²⁶ *Corrections Act 1986* (Vic) s 58E (Emergency Management Days).

²⁷ *Scott v R* [2020] NSWCCA 81, [166]; see also *R v KAX* [2020] QCA 218, 31.

they are already faced with.²⁸ Since contact with family members — including their children — and friends is already substantially limited, restricting contact with their support networks even further is likely to cause substantial distress.

Prisoners in medical segregation are spending extended periods of time in complete social isolation. Since many segregated prisoners are permitted to exercise together, placement in isolation for the rest of the day seems unnecessary and inconsistent. Regardless, it is important that contact with family and friends is maintained. Our case studies demonstrate that some prisoners did not have contact with family and friends at all during medical isolation, not even by phone, either because one was not made available to them or because they did not have enough funds in their prison account. The WHO has noted the importance of maintaining human contact during medical isolation, even if this can only be done remotely.²⁹ Mobile phones, free calls on the telephone system and access to videoconferencing (through iPads and other devices) could have been rapidly provided to prisoners in medical segregation. As was seen from our case studies, after many weeks some prisoners were provided with access to devices for the purpose of virtual visits. However, this could and should have occurred as a matter of urgency, particularly for prisoners with children.³⁰

Our case studies also indicated that prisoners' access to health and psychological services was often limited in medical isolation. Prisoners were not always examined by medical practitioners, despite the relevant legislative requirements.³¹ Further to this, prisoners in medical isolation did not always have access to external monitors, including official visitors.³² *The Nelson Mandela Rules* state that the use of solitary confinement should be 'subject to independent review and only pursuant to the authorisation by a competent authority'.³³ Access to lawyers has also been restricted. Since many prisoners do not have ongoing contact with family or friends, lawyers may be the only people who are

²⁸ World Health Organisation (n 18) 1, 5.

²⁹ *Ibid* 5.

³⁰ Catherine Flynn, 'Getting There and Being There: Visits to Prisons in Victoria – the Experiences of Women Prisoners and Their Children' (2014) 61(2) *Probation Journal* 176, 178.

³¹ *Corrective Services Act 2006* (Qld) ss 56-57, 63-64.

³² *Ibid* s 121.

³³ *The Nelson Mandela Rules* (n 9) rule 45(1).

advocating for their wellbeing, and legal representation enables criminal charges or parole decisions to progress which can lead to a prisoner being released.

D Release from Prison as an Alternative to Isolation

Both the case studies presented above, and the relevant policy documents, demonstrate that isolation practices were not always logical or consistent with medical advice. Not all prisoners were provided with a COVID-19 test, despite the fact that not all infections are symptomatic infections. Prisoners who were at risk of having COVID-19, including those at Wolston Correctional Centre, were doubled up in cells and prisons were significantly over-crowded. Prior to COVID-19, Queensland prisons were operating at 130% of capacity, and with the recent closure of work camps, over-crowding has increased. The Coalition for the Human Rights of Imprisoned People has described this as a 'tinderbox environment' when it comes to infection control.³⁴

All Aboriginal and Torres Strait Islander people, elderly people, pregnant women and people with chronic health conditions should be considered vulnerable to COVID-19.³⁵ In April 2020, there were 3179 prisoners in Queensland that identified as Aboriginal and/or Torres Strait Islander.³⁶ Almost one in three Australian prisoners report having a chronic health condition³⁷ and 3% of prisoners are aged over 65 years.³⁸ Therefore, a significant proportion of the prison population should be considered vulnerable.

Of course, the least restrictive alternative to medical segregation for low-risk prisoners is that they be released from prison. Many prisoners could be safely released to prevent outbreaks and protect the health and welfare of both staff and prisoners, including: prisoners on remand, prisoners serving sentences of less than six months, prisoners who are within six months of the expiration of their sentence, prisoners who are eligible for

³⁴ Coalition for the Human Rights of People Imprisoned in Australia, 'Suspending Family Visits Will Not Prevent COVID-19' (Media Release, 23 March 2020) 1.

³⁵ 'Novel Coronavirus (COVID-19)', *Queensland Government* (Web Page, 2020) <<http://conditions.health.qld.gov.au/HealthCondition/condition/14/217/838/novel-coronavirus>>; Tamara Power et al, 'COVID-19 and Indigenous Peoples: An Imperative for Action' (2020) 29(15-16) *Journal of Clinical Nursing* 2737.

³⁶ 'Custodial Offender Snapshot April 2020', *Queensland Government Open Data Portal* (Web Page, 2020) <<https://www.data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/ea617acb-a927-4036-b994-308d8b37dfaa>>.

³⁷ Australian Institute of Health and Welfare, 'The Health of Australia's Prisoners 2018' (Report, 30 May 2019) vii.

³⁸ 'Prisoners in Australia in 2019', *Australian Bureau of Statistics* (Web Page, 5 December 2019). <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2019>>.

parole, prisoners who are in custody on parole suspensions or cancellations, and elderly and immunocompromised prisoners. A substantial proportion of prisoners are at low risk of reoffending: 12% of prisoners in Queensland are 'low security' prisoners and 62% of sentences are for non-violent offences.³⁹ The median prison term in Queensland is 3.9 months, so a substantial proportion of prisoners are serving very short sentences.⁴⁰ Many of these offenders pose a low risk to the community and could be safely released. Further to this, 30% of prisoners in Queensland are unsentenced,⁴¹ and could be granted bail in circumstances where the court considers this appropriate, subject to conditions if necessary.⁴²

In NSW, the *Crimes (Administration of Sentences) Act 1999* (NSW) was amended to allow the NSW Commissioner to make an order releasing low-risk prisoners on parole if the Commissioner was satisfied this was 'reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic', taking into account their vulnerability and any risk to community safety.⁴³ No direct equivalent exists in Queensland, however powers already exist under the *Corrective Services Act 2006* (Qld) that allow for the release of prisoners in certain circumstances. The Commissioner has the power to grant a prisoner leave of absence for compassionate reasons, or for any other purpose the Commissioner considers justified.⁴⁴ Also, the Parole Board of Queensland has wide discretionary powers to release prisoners on parole, including in circumstances where it is satisfied that exceptional circumstances exist in relation to the prisoner.⁴⁵

Many people are in custody for short periods due to temporary suspensions of parole orders and in many instances, prisoners' parole is revoked in circumstances where they do not pose any significant risk to the community. In 2018/19, a total of 4015 parole

³⁹ Queensland Productivity Commission, 'Inquiry into Imprisonment and Recidivism' (Report, 31 January 2020) 192.

⁴⁰ *Ibid* 40.

⁴¹ Custodial Offender Snapshot April 2020 (n 36).

⁴² *Bail Act 1980* (Qld) ss 8 (general powers relating to bail), 10(1) (availability of Supreme Court bail), 11 (bail conditions).

⁴³ *Crimes (Administration of Sentences) Act 1999* (NSW) s 276(1); *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW).

⁴⁴ *Corrective Services Act 2006* (Qld) s 72(1).

⁴⁵ *Ibid* s 194(1)(a). A prisoner can apply for exceptional circumstances parole at any time: s 176.

orders were suspended⁴⁶ and 1016 of these parole suspensions were issued because a person failed to comply with a condition of their parole order.⁴⁷ Only nine parole suspensions were issued because a person posed a serious and immediate risk of harm to another.⁴⁸ Limiting the use of parole suspensions is one means by which the prison population in Queensland could be dramatically reduced during the pandemic without compromising community safety.

V CONCLUSION

The COVID-19 pandemic has created a situation in which prisoners' human rights may have to be limited to some extent. However, placing prisoners in solitary confinement — often with no opportunity for fresh air, exercise, or contact with the outside world and for prolonged periods — cannot be considered reasonable or demonstrably justified. Less restrictive alternatives are available. Many prisoners could be released safely into the community; virtual contact with family members could be facilitated; and increased access to medical and psychological support could be available. Instead, there is a reasonable likelihood that some of the prisoners who were subject to medical isolation will experience ongoing adverse effects as a result of their time in solitary confinement. There are important lessons to be learned from this period of time. While COVID-19 transmission continues to occur in Australia, medical isolation will continue to be used in prisons and it is important that we build upon these learnings.

⁴⁶ Queensland Government, Parole Board Queensland, 'Annual Report: 2018–2019' (Report, September 2019) 27.

⁴⁷ Queensland Government, Parole Board Queensland, 'Submission to Queensland Sentencing Advisory Council: Intermediate Sentencing Options and Parole', *Queensland Sentencing and Advisory Council* (Report, 31 May 2019) 6 (data current as at May 2019 for the 2018/19 financial year).

⁴⁸ An additional 1672 parole suspensions were made because a person was considered to pose an unacceptable risk to the community and 803 were made for 'multiple reasons'. *Ibid.*

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Prisoner isolation

Unresolved complaint under
section 88 *Human Rights Act 2019*

Published 2 February 2021

For public release

Contents

Introduction.....	2
Summary of the complaint.....	3
Details of the complaint	3
Outline of response	6
Actions taken to try and resolve the complaint	7
Discussion	8
Basis for period of isolation.....	8
Policy change	9
Compatibility with human rights	11
Humane treatment when deprived of liberty	11
Isolation.....	12
Health care.....	15
Visits and family contact.....	15
Access to lawyers	16
Access to relevant oversight procedures and to make complaints.....	16
Access to cultural support	17
Daily fresh air and exercise	17
Assessment of compatibility.....	17
Periods of isolation	18
Compatibility of duration of isolation	23
Compatibility of entitlements while in isolation	24
Compatibility of access to fresh air while in isolation	25
Conclusion.....	26
Recommendations	27

Introduction

1. The *Human Rights Act 2019* (Qld) (**HR Act**) creates obligations on public entities to act or make decisions in a way that is compatible with human rights, and give proper consideration to human rights when making a decision.¹ This means a public entity, through its acts and decisions, can only limit human rights to the extent that is reasonably and demonstrably justifiable.²
2. The Queensland Human Rights Commission (**Commission**) receives complaints from individuals alleging contraventions of the HR Act by public entities.
3. This report has been prepared by the Queensland Human Rights Commissioner (the Commissioner) in relation to an unresolved human rights complaint in accordance with section 88 of the HR Act. It contains the:
 - substance of the complaint;
 - actions taken by the Commission to try to resolve the complaint; and
 - details of action the Commissioner considers Queensland Corrective Services (**QCS**), as a respondent to the complaint, should take to ensure its acts and decisions are compatible with human rights. The recommendations apply to QCS only as the entity responsible for the relevant policies.
4. A draft of the comments and recommendations in this report was provided to the respondents, and their responses have been incorporated into this final report.
5. A copy of this report has been provided to all the parties, who must agree before it can be used in any proceeding in relation to a contravention of the HR Act.
6. It is intended that the Commissioner will publish this report under section 90 of the HR Act.

¹ *Human Rights Act 2019* s 58.

² *Human Rights Act 2019* ss 8, 13.

Summary of the complaint

7. The complainant (C) told us she is a vulnerable Aboriginal woman aged in her twenties experiencing a range of mental health conditions, exacerbated by the nature of her incarceration in April to May 2020.
8. Under relevant policies made in response to the COVID-19 pandemic, C was placed in isolation upon her admission to prison. C alleges that her isolation should not have been prolonged for greater than 14 days including because it exacerbated her mental illness. She further alleged that during her isolation:
 - There was no clarity on the legal basis for her ongoing placement in isolation;
 - She was deprived of medical treatment, education, exercise, fresh air and reticulated water. This included a lack of sufficient medical treatment for her mental health;
 - The respondents failed to facilitate any communication between C and her mother; and
 - The respondents failed to make adequate arrangements for C to have telephone calls with her lawyers.
9. The parties disagree about certain details of the complainant's treatment. In this report, the Commissioner does not seek to make findings of fact regarding the treatment of the complainant, but rather provide recommendations to ensure QCS acts and makes decisions compatibly with human rights.
10. While the parties disagreed on the precise time C spent in isolation, there is agreement that it was greater than 14 days.

Details of the complaint

11. At the time of the allegations C was detained in a prison managed by Serco Australia Pty Ltd for the State of Queensland. Health services in this prison are provided by Serco, and mental health services by West Moreton Hospital and Health Service.
12. On 22 March 2020, the Chief Health Officer published the Corrective Services Facilities Direction pursuant to section 362B of the *Public Health Act 2005* which prohibited the entry of personal visitors to a corrective services facility effective 23 March 2020. The Direction included a specific direction to the QCS Commissioner and to corrective services officers that they must not allow personal visitors to enter a corrective services facility.

13. On 23 March 2020, in light of the Public Health Direction, the QCS Commissioner made a decision pursuant to section 157 (1A) of the *Corrective Services Act 2006 (CS Act)* to suspend visitor access approvals for personal visitors. The direction limiting access to other non-personal visitors was made pursuant to the QCS Commissioner's powers under sections 263(2) and 268(4) of CS Act. On 26 March 2020, the QCS Commissioner, with the Minister's approval, exercised his power pursuant to s 268 of the CS Act to declare that an emergency existed in relation to all prisons in Queensland as a result of the COVID-19 pandemic and specifically the threat the virus posed to the safety and welfare of prisoners and employees at all prisons. The declaration was made following advice from the Chief Health Officer (**CHO**) who believed it was necessary to give this declaration to assist in containing, or to respond to, the spread of COVID-19 within the prison and the wider community.
14. While a declaration of emergency is in force pursuant to section 268 of the CS Act the QCS Commissioner may relevantly:
 - restrict any activity in, or access to, the prison; or
 - order that prisoner's privileges or a stated prisoner's privileges be withheld.
15. On 30 March 2020, C was received into reception at a prison managed by QCS.
16. Pursuant to s 268(4) of the CS Act, the QCS Commissioner issued the *Managing Prisoner Reception and Transfer COVID-19 Policy* which came into effect on 8 April 2020 (April Isolation Policy). QCS submits that:

The April Isolation Policy was the product of very careful consideration and consultation with Queensland Health (QH) and contemporaneous public health advice from the CHO.

The April Isolation Policy was introduced at a time when the COVID-19 transmission rate was quickly climbing in Queensland. In the period between 1 April to 8 April 2020, the number of COVID-19 cases in Queensland had risen from 778 to 943 and the cases were continuing to rise.
17. QCS further notes that the April Isolation Policy relevantly provided:

Application

This policy applies to prisoners entering Queensland Corrective Services (QCS) custody, and those prisoners in custody at the time of information.

This policy is designed to preserve the integrity of the correctional environment to limit the risk of COVID-19 infection on the basis of contemporaneous public health advice from Queensland Health (QH).

...

Definitions

Isolation is a continuous period of 14 days in which a prisoner is required to remain in a single cell, insofar as practicable.

Management of Prisoners

To limit the risk of prisoners with COVID-19 being received into the secure custody environment, reception prisoners and transfer prisoners are to be subject to:

- isolation for a period of 14 days in single cell accommodation; and
- temperature checks and health checks as determined by QH personnel

18. C alleges she was transferred to the relevant prison on 14 April and immediately commenced being accommodated in isolation from other detainees pursuant to the April Isolation Policy.
19. The respondents instead state that records show that C was transferred and received into the prison on 15 April 2020.
20. The respondents state that records indicate that on 23 April 2020 C was taken to the medical centre within the prison as she required medical treatment which could not be administered in her cell. C instead alleges this occurred on or about 19 April. Nonetheless, following her attendance at the medical centre, C returned to isolation and, in accordance with the April Isolation Policy her 14 day quarantine period was reset.
21. C concluded isolation on 3 May 2020. This means there is disagreement between the parties as to the precise duration of her isolation. Regardless, it is not disputed that C spent at least an additional three days in isolation beyond the original 14-day isolation period.
22. The complaint was made against Queensland Corrective Services, Serco Australia Pty Ltd and West Moreton Hospital and Health Service.

23. In the Commission's assessment, the complaint alleged a possible breach of the rights to recognition and equality before the law³, right to protection from torture and cruel, inhuman or degrading treatment⁴, humane treatment when deprived of liberty⁵, right to protection of families,⁶ cultural rights of Aboriginal Peoples and Torres Strait Islander Peoples,⁷ and right to health services.⁸
24. The recommendations and comments in this report focus on the right to humane treatment while deprived of liberty, although other rights are considered where relevant.

Outline of response

25. The Commission is grateful for the submissions of the respondents which were received during the course of the complaint, and were considered in preparing this report.
26. In their submissions, the respondents note that Queensland Corrective Services and Serco Australia staff have received training regarding the implementation of the HR Act in Queensland.
27. It is also evident that all three respondents took steps to ensure that the COVID-19 pandemic did not come into the correctional environment and that they strived to undertake all reasonable measures to keep prisoners, staff and visitors safe. The respondents identified that prisons hold a significant number of vulnerable people including those with significant health problems.
28. QCS submit:

Given the scale of the COVID-19 pandemic and global health emergency, and the implications for correctional facilities and for the community, any response by QCS is necessarily focussed, in the first instance, on three critical goals, being the preservation of life, keeping prisoners, staff and visitors safe, and the containment of the virus.

The measures taken by QCS have been demonstrably successful in that to date there has been no outbreak of COVID-19 amongst the

³ *Human Rights Act 2019* s 15.

⁴ *Human Rights Act 2019* s 17.

⁵ *Human Rights Act 2019* s 30.

⁶ *Human Rights Act 2019* s 26.

⁷ *Human Rights Act 2019* s 28.

⁸ *Human Rights Act 2019* s 37(2).

approximately 9000 prison population in Queensland and no prisoner has tested positive for COVID-19.

29. The respondents also state that all prisoners placed in isolation, through the joint efforts of the three respondents, have:
- continued to receive mental health services;
 - been given a weekly 'uplift' of \$2.00 into their own accounts so they can continue to make contact with their families via telephone;
 - received legal calls⁹;
 - received extra provisions such as the introduction of virtual visits on iPads and tablets. Serco Australia in particular supplied tablets for those in isolation; and
 - access to official visitors via the telephone and that there was no disruption to the service delivery of the official visitors during the isolation/COVID-19 pandemic.
30. QCS do not consider any policy change is necessary in light of the complaint. The relevant policies were designed to preserve the integrity of the correctional environment, which is considered a high risk environment, to limit the risk of COVID-19 infection, and are the product of very careful consideration and consultation with Queensland Health and contemporaneous public health advice from the State's Chief Health Officer.
31. The respondents deny that there has been any contravention of the HR Act as alleged, or at all.

Actions taken to try and resolve the complaint

32. Under section 65(1) of the HR Act, C is required to wait 45 business days after making an internal complaint before lodging a human rights complaint with the Commission. The Commissioner waived this requirement due to concerns about C's ongoing isolation and the impact

⁹ Apart from the specific allegation made in this complaint, the Commissioner generally notes the joint statement of the Prisoners Legal Service and the Caxton Legal Centre that 'our lawyers have experienced restrictions in communicating with clients in prison since March': Prisoners Legal Service and Caxton Legal Centre, 'Prisoners held in solitary confinement, denied access to lawyers in COVID-19 response' (Media statement, 16 September 2020) <<https://plsqld.com/prisoners-held-in-solitary-confinement-denied-access-to-lawyers-in-covid-19-response/>>.

on her mental health, particularly as it was understood by her representative that at the time of the complaint she was still in isolation.

33. The Commission attempted to resolve the complaint between the parties by:
- making enquiries of the parties;
 - discussing the complaint with each of the parties; and
 - conducting a conciliation conference on 6 August 2020 and facilitating post-conference negotiations.
34. The QHRC considers the complaint unresolved as C was unsatisfied with the information provided to her by the respondents.

Discussion

35. The Commissioner appreciates that the COVID-19 pandemic has created a unique challenge for Queensland Corrective Services and acknowledges its efforts to date in successfully controlling the spread of the disease. The policies and procedures implemented to date have been consistent with the state's obligations under the right to life (s 16) and right to security of the person (s 29) of the HR Act.
36. Actions and decisions made during this time require a complex balancing of the rights of individual prisoners in circumstances such as those of C with the rights of other prisoners, prison officers and others. This report seeks to assist relevant public entities in this task.

Basis for period of isolation

37. C was isolated under the April Isolation Policy, to address the risk of COVID transmission. The April Isolation Policy required that a reception prisoner and transfer prisoner were to be subject to isolation for a period of 14 days in single cell accommodation. A reception prisoner is one received into QCS custody from a Queensland Police Service (QPS) watch house, a court, or is otherwise received into the custody of a QCS facility. A transfer prisoner is a prisoner who is required to transfer from one secure facility to another, or from a low custody facility to a secure one.
38. According to the terms of the April Isolation Policy, C's period of isolation restarted due to her transfer to the medical unit for treatment, extending it beyond 14 days.

39. The April Isolation Policy stated that to preserve the health and wellbeing of each prisoner subject to isolation, to the greatest extent possible, each prisoner subject to isolation must also have:
- access to confidential medical assessment and treatment including specialist mental health services;
 - access to engagement with the offender development team to monitor and support their mental health;
 - engagement with unit and activities officers to provide activities that may be undertaken whilst isolated (such as books, drawing and letter writing);
 - access to blue letter mail processes and unmonitored calls with legal representatives; and
 - access to facilitated telephone calls, and/or videoconference connection with family.

Policy change

40. On 2 May 2020, the *Managing Prisoner Receptions COVID-19 Policy* came into effect (**May Isolation Policy**) which replaced the April Isolation Policy.
41. The May Isolation Policy relevantly provides [emphasis added]:

Application

...

This policy is designed to preserve the integrity of the correctional environment to limit the risk of COVID-19 infection on the basis of contemporaneous public health advice from Queensland Health (QH).

Definitions

Isolation is a period of 14 days (**which may be cumulative if a prisoner is transferred**) in which a prisoner is required to be accommodated in a single cell, insofar as practicable.

...

Management of Prisoners

To reduce the risk of COVID-19 being introduced into the secure custody environment, a reception prisoner will be subject to:

- isolation for a cumulative period of 14 days in single cell accommodation insofar as practicable; and
- temperature checks and health checks as determined by QH personnel.

...

Once the 14 day period has expired, the prisoner will be considered for placement in the general prisoner population subject to a final health check and temperature check by QH.

Isolated Prisoners – 14 day parameters

Whilst prisoners in isolation are to be in single cell accommodation insofar as practicable for the protection of the broader prisoner and staff population, **they can undertake the following without resetting the 14 day period:**

- attending medical appointments at the Medical Centre or a hospital;

...

1. Isolation in this context is equivalent with the Queensland health definition of quarantine.

42. QCS confirm that if C had attended the medical centre in circumstances where the May Isolation Policy was in effect, her 14-day isolation period would not have been reset:

The relaxing of the isolation protocols as between the April Isolation Policy and the May Isolation Policy reflected the changing nature of the COVID-19 pandemic in the community, with few new active cases being identified at the time, and the outcome of continued consultation with QH. As the risk reduced QCS' protocols changed in a responsive and proportionate way. QCS demonstrated an agility in responding to a rapidly unfolding emergency situation, changing infection rates and developing science in relation to the COVID-19 pandemic

43. The Commissioner welcomes this confirmation, particularly as the restarting of isolation under the April Policy was likely a deterrent for C and other prisoners to seek medical treatment.
44. However under the May Isolation Policy and the subsequent *Managing new admission reception prisoners and COVID-19 Isolation policy*, effective 11 June 2020 (June Isolation Policy), some specific supports such as access to medical treatment are still subject to the caveat of 'to the greatest extent possible'.

Compatibility with human rights

45. This complaint raises two different decisions that engage the obligation on public authorities in section 58(1) of the HR Act:
- a. The decision to isolate C, and potentially other prisoners in future, for more than 14 days in response to the COVID-19 pandemic including through the reference in the June Isolation Policy to prisoners only 'being considered' for placement in the general population after 14 days; and
 - b. The decision to include a proviso in relevant policies that certain entitlements are only provided 'to the greatest extent possible'.

Humane treatment when deprived of liberty

46. Section 30 of the HR Act provides:

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

...

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

47. The right creates a positive obligation on public entities to treat persons in detention with humanity and respect for dignity, and complements the prohibition on torture and cruel, inhuman or degrading treatment,¹⁰ although the latter is a more general protection for all people against the worst forms of conduct.¹¹
48. To assist with the interpretation of rights, the HR Act provides that regard can be had to international law and the judgments of domestic, foreign and international courts and tribunals.¹² This includes international human rights treaties, such as the *International Covenant on Civil and Political Rights (ICCPR)*, and General Comments published by the Human Rights Committee, a body of independent experts who monitor the implementation of the ICCPR. General Comments provide the Human Rights Committee's interpretation of provisions of the ICCPR. Standards and advice prepared by United Nations agencies and other human rights treaty bodies can also provide guidance.

¹⁰ *Human Rights Act 2019* s 17.

¹¹ *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [99].

¹² *Human Rights Act 2019* s 48; Explanatory Notes, Human Rights Bill 2018 (Qld) 31.

Extent of the right

49. Section 30 of the HR Act is modelled on articles 10(1) and 10(2)(a) of the ICCPR, but also ‘expands on article 10 by requiring certain treatment of an accused person or a person who is detained without charge under subclause (3)’.¹³ The relevant UN General Comment regarding article 10 states that it applies to anyone deprived of liberty by the State, and provides a non-exhaustive list of examples such as people held in prisons, hospitals, and detention camps.¹⁴ It goes on to explain that the right protects people from any hardship or constraint other than that resulting from the deprivation of liberty.¹⁵ Given the fundamental principles of humanity and dignity the right protects, the General Comment states the application of the rule should not be dependent on the material resources available to the State party.¹⁶
50. The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules) are considered the international standard for the humane treatment of prisoners.¹⁷ In a joint statement earlier this year, the United Nations Office on Drugs and Crime (UNODC), the World Health Organisation (WHO), Joint UN Programme on HIV/AIDS (UNAIDS) and Office of the High Commissioner for Human Rights (OHCHR) urged governments to ensure that COVID-19 preparedness and responses in closed settings are identified and implemented in line with fundamental human rights. In prisons, they stated that any intervention should comply with the Mandela Rules.¹⁸
51. Several international bodies have also released related guidance material on the treatment of those in detention, including during the COVID-pandemic. This guidance material is relevant in considering the obligation on the state to treat those in detention humanely.

Isolation

52. Rules 44 and 45 of the Mandela Rules refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact to be ‘solitary confinement’, only to be used as an exceptional measure, and never beyond a maximum of 15 consecutive days (prolonged solitary

¹³ Explanatory Notes, Human Rights Bill 2018 (Qld) 24-25.

¹⁴ Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, (10 April 1992) [2].

¹⁵ Ibid [3]

¹⁶ Ibid [4]

¹⁷ United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1955); *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (17 December 2015)

¹⁸ UNODC, WHO, UNAIDS and OHCHR, *Joint statement on COVID-19 in prisons and other closed settings* (13 May 2020) <<https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>>

confinement). Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.¹⁹

53. QCS submit that it 'does not consider that a period of isolation pursuant to the isolation protocols can be equated with solitary confinement. Solitary confinement operates in the context of restrictions, discipline and sanctions imposed as punitive measures against prisoners.' QCS cites rules 36, 43 and 44 of the Mandela Rules to support this submission:

Restrictions, discipline and sanctions

Rule 36

Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.

Rule 43

In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhumane or degrading treatment or punishment. The following practises, in particular, shall be prohibited:

- (a) Indefinite solitary confinement;
- (b) Prolonged solitary confinement;
- (c) Placement of a prisoner in a dark constantly lit cell;

Rule 44

For the purposes of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days

54. QCS states that the isolation of prisoners pursuant to the April Isolation Policy and May Isolation Policy was for the purposes of limiting the transmission of COVID-19 within correctional facilities and in accordance with the isolation protocols prisoners had access to specific entitlements

¹⁹ Mandela Rules 44 and 45

so as to preserve the health and wellbeing of each prisoner, on the basis of contemporaneous advice from QH.

55. The Commissioner accepts that arguably rules 36 and 43 are focused on disciplinary sanctions. However, these, along with rule 44, are made under the heading 'Restrictions, discipline and sanctions'. Further, rule 37(d), in the same section of the rules, states that the following should always be subject to authorisation by the regulation of the competent administrative authority:

Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation.

56. Further, guidance material on the rules state:

Prohibitions and limitations of solitary confinement incorporated into the Mandela Rules apply regardless of whether the measure is used as a disciplinary sanction or for other purposes (see Rule 37(d), Rule 43(1) and the definition in Rule 44)²⁰

57. In 2011, the Special Rapporteur on Torture defined solitary confinement as 'the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day'. That report considers situations where solitary confinement takes place other than because of disciplinary breaches, noting 'persons with disabilities are held in solitary confinement in some jurisdictions as a substitute for proper medical or psychiatric care or owing to the lack of other institutional housing options.'

58. The Special Rapporteur notes that 15 days is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.²¹

59. The UN Office on Drugs and Crime has said that 'under no circumstances whatsoever must COVID-19 measures in prisons amount to inhumane or degrading treatment'.²² Similarly, the UN Subcommittee on the Prevention

²⁰ Organisation for Security and Co-operation in Europe and Penal Reform International, *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations revised standard minimum rules for the treatment of prisoners* (9 August 2018) 105 [49].

²¹ Juan E.Méndez, Special Rapporteur, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN DOC A/66/268 (5 August 2011) 8 [26].

²² United Nations Office on Drugs and Crime, *Position Paper: COVID-19 preparedness and responses in prisons* (31 March 2020) 3.

of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has provided the following advice on responding to the COVID-19 pandemic:

...medical isolation must be on the basis of an independent medical evaluation, proportionate, limited in time and subject to procedural safeguards.²³

60. Therefore, while appreciating that C was not isolated for disciplinary purposes, the Commissioner suggests that any isolation of a prisoner for more than 15 days should be measured against the Mandela Rules and similar international human rights standards. In particular, these standards recognize the negative impact of that prolonged isolation on that person, regardless of the reason or description of that confinement.

Health care

61. In relation to accessing health care while in detention during the COVID-19 pandemic, the World Health Organisation (WHO) has observed:

According to international human rights law, it is the responsibility of the State to ensure that people in prisons and other places of detention enjoy the same standards of health care that are available in the outside community, without discrimination on the grounds of their legal status.²⁴

62. Similarly, while the WHO suggests that prison management should consider measures to limit the movement of prisoners based on the risk of infection, 'the psychological impact of these measures needs to be considered and mitigated as much as possible, and basic emotional and practical support for affected people in prison should be available'.²⁵

Visits and family contact

63. Visits and contact with family are also protected under the Mandela Rules, which states that prisoners shall be allowed to communicate with their family and friends at regular intervals. This includes by corresponding and by receiving visits.²⁶ The UN *Body of Principles for the Protection of All*

²³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee to States parties and national preventative mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN DDOC CAT/OP/10 (7 April 2020) 3.

²⁴ World Health Organisation (Europe), *Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention* (2020) <https://www.euro.who.int/data/assets/pdf_file/0008/436904/prisons-FAQ-COVID-2019.pdf?ua=1>

²⁵ World Health Organisation, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance* (15 March 2020) 9.

²⁶ Mandela Rules, rule 58.

Persons under Any Form of Detention or Imprisonment state a detained person should be allowed to communicate with their family and not be denied access to them for more than ‘a matter days’.²⁷

64. In considering the provision of visits and communication with family and friends during the pandemic, WHO Europe has noted:

Decisions to limit or restrict visits should take into account the impact on the mental well-being of people in prisons and the increased levels of anxiety that separation from friends and family and the outside world may cause. Banning of visitors to protect the setting from COVID-19 may result in violence, so other measures that facilitate non-contact visits, such as the introduction of video conferencing (e.g. Skype), should be considered.²⁸

Access to lawyers

65. Section 32 of the HR Act provides that a person charged with a criminal offence is entitled, without discrimination, to a range of minimum guarantees, including but not limited to, adequate time and facilities to prepare the person’s defence and communicate with a lawyer or advisor chosen by the person.
66. The WHO suggests that while suspension of on-site prison visits may be necessary in responding to COVID-19, alternative measures should be adopted to ensure prisoners can speak to lawyers.

Measures that may be considered include, as appropriate, restriction of family visits, reducing visitor numbers and/or duration and frequency of visits, and introduction of video conferencing (e.g. Skype) for family members and representatives of the judicial system, such as legal advisers.²⁹

67. The Mandela Rules similarly requires that prisoners be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice.³⁰

Access to relevant oversight procedures and to make complaints

68. The Mandela Rules provide that every prisoner have the opportunity to make requests or complaints, including regarding his or her treatment to

²⁷ United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN Doc A/43/49 (9 December 1988) principle 15.

²⁸ World Health Organisation (Europe), *Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention* (2020) <https://www.euro.who.int/data/assets/pdf_file/0008/436904/prisons-FAQ-COVID-2019.pdf?ua=1>

²⁹ World Health Organisation, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance* (15 March 2020) 22.

³⁰ Mandela Rules, rule 61.

the central prison administration.³¹ The WHO suggests that independent bodies with responsibility for inspecting prisons should have access to all people deprived of their liberty in prisons and other places of detention, including to persons in isolation.³²

Access to cultural support

69. Specific cultural rights of Aboriginal peoples and Torres Strait Islander peoples are provided for in s 28 of the HR Act. Further, principle 4.1.10 of the *Guiding Principles for Corrections in Australia* states that Aboriginal and Torres Strait Islander prisoners should be provided holistic health services that encompass cultural and spiritual health needs.³³

Daily fresh air and exercise

70. Daily access to fresh air and one hour of outdoor exercise has long been regarded under international law as a minimum standard of treatment for people in correctional facilities.³⁴ During the COVID-19 pandemic, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has published advice reinforcing the need to respect minimum requirements for daily outdoor exercise, within the limits of necessary public health measures, in detention settings such as prisons, immigration detention centres, closed refugee camps, psychiatric hospitals, and other medical settings.³⁵

Assessment of compatibility

71. In applying s 30 to the circumstances of this complaint, the Commissioner considers that the right to humane treatment while deprived of liberty is limited in situations where a person spends more than 14 days in medical isolation to address the risks of COVID-19 infection. This is because 14 days is the standard period for quarantine in the community and international human rights standards stress that solitary confinement should not be longer than a period of 15 days.
72. The Commissioner considers this right is also limited by the April, May and June Isolation Policies, which suggest prisoners in isolation will only receive minimum entitlements 'to the greatest extent possible'.

³¹ Mandela Rules, rule 56

³² World Health Organisation, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance* (15 March 2020) 5.

³³ *Guiding Principles for Corrections in Australia*, 2018, p 20.

³⁴ Mandela Rules 14(a), 23(1), 42.

³⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee to States parties and national preventative mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN Doc CAT/OP/10 (7 April 2020), [9(i)].

73. In accordance with s 8 of the HR Act a decision is compatible with human rights if it limits a human right only to the extent that it is reasonable and demonstrably justifiable in accordance of s 13 of the HR Act.
74. Section 13(1) provides the overarching test for assessing if a human right may be limited: any such limitation may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13(2) then provides a list of non-exhaustive factors to be considered in assessing compatibility:
- (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).
75. In so providing, the HR Act recognises that human rights are not absolute; they may be subject to reasonable limits which are justified in a free and democratic society. This may occur in the context of competing rights and interests held by others or countervailing matters of public policy, where these are of significance.

Periods of isolation

The nature of the human right - s 13(2)(a)

76. In terms of the nature of the right, the right to humane treatment goes to the core of protecting the human dignity of persons vulnerable to the exercise of power by the state.
77. QCS recognise ‘what is at stake when the right to humane treatment when deprived of liberty is limited. The right serves to ensure that persons

deprived of their liberty continue to be recognised as human beings and are not denied their basic human needs'.³⁶

Proper purpose – s 13(2)(b)

78. QCS made the following submissions on the purpose of the limitation:

Exposing prisoners and staff to a prisoner who is yet to complete the 14-day isolation period represents a significant transmission risk. Prisoners being transferred into a correctional facility may be asymptomatic and pre-symptomatic. The incubation period of 14 days was tied to the typical incubation period for COVID-19. However, at the time there was ongoing research into the period of transmission and the science around incubation periods was developing.³⁷ The isolation period was for a temporary period only. Ultimately, the purpose of quarantine is to limit the opportunity for the transmission of COVID-19 during the potential incubation period.

The WHO identified at the time that COVID-19 is transmitted through 'respiratory secretions' (droplets that are produced when sneezing, talking, or coughing) and the two main ways of COVID-19 spreading is through:

- a. breathing in droplets coughed out or exhaled by a person with COVID-19 virus within one metre; or
- b. touching contaminated surface or objects (fomites) and then touching their eyes, nose and mouth.

The AHPPC's [Australian Health Protection Principal Committee] advice to National Cabinet on 30 March 2020 was that 'given the transmission characteristics of the virus' correctional and detention facilities were considered 'at higher risks of outbreaks of COVID-19'. The AHPPC, also recognised that correctional and detention facilities housed a considerable population of vulnerable persons. The people identified by the AHPPC as falling within this category included 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.³⁸

³⁶ The respondents cite the New Zealand Supreme Court decision of *Taunoa v Attorney-General* [2008] 1 NZLR 529, 47122 [80]

³⁷ The respondents cite World Health Organisation-*Preparedness, prevention and control of COVID-19 in prisons and other places of detention-Interim guidance* (15 March 2020) 10.

³⁸ The respondents cite that: On 7 April 2020, the Commissioner issued the Managing Vulnerable Prisoners COVID-19 Policy in order to preserve the integrity of the correctional environment and to limit the risk of COVID-19 infection amongst prisoners within Queensland

At the time measures were being taken across Queensland and the Australian community to combat the spread of COVID-19 which was predicated on the notion of restricting borders and opportunities for transmission across borders. For example, on 2 April 2020 the CHO had issued *Public Health Direction Border Restriction (No. 3)* which applied to people arriving in Queensland and required them to quarantine for 14 days providing restricted access to persons travelling to Queensland.

The April Isolation Policy was put in place due to a sharp increase in COVID-19 cases in Queensland at the time and in accordance with contemporaneous advice received from QH.

The aim of protecting public health is a proper purpose. Protecting prisoners, staff and visitors in a correctional facility from the risk of COVID-19 also promotes their human rights to life (s 16 of HR Act), health (s 37 of the HR Act), and security of persons (s 29 of the HR Act).³⁹ At international law, the right to health includes, the 'prevention, treatment and control of epidemic endemic... and other diseases'.⁴⁰ The purpose of protecting and promoting human rights is necessary and consistent with a society based on human dignity, equality and freedom. The April Isolation Policy was put in place due to a sharp increase in COVID-19 cases in Queensland.

The overarching objective of the April Isolation Policy was to protect prisoners, staff and visitors from a COVID-19 outbreak and to keep prisoners, staff and visitors safe particularly in circumstances where there was a high risk of transmission in the correctional environment and elevated numbers of vulnerable prisoners and staff.

Suitability - s 13(2)(c)

79. The Commissioner agrees with QCS that there is clearly a rational relationship between the April Isolation Policy (and later policies) and preventing the spread of COVID-19 based on the main methods of transmission which were known at the time. QCS further note that:

The April Isolation Policy specifically provides that transfers between correctional centres were to be restricted and that in order to preserve the health and wellbeing of each prisoner subject to isolation certain measures were put in place including, but not limited to:

corrective services facilities, in particular to protect vulnerable prisoners who fall within the category of people identified in the statement published by the AHPCC on 30 March 2020 as being at, or likely to be at a higher risk of illness if infected with COVID-19.

³⁹ The respondents cite: *C Boffa v San Marino* [1998] 92 EUR CNNHR 27

⁴⁰ The respondents cite: *International Covenant on Economic, Social and Cultural Rights*, Article 12 (2)(c)

- a. access to confidential medical assessment and treatment including specialist mental health services;
- b. engagement with the unit and activities officers; and
- c. access to facilitated telephone calls and/or video conferencing with family.

Necessity – s 13 (2) (d)

80. Regarding necessity, QCS submit:

The formulation of QCS policy was at all times the subject of very careful consideration and based on the advice of the CHO and advice from QH. Resetting C’s isolation period after she attended the health unit was the best way for QCS to manage the possible spread of COVID-19 with the least impact on prisoners generally and in light of the contemporaneous scientific evidence with regard to possible COVID-19 transmission periods. The alternative would have been for every prisoner who visited the medical centre to be isolated upon leaving which was undesirable. Isolated prisoners were capable of being managed should they develop symptoms or contract COVID-19 and they did not have a chance to unwittingly spread the virus further.

It is significant that the April Isolation Policy and the requirement that a prisoner undergo 14 days continuous isolation was developed in the context of a public health emergency and developing science. QCS submits that the ‘precautionary principle’ should apply when assessing necessity and whether there is any less restrictive and reasonably available ways to achieve the purpose.

81. QCS cites *Taylor v Newfoundland and Labrador*,⁴¹ a decision of the Supreme Court of Newfoundland and Labrador (Canada) in which the Court considered whether restrictions limiting movement into the province were compatible with human rights. The Court referred to the ‘precautionary principle’ and said (footnotes removed):

[60] In the context of a public health emergency with emergent and rapidly evolving situations, the time available for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow: “The more urgent the situation, and the less evidence or precedent, the more that ‘best judgment’ must be exercised.” This approach is illustrative of the “precautionary principle”, the case for action to prevent anticipated harm before confirmatory evidence is available. To illustrate the point Dr. Wilson referred

⁴¹ 2020 NLSC 125

to Canada's 'tainted blood' tragedy, where decision makers delayed measures to protect the supply of donated blood from HIV while awaiting evidence, prompting the Krever Commission to conclude that the "action to reduce risk should not await scientific certainty."

82. QCS notes that when the Court considered the necessity test it said:

[467] I am reminded at this juncture of the evidence of Dr. Wilson and the precautionary principle in public health decision making. In the context of the COVID-19 pandemic, with the prospect of serious illness or death, the margin for error is small. In such a circumstance, the public health response is to err on the side of caution until further confirmatory evidence becomes available; the precautionary principle.

83. As this quote suggests, the 'precautionary principle' is a principle of public health decision-making. The precautionary approach was considered by the Federal Court of Australia in *Palmer v State of Western Australia (No 4)*⁴² in the context of the pandemic:

[79] Although the probability that a particular health risk will manifest may be small, if its consequences are potentially catastrophic, a precautionary approach is required. This means, from a purely public health perspective, all reasonable and effective measures to mitigate that risk should ideally be put in place.

Fair balance – s 13 (2)(e), (f) and (g)

84. The respondents made the following submissions on fair balance:

QCS acknowledges that it is important to treat prisoners with humanity and respect for their inherent dignity. Ultimately, the importance of avoiding the risk of the spread of COVID-19 within the prison population outweighs the impact on the limitation to the right to be treated humanely when deprived of liberty which meant that C had to undergo a further three days in isolation to ensure, on the basis of the contemporaneous epidemiological knowledge available, she completed a continuous period of 14 days quarantine before being exposed to the general prison population.

C's period of isolation following the reset ended on 3 May 2020 when she was released back into the general prison population because of the change brought in by the May Isolation Policy. The relaxing of the isolation protocols as between the April Isolation Policy and the May Isolation Policy reflected the changing nature of the COVID-19 pandemic in the community with few new active cases being

⁴² [2020] FCA 1221

identified at the time and the consequent flattening of the epidemiological curve. As the risk reduced QCS' protocols changed in a responsive and proportionate way.

Accordingly, the limits on C's right to be treated humanely when deprived of liberty served a proper purpose because they were necessary to achieve their purpose and they struck a fair balance between her human right and the need to protect the prisoners, staff and visitors in a correctional service from the risk posed by COVID-19.

85. The Commissioner agrees with QCS' submission to the extent they demonstrate that a period of isolation of up to 14 days is a reasonable and proportionate limitation on rights. The Commissioner also appreciates that at the time of C's isolation the respondents were still assessing the risks of the pandemic and so applied a precautionary approach. At the time of C's isolation there were several factors that created uncertainty about how best to assess and respond to the risks of COVID-19. The Commissioner notes QCS' position that in applying public health guidelines such as the 'precautionary principle', a period of more than 14 days in isolation was reasonably necessary to achieve the important purpose of stopping the spread of the virus.
86. The Commissioner does not have the benefit of public health expert opinion to consider this further. Nor is the Commissioner in a position to make findings of fact about the nature and extent of supports that were provided to C while she was in isolation, which would be relevant to determining if her treatment was compatible with relevant rights.
87. However, the Commissioner suggests what may have been reasonable in April and May 2020 does not necessarily remain so now.

Compatibility of duration of isolation

88. Given all that is known about controlling the spread of COVID-19 now, it is unlikely isolating a person for more than 14 days remains a reasonable and justifiable limitation on rights other than in exceptional circumstances, such as where the prisoner has tested positive to COVID-19.
89. The Commissioner welcomes the following submissions from QCS:

The May Isolation Policy on its proper construction, with respect, does provide that prisoners will be released into the general population after the expiry of 14 days subject to exceptional circumstances as determined by advice from QH. In this regard it is noted that the definition of the isolation period of 14 days is accordance with the definition of quarantine as defined by QH, the

policy has been developed on the basis of contemporaneous advice provided by QH and the May Isolation Policy relevantly provides:

...

Management of Prisoners

To reduce the risk of COVID-19 being introduced into the secure custody environment, a reception prisoner will be subject to:

- isolation for a cumulative period of 14 days in single cell accommodation insofar as practicable; and
- temperature checks and health checks as determined by QH personnel.

...

Once the 14 day period has expired, the prisoner will be considered for placement in the general prisoner population subject to a final health check and temperature check by QH.

Therefore, in accordance with May Isolation Policy, any final determination as to whether a prisoner may be released back into the general population will be subject only to exceptional circumstances and based, significantly, on advice from QH.

90. Nonetheless, the Commissioner remains concerned about the use of the word 'considered' in the June Isolation Policy and recommends that the policy be changed to make clear that a person should only remain in isolation for more than 14 days in exceptional circumstances based on health advice.

Compatibility of entitlements while in isolation

91. The Special Rapporteur on Torture has observed in relation to solitary confinement:

Regardless of the specific circumstances of its use, effort is required to raise the level of social contacts for prisoners: prisoner-prison staff contact, allowing access to social activities with other prisoners, allowing more visits and providing access to mental health services.⁴³

92. The Commissioner acknowledges that the May and June Isolation policies appropriately sets out a number of the minimum entitlements for prisoners

⁴³ Manfred Nowak, Special Rapporteur, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN DOC A/63/175 (28 July 2008) 21 [83].

placed in isolation. However, the Commissioner suggests a more compatible policy would not make many of these entitlements subject to the qualifying words: 'to the greatest extent possible'.

93. QCS submits that the removal of these qualifying words would be impracticable in the context of the operational requirements of a correctional facility. Further, QCS considers that the removal of the qualifying wording may undermine the Commissioner's statutory duty to ensure the security and good management of the prison and the safety of persons.
94. The Commissioner considers that international standards such as those provided for in the Mandela Rules are intended to set out minimum entitlements that can be implemented without undermining the security and good order of a correctional facility. According to international experts, including the WHO, certain entitlements must continue even during the pandemic.
95. The respondents point out that a case by case assessment of providing certain items, for example access to an in-cell television or kettle could put a particular prisoner's safety at risk or risk damage to property. The Commissioner agrees that mandating such items may undermine the statutory obligation of the QCS Commissioner and does not recommend that such items be included in those entitlements provided without qualification.
96. Nonetheless, the Commissioner suggests there is no justification for placing the caveat of 'to the greatest extent possible' on specific entitlements listed in the June Isolation Policy which are recognised as required for the humane treatment of those deprived of liberty as outlined above. A less restrictive option would be to ensure that these are provided as the minimum standards they are intended to be.

Compatibility of access to fresh air while in isolation

97. The Commissioner is also concerned the policy does not specify a prisoner's right to access daily fresh air and exercise. In that regard, QCS maintains that any limitation on the right to humane treatment while in detention is reasonable and demonstrably justified in the context of the operational requirements and constraints of the correctional facilities. QCS submit it is not feasible to provide daily access to exercise and fresh air to all prisoners who are undergoing isolation in accordance with the isolation protocols.
98. The Commissioner accepts that in some limited circumstances during this pandemic a failure to provide daily fresh air and exercise may be

compatible with the right to humane treatment when deprived of liberty. However, such a limitation would have to be justified on a case by case basis and the Commissioner suggests would only be compatible in exceptional circumstances and where efforts were made regularly to facilitate whatever access to fresh air is possible during the period of isolation.⁴⁴

99. The New Zealand Ombudsman recently reported on its inspections of prisons in light of COVID-19. The Ombudsman noted several prisons had dedicated areas or units to accommodate prisoners separated from the general prison population as part of their infection control measures. This included prisoners in ‘medical isolation,’ prisoners with suspected or confirmed COVID-19, or prisoners entering or re-entering the prison. The Report considered the challenge of keeping prisoners in isolation separate, while ensuring that all prisoners received their minimum daily entitlements. Nonetheless, citing the Mandela Rules, the Ombudsman stated:

My Teams found the cohort ‘bubble’ and isolation systems in all the prisons visited to be clear and effective at keeping prisoners separated from each other, minimising the risk of the potential spread of COVID-19 in prisons.

However, at some of the prisons the separation of individuals and the resulting unlock regimes had a negative effect on some prisoners’ daily access to fresh air and activities. Therefore, I recommended to four prisons that all prisoners should have access to at least one hour each day of fresh air.⁴⁵

Conclusion

100. The Commissioner acknowledges the significant efforts of the Queensland government, and the particular respondents, in responding to the COVID-19 pandemic. A human rights approach serves to enhance that response, by requiring proper consideration of a broad range of relevant matters, and scrutinising restrictions against the values of a free and democratic society.

101. The Commissioner welcomes the change in QCS policy to clarify that a prisoner transferred does not need to restart their period of 14 days

⁴⁴ Recognising these risks, in an earlier unresolved human rights complaint involving hotel quarantine, the Commissioner recommended that the respondents ensure opening windows or balconies be included as a minimum standard for the selection of quarantine hotels, and plans be put in place to decommission currently used hotels that do not meet these minimum standards.

⁴⁵ New Zealand Ombudsman, *OPCAT COVID-19 report - Report on inspections of prisons under the Crimes of Torture Act 1989* (June 2020) 10.

isolation, reflecting international human rights standards and the apparent weight of medical opinion that 14 days is an appropriate time to reduce the risk of a contagious person spreading COVID-19.

102. Nonetheless, in this unresolved complaint report, the Commissioner considers the right to humane treatment when deprived of liberty is limited by a period of isolation stretching beyond 14 days, and that the respondents have to demonstrably justify this limitation on rights.
103. These recommendations are made to only one respondent – QCS – as the entity responsible for the relevant policies.

Recommendations

104. In accordance with section 88(4) of the HR Act, the Commissioner considers that QCS should take the following actions to ensure their acts and decisions are compatible with human rights:
 - a. That relevant policies explicitly state that prisoners isolated in response to the COVID-19 pandemic should not be isolated for more than 14 days other than where Queensland Health provide clear medical advice that their isolation must continue due to a risk of infection. Any further period of medical isolation must be clearly defined as being based on expert health advice. This requires more than a mere consideration of transfer out of isolation after 14 days as provided for in the current policy. Rather, the policy must mandate that a prisoner is transferred out of isolation other in exceptional circumstances, such as the risk of COVID-19 infection remaining.
 - b. While in isolation, prisoners must receive certain minimum entitlements without the caveat of ‘to the greatest extent possible’. A failure to provide the following measures to a particular prisoner risks their treatment being an unreasonable limitation on the right to humane treatment when deprived of liberty:
 - i. access to confidential medical assessment and treatment including specialist mental health services;
 - ii. adequate facilities to effectively communicate unmonitored with a lawyer or advisor;
 - iii. regular, facilitated communication with family if necessary via free calls to ensure communication can take place;
 - iv. access to relevant oversight procedures and to make complaints;
and

- v. access to cultural support.
 - c. Relevant policies be amended to provide that while in isolation, prisoners must be provided daily access to fresh air and exercise other than in exceptional circumstances.
105. The Commissioner is grateful for the assistance of all parties in handling this complaint and preparing this report.

Imposed isolation plagues Queensland prisons during pandemic

11 December 2020

By Tamara Walsh and Helen Blaber

COVID-19 introduced a plethora of conundrums when it came to keeping the community safe—with these issues further complicated when it came to the prisons during the pandemic. In Queensland, strict isolation measures were introduced to protect the prison population from a potential outbreak of the virus. However, advocacy groups have raised concerns that the use of isolation in Queensland’s prisons has amounted to a serious violation of human rights^{[i](#)}.

Research around the world has demonstrated that placing people in solitary confinement, even for short periods of time, can cause serious psychological harm which may be irreversible.^{[ii](#)} It can be argued that the incursions on human rights that have occurred for people in prison during the pandemic have been disproportionate and that less restrictive measures could have achieved the purpose of preventing transmission in prison—begging the question, what should have been done instead?

Emergency declarations and isolation

Between March and September 2020, emergency declarations were imposed throughout Queensland prisons to enable restrictions on prisoner movement to be imposed, and visits and access to privileges to be limited.^{[iii](#)}

As a result of these declarations, all visits ceased.^{[iv](#)} Visits by certain professionals could occur subject to approval, but no personal or legal visits were permitted. Further to this, Queensland’s corrective services facilities began implementing isolation measures, and many prisoners were segregated to limit the risk of COVID-19 infection.

Isolated prisoners were confined to their cells for 14-day periods without any out of cell time or engagement with others. Unlike people quarantined in the community, isolated prisoners did not have access to fresh air, exercise, internet or mobile phones and some experienced poor living conditions.

The impact of isolation on prisoners' human rights

Prisoners in medical isolation were effectively being held in solitary confinement as they were locked down in a cell for at least 22 hours a day with limited or no association with other prisoners.^[vi] Placement in solitary confinement conditions can result in serious psychological harm, which may be permanent. Recent research out of the University of Queensland suggests that people in solitary confinement often display symptoms of psychosis after only a short period of time.^[vii] They also frequently engage in disordered and obsessive behaviour as well as acts of self-harm.^[viii]

Placement in solitary confinement has been found to breach prisoners' human rights. For example, the Supreme Court of British Columbia recently held that laws authorising administrative segregation breached the right to life, liberty and security of person because of the risk of suicide and the 'significant risk of serious psychological harm' that solitary confinement created.^[ix] The Supreme Court of New Zealand has also held that solitary confinement may breach prisoners' right to humane treatment when deprived of liberty where their 'basic human needs, including personal dignity and physical and mental integrity' are not being met.^[x] The European Court of Human Rights has held that solitary confinement may amount to 'inhuman treatment' in circumstances where the prisoner experiences 'complete sensory isolation, coupled with total social isolation.'^[xi]

In Queensland, the recently passed *Human Rights Act 2019* (Qld) requires public entities, including corrective services, to act and make decisions in a way that is compatible with human rights, and in making decisions, to give proper consideration to relevant human rights.^[xii] Based on the Canadian approach, the Queensland *Human Rights Act* recognises that rights may be limited, but only where they are reasonable and demonstrably justified.^[xiii]

While limitations on human rights may well be reasonable and justifiable in the context of COVID-19, to be human rights compliant, Queensland Corrective Services is required consider whether any less restrictive alternatives existed to achieve the same purpose. The WHO has stated that medical isolation should only occur as a matter of 'medical necessity' and that, even in the context of COVID-19, human rights protections still apply, particularly the rules that prohibit prolonged solitary confinement and cruel, inhuman or degrading treatment, and that require external monitoring of correctional facilities.^[xiv]

Isolation measures in Queensland's prisons did not always comply with minimum legislative requirements. For instance, prisoners in solitary confinement must have access to reticulated water, and a toilet and shower facilities and be given the opportunity to exercise in the fresh air for at least two daylight hours a day, unless a doctor or nurse has advised otherwise.^[xiv] Yet isolated prisoners were not provided exercise opportunities and some had limited access to food and drinking water, and were restricted as to the number of times they could flush the toilet. Prisoners spent extended periods of time in complete social isolation and in some circumstances, did not have contact with family and friends or their legal representatives.

Many of these restrictions infringed prisoners' human rights and some were not consistent with the goal of limiting the spread of COVID-19. Locking a prisoner down in their cell for 24 hours a day with no opportunity for fresh air or exercise may amount to cruel, inhuman and degrading treatment.^[xv] Preventing prisoners from communicating with others may also breach family and cultural rights protected under the Human Rights Act.^[xvi] Mobile phones, free calls on the telephone system and access to videoconferencing (through iPads and other devices) should have been rapidly provided to prisoners in isolation, particularly for prisoners with children.^[xvii] Limiting access to lawyers and external monitors raises additional human rights concerns^[xviii] and could similarly have been provided without increasing transmission risk through the use of technology. The failure to do so meant that adequate accountability measures were not in place at a time when they were needed most.

[i] Ben Smee, 'Some prisoners spending 22 hours a day in solitary confinement due to Queensland Covid lockdown', *The Guardian* (online, 16 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/16/vulnerable-prisoners-sent-to-solitary-confinement-during-queenslands-covid-lockdown-lawyers-say?fbclid=IwAR3Rb4e4CcP-uQlISQ9A752eCtQVXf1quDaED9lJUhvJ4rbXBdqmNlyRR9s>>.

[ii] Terry A. Kupers, 'What To Do With the Survivors? Coping with the Long-Term Effects of Isolated Confinement' (2008) 35(8) *Criminal Justice and Behaviour* 1005, 1006.

[iii] For all Queensland Corrective Services Emergency Declarations, see <<https://www.publications.qld.gov.au/dataset/emergency-declarations>>.

[iv] 'High Level Summary of QCS Management of COVID-19 within Correctional Centres: current 23/04/2020', *Queensland Corrective Services (Summary, 23 April*

2020) <https://corrections.qld.gov.au/wp-content/uploads/2020/04/QCS-Stakeholder-information_lr.pdf>.

[v] *United Nations Office on Drugs and Crime, The United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 44 ('The Nelson Mandela Rules')*.

[vi] *Tamara Walsh et al, 'Legal Perspectives on Solitary Confinement in Queensland', University of Queensland School of Law (Report, 2020) 10-11.*

[vii] *Ibid* 6.

[viii] *British Columbia Civil Liberties Association v Canada (Attorney General) 2018 BCSC 62, [247].*

[ix] *Taunoa & Ors v The Attorney-General & Anor [2008] 1 NZLR 429, 471 [80].*

[x] *Mathew v The Netherlands (European Court of Human Rights, Application No 24919/03, 29 September 2005) [199], [205].*

[xi] *Human Rights Act 2019 (Qld) s 58.*

[xii] *Human Rights Act 2019 (Qld) s 13.*

[xiii] *WHO, 'Preparedness, preventing and control of COVID-19 in Prisons and other Places of Detention: Interim Guidance', World Health Organisation Regional Office for Europe (Report, 15 March 2020) 5.*

[xiv] *Corrective Services Regulation 2017 (Qld) s 4.*

[xv] *Ahmad & Ors v The United Kingdom (European Court of Human Rights, Application No 2402/07, 10 April 2012).*

[xvi] *Human Rights Act 2019 (Qld) ss 26, 27.*

[xvii] *Catherine Flynn, 'Getting There and Being There: Visits to Prisons in Victoria – the Experiences of Women Prisoners and Their Children' (2014) 61(2) Probation Journal 176, 178.*

[xviii] *Human Rights Act 2019 (Qld) s 32; The Nelson Mandela Rules, UN Doc A/RES/70/175 (n 5) rule 45(1).*