

Submission from the ACT Inspector of Correctional Services to the Commonwealth Government COVID-19 Response Inquiry

I provide this submission in relation to the Inquiry's terms of reference regarding the role of and responsibilities of governments and the national governance mechanisms, and advisory bodies supporting responses to COVID-19. This submission is also relevant to the Inquiry's purpose of identifying 'mechanisms to better target future responses to the needs of particular populations', in relation to detained people.

In summary, based on the experience of the COVID-19 pandemic, I suggest future governments must ensure:

- Restrictions imposed in places of detention are constantly assessed to ensure they remain proportionate, particularly when restrictions are eased in the broader community;
- Oversight bodies can independently decide whether to visit places of detention during a pandemic;
- Detaining authorities have the ability to release detained people in an emergency pandemic situation.

About OICS

The ACT Inspector of Correctional Services (OICS) was established in 2018 to provide independent oversight of ACT correctional and youth justice facilities, focusing on continual improvement and prevention of ill-treatment.¹ The Inspector provides oversight through conducting reviews of ACT correctional facilities and services, and reviewing critical incidents. Reviews are conducted against published inspection standards, which set out the expectations for treatment and care, and indicators that help assess whether expectations are being met. The methodology for conducting reviews draws on internationally accepted good practice approaches for preventive detention monitoring, as set out in the Optional Protocol to the Convention against Torture (OPCAT) and related guidance.² In early 2022, the ACT Government nominated OICS, the ACT Human Rights Commission and the ACT Ombudsman to be the multi-body National Preventive Mechanism (NPM) under OPCAT.

OICS approach to COVID-19

As well as posing a challenge for detaining authorities, oversight bodies such as OICS also faced uncertainty in determining whether they could, and should, continue to visit places of detention during the height of the pandemic. On 25 August 2020, OICS announced that it would visit the Alexander Maconochie Centre (AMC), Bimberi Youth Justice Centre and the court cells during the COVID-19 pandemic where it is safe to do so consistent with ACT Chief Health Officer advice.³ In our 2019-20 Annual Report, the then Inspector noted:

The year also brought us COVID-19 and the challenge of conducting our business as an independent oversight body without doing harm to the very people...whose well-being we are supposed to be monitoring. I decided quite early that we would cease all non-essential visits to the centres and the Court Transport Unit...under the "do no harm" principle. However, we closely monitored COVID-19 responses both in the ACT and other jurisdictions and set up an information bank on our website that was regularly updated.

Planning for future pandemics

Based on OICS' experience, I suggest an important safeguard for all jurisdictions is ensuring primary legislation clearly establishes that it is a matter for independent oversight bodies to determine if they will continue to visit places of detention during a pandemic, based on public health advice in relation to the risk to staff, detained people and the broader community.⁴ Detaining authorities should not be able to refuse entry to independent oversight agencies based on the risk of transmission. This is consistent with advice of the World Health Organization released in 2021:

¹ See *Inspector of Correctional Services Act 2017* (ACT).

² Australia ratified the OPCAT in 2017 and the obligations in the treaty became binding in 2023.

³ *OICS Latest News: COVID-19* (Website) <<https://www.ics.act.gov.au/latest-news/articles/covid-19>>

⁴ Noting Victoria appears to be the only jurisdiction to have enacted general long term pandemic legislation to ensure a consistent framework for responding to pandemic risks in future. See *Public Health and Wellbeing Act 2008* (Vic) Part 8A.

The COVID-19 pandemic must not be used as a justification for objecting to external inspection of prisons and other places of detention by independent international or national bodies whose mandate is to prevent torture and other cruel, inhuman or degrading treatment or punishment; such bodies include national preventive mechanisms under the Optional Protocol to the Convention against Torture, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment...Even in the circumstances of the COVID-19 pandemic, bodies of inspection in the above sense should have access to all people deprived of their liberty in prisons and other places of detention, including to persons in medical isolation, in accordance with the provisions of the respective body's mandate. All monitoring bodies should, however, observe the "do no harm" principle when dealing with persons in places of detention.⁵

Even if oversight bodies make the decision not to visit places of detention in person, there must still be mechanisms for oversight bodies to continue to monitor in other ways. For example, speaking to detained people via phone or video link, and meeting with family and friends of detained people to understand their experiences and ensure they are able to contact them. Detaining authorities and oversight bodies should also continue to meet, if necessary remotely, during pandemics.

I also note that the Director-Generals in the ACT with responsibility for the custody of detained adults and children have some discretion to grant temporary release from custody.⁶ However, in comparison, in NSW express new powers were provided to the Commissioner of Corrective Services to grant parole to low-risk and vulnerable detained people to protect them from the virus.⁷ Given the significant potential risk to detained people in a place of detention during a pandemic, I would suggest this too should be included in legislation.

The need to ensure measures in places of detention remain proportionate

I appreciate that the threat posed by COVID-19 provided a unique challenge to Australia's federated model of government. OICS has publicly acknowledged that staff operated in an environment that was made even more challenging by COVID-19. Detaining authorities made significant efforts to prevent large-scale outbreaks of the virus in places of detention, and were successful in the ACT. Fortunately, many of these measures such as significant periods of health isolation on admission, cessation of in-person visits, programs and activities etc are no longer necessary or in place. In the ACT, COVID-19 was a catalyst to implement virtual visits for detained people in the AMC, which has become an ongoing option for detained people in addition to in person visits. Furthermore, increasing use of audio-visual links for court appearances, and for tele-health appointments is positive, though may not be appropriate in all cases.

Nonetheless, in fulfilling my functions, I observed a significant delay between a lessening of public health restrictions (as informed by national decisions and guidance) imposed by the ACT Chief Health Officer for youth justice facilities, and a commensurate relaxation of limitations on detained young people imposed by detaining authorities. Responsiveness of restrictions to changes in risk is particularly relevant in a jurisdiction like the ACT, in which human rights legislation places obligations on detaining authorities to act and make decisions that are compatible with human rights and give proper consideration to human rights.⁸ This requires detaining authorities to demonstrate any limitation of human rights imposed on public health grounds (for example, to prevent the transmission of COVID-19) are proportionate to the risks posed by COVID-19. This is detailed in a report I recently tabled in the ACT Legislative Assembly: *Thematic Review of a Correctional Service: Isolation of children and young people at Bimberi Youth Justice Centre*, which is attached.

This was the first thematic review at the ACT's Bimberi Youth Justice Centre conducted by OICS, and served as a pilot NPM visit under OPCAT. The review considered the topic of isolation of children and young people. This topic was chosen because of the potential for isolation, particularly when it is prolonged, to cause significant harm to children and young people in detention. Isolation must be avoided where possible, and when it cannot be avoided, isolation should be for the shortest possible time, in the least restrictive way and with safeguards such as regular reviews and right to appeal built in.

⁵ World Health Organisation, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance* (8 February 2021) 5. See also UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic* (adopted on 25th March 2020).

⁶ Corrections Management Act 2007 (ACT) s 205; Children and Young People Act 2008 s 241, though noting these provisions may not be fit for purpose in relation to a pandemic.

⁷ See *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) which added Part 15 to the *Crimes (Administration of Sentences) Act 1999* (NSW) (now repealed). See also *Crimes (Administration of Sentences) Regulation 2014* (NSW) Part 23.

⁸ See *Human Rights Act 2004* (ACT).

The most significant issue identified by the Review Team was in relation to COVID-19 health segregation. The Review Team was deeply concerned to observe when onsite at Bimberi Youth Justice Centre in June 2023 that on admission to custody, children and young people were still being required to undergo an initial period of health segregation that was usually 6–7 days. This was despite youth detention not being considered a ‘high risk setting’ by the ACT Chief Health Officer since October 2022 - some 8 months prior - and there being no other formal COVID-19 restrictions in place in the broader ACT community. The initial hours and days in custody are considered to be a high-risk time for detained people in terms of their mental health and may be a traumatic experience particularly if it is their first time in custody. This practice of up to 7 days health isolation on admission in June 2023 appeared out of step with the advice of national governance mechanisms and the approach taken in other jurisdictions.

Through the review process, I brought this matter to the urgent attention of the Community Services Directorate, Justice Health Services and the Minister for Youth Justice. Pleasingly, there was a timely response, resulting in changes to COVID-19 health segregation practices on admission. In addition to the ‘urgent recommendations’ raised initially, the review also recommended that the ‘treating doctor’ under the legislation governing youth detention in the ACT play an ongoing role in monitoring any restrictions on children and young people in Bimberi resulting from health segregation, to ensure limitations are proportionate.

I believe our findings and recommendation arising from this review in relation to public health restrictions provide an important lesson in the wake of the COVID-19 pandemic. A continued focus is required to test the proportionality of restrictions imposed in adult corrections and youth justice settings (as well as other settings) as the threat to health posed by a virus eases.

Other COVID-19 issues

COVID-19 was a focus of some of OICS’ reports tabled from 2020 onwards:

- Our 2022 Healthy Prison Review of the Alexander Maconochie Centre (AMC) noted that the COVID-19 pandemic significantly impacted operations including causing significant staffing pressure, and for detainees reduced time out of cell and reduced access to programs and visits.⁹
- In a review of a death in custody in February 2022, OICS recommended ACT Corrective Services develop guidance for operations of the then ‘COVID-19 unit’ to ensure it is the least restrictive environment possible in the circumstances. The review recommended that this guidance consider protective factors and supports, such as prioritising detainee’s contact with the outside world, and have key performance indicators around timeframes for setting up detainee phone lists.
- A November 2020 Critical Incident Review into a riot noted that a factor causing unrest at the AMC may have been the restrictions on social visits implemented due to the COVID-19 pandemic. At the time of the riot, detainees could have limited face-to-face visits, but there were restrictions on the number of visitors and no physical contact was allowed, including with children. This restricted visit regime came after a period of several months where there were no in-person visits permitted. However, video visits were occurring during most of this period. While visits were not raised as an issue in the detainee survey OICS conducted, it was mentioned as a “demand” during the riot.¹⁰
- In our 2020 Healthy Centre Review of Bimberi we noted that the use of video call technology has emerged as an innovative tool in correctional facilities to enhance contact with families and friends, especially during the COVID-19 pandemic and recommended video call technology be used for social visits (which ultimately occurred).

Conclusion

Thank you for the opportunity to make this submission. Based on the above examples, I suggest there are opportunities to learn from our experience as an independent detention oversight body in relation to managing COVID-19 and other pandemics in places of detention in future.

⁹ ACT Inspector of Correctional Services (2022), *Report of a healthy prison review of the Alexander Maconochie Centre*, Canberra.

¹⁰ ACT Inspector of Correctional Services (2021), *Report of a review of a critical incident: Riot and serious fires at the Alexander Maconochie Centre on 10 November 2020*, Canberra.