

## **Novel Coronavirus (COVID-19)**

### **Information for NSW criminal law practitioners<sup>1</sup>**

1. This document is intended to provide criminal law practitioners in NSW with general information about the novel coronavirus ('COVID-19') and its potential impact on people facing criminal charges, whether in terms of bail, sentencing or otherwise.
2. It will not refer to any NSW or Australian case law dealing with the impact of COVID-19 on criminal matters, or the way in which COVID-19 might be relevant to issues such as bail, sentencing or parole. This is because the Public Defenders have created and are maintaining a detailed and up-to-date website dedicated to such material, which is available via [this link](#).

#### **General information about COVID-19<sup>2</sup>**

##### *What is COVID-19?*

3. Coronaviruses are a large family of viruses known to cause respiratory infections. This new coronavirus is named COVID-19.
4. There is currently no vaccine to prevent COVID-19. Therefore no one has immunity from this virus.
5. The World Health Organization ('WHO') has declared that COVID-19 is a "pandemic". A pandemic is the worldwide spread of a new disease against which most people have no immunity.
6. The Australian Government has declared that the COVID-19 outbreak in Australia is a "health emergency".<sup>3</sup>

##### *How is it spread?*

7. Respiratory secretions, formed as droplets and produced when an infected person coughs, sneezes or talks, contain the virus and are the main means of transmission.
8. There are two main routes by which people can spread COVID-19:
  - a. Infection can be spread to people who are nearby (within 1 metre) by breathing in droplets coughed out or exhaled by a person with the COVID-19 virus; and

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<sup>1</sup> Version 1 – 12 April 2020.

<sup>2</sup> Unless otherwise stated, the information in this section comes from the World Health Organization ('WHO') 'Coronavirus disease (COVID-19) situation reports' (various dates), available via this link: < <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports>>.

<sup>3</sup> Australian Government Department of Health fact sheet, 'COVID-19 – Frequently asked questions' (Version 9 – 1 April 2020), available via this link: <[https://www.health.gov.au/sites/default/files/documents/2020/04/coronavirus-covid-19-frequently-asked-questions\\_0.pdf](https://www.health.gov.au/sites/default/files/documents/2020/04/coronavirus-covid-19-frequently-asked-questions_0.pdf)>.

- b. People may become infected by touching contaminated surfaces or objects (fomites) and then touching their eyes, nose, or mouth.
9. According to current evidence, transmission may start just before symptoms become visible. However, many people infected with COVID-19 experience only mild symptoms. This is particularly true at the early stages of the disease. It is therefore possible to catch COVID-19 from someone who has, for example, just a mild cough and does not feel ill.

*How long can the virus survive on surfaces?*

10. How long any respiratory virus survives will depend on a number of factors, including the type of surface the virus is on, whether it is exposed to sunlight, differences in temperature and humidity, and exposure to cleaning products.
11. Under most circumstances, the amount of infectious virus on any contaminated surface is likely to decrease significantly after 48 hours.
12. Once such viruses are transferred to hands, they survive for very short lengths of time. Regular cleaning of hands and frequently touched hard surfaces with disinfectants will therefore help to reduce the risk of infection.

*What are the symptoms of COVID-19?*

13. The most common symptoms of COVID-19 are fever, tiredness and dry cough. Some patients may have aches and pains, nasal congestion, runny nose, sore throat or diarrhoea.
14. Approximately 80% of COVID-19 cases manifest as a fairly mild illness. Those people generally recover from the illness without needing specialist treatment.
15. However, approximately 20% of cases (or 1 in 5 people who are infected with COVID-19) become seriously ill and develop difficulty breathing. Approximately 6% of cases require specialist medical care, including mechanical ventilation.

*How do we stop the spread of COVID-19?*

16. Practising good hand and sneeze/cough hygiene and keeping one's distance from others when sick is the best defence against viruses such as COVID-19.

*Who is most at risk?<sup>4</sup>*

17. According to the Australian Government Department of Health, the people most at risk of contracting COVID-19 are:
- a. Travellers who have recently been overseas;
  - b. Those who have been in close contact with someone who has been diagnosed with COVID-19;

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<sup>4</sup> Australian Government Department of Health fact sheet, 'COVID-19 – Frequently asked questions' (Version 9 – 1 April 2020), above n 3.

- c. People in correctional centres and detention facilities; and
  - d. People in group residential settings.
18. People who are, or are more likely to be, at higher risk of serious illness if they contract COVID-19 are:
- 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 (especially high blood pressure, heart problems or diabetes);
  - c. People 70 years and older; and
  - d. People with compromised immune systems.
19. The Australian Government Department of Health has stated that detention centres and other correctional facilities are “high risk settings” for the spread of COVID-19.<sup>5</sup>

### **Prevalence of COVID-19**

#### *World*<sup>6</sup>

20. As at 10am on 12 April 2020, a total of 1,614,951 confirmed cases of COVID-19 have been reported in the world.
21. There have been 99,887 confirmed deaths so far as a result of COVID-19.

#### *Australia*<sup>7</sup>

22. As at 6am on 12 April 2020, a total of 6,289 confirmed cases of COVID-19 have been reported in Australia.
23. Of the 6,292 confirmed cases in Australia, 57 have died from COVID-19. The majority of those deaths (22) have been in NSW.
24. There are currently 236 people in Australia in hospital receiving treatment for COVID-19. The vast majority of those people (83) are in NSW.

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<sup>5</sup> Australian Government Department of Health fact sheet, ‘COVID-19 – Frequently asked questions’ (Version 9 – 1 April 2020), above n 3.

<sup>6</sup> The information in this section has been taken from the WHO website, ‘Coronavirus disease (COVID-19) Pandemic’ (12 April 2020), available via this link: <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

<sup>7</sup> The information in this section has been taken from the Australian Government Department of Health website, ‘Coronavirus (COVID-19) at a glance’ (12 April 2020), available via this link: <<https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance>>, and their website, ‘Coronavirus (COVID-19) current situation and case numbers’ (12 April 2020), available via this link: <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

25. There are currently 80 people throughout Australia in intensive care units as a result of COVID-19. The majority of those people (30) are in NSW.
26. Over the past week, there has been an average of 122 new cases reported each day. Of the newly reported cases, the majority have been from NSW.
27. Cases of COVID-19 have been reported across all ages. The median age of all cases is 47 years (range: 0 to 100 years). The median age of deaths is 80 years (range: 55 to 94 years).
28. There is a relatively equal ratio of male-to-female cases across most age groups. The higher proportion of females in the 20-29 age group is under investigation, as is the higher proportion of males in the 40-49 age group.

#### *Comparable Western nations*<sup>8</sup>

29. As at 9am on 12 April 2020:

- a. In the USA, a total of 461,275 confirmed cases of COVID-19 have been reported, with 16,596 deaths.
- b. In the UK, a total of 70,276 confirmed cases of COVID-19 have been reported, with 8,958 deaths.
- c. In Canada, a total of 21,226 confirmed cases of COVID-19 have been reported, with 531 deaths.
- d. In New Zealand, a total of 1,035 confirmed cases of COVID-19 have been reported, with 4 deaths.

#### **NSW prison statistics**

30. As at December 2019, there were 13,635 adults in detention in NSW. This figure represents an increase of 3.6% or 470 people in the previous 12 months, and is only slightly lower than the highest ever previous number of 13,651 in May 2018.<sup>9</sup>
31. As at the same date, there were 275 young people in detention in NSW. This is roughly similar to the previous year (259 young people in December 2018).<sup>10</sup>
32. According to the NSW Government Justice Health and Forensic Mental Health Network ('Justice Health'), so far there have been three confirmed cases of COVID-19 amongst health staff at NSW correctional centres. There have not yet been any confirmed cases amongst inmates.<sup>11</sup>

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<sup>8</sup> The information in this section has been taken from the WHO 'Coronavirus (COVID-19) Dashboard' (12 April 2020), available via this link: <<https://who.sprinklr.com/>>.

<sup>9</sup> NSW Bureau of Crime Statistics and Research ('BOCSAR') 'NSW custody statistics: Quarterly update December 2019' (4 February 2020), available via this link: <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/NSW-Custody-Statistics-Dec2019.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_news/NSW-Custody-Statistics-Dec2019.aspx)>.

<sup>10</sup> NSW Bureau of Crime Statistics and Research ('BOCSAR') 'NSW custody statistics: Quarterly update December 2019', above n 9.

<sup>11</sup> Justice Health website, 'COVID-19 (Novel Coronavirus)', available via this link: <<https://www.justicehealth.nsw.gov.au/novel-coronavirus>>.

33. According to an [article](#) by Sahar Mourad published jointly on Daily Mail Australia (admittedly, an ordinarily less-than-reputable source of factual information) and Australian Associated Press ('AAP') on 2 April 2020:

*Some 66 prisoners in NSW jails have been put into isolation after developing coronavirus-like symptoms.*

*None of the prisoners are yet confirmed as having COVID-19, a source told AAP.*

*But some coronavirus tests have been administered and those inmates are awaiting the results.*

34. I have not been able to independently verify that information or to find out whether any of the 66 prisoners allegedly placed in isolation have subsequently been diagnosed with COVID-19.

### **Corrective Services NSW response**

35. Corrective Services NSW has created a dedicated '[COVID-19 \(coronavirus\) response](#)' website.

36. The website includes the following information:

#### ***Our response***

*CSNSW is working closely with Justice Health and Forensic Mental Health Network and NSW Health to prevent and manage potential and confirmed cases of COVID-19...*

...

#### ***Affected correctional centres***

*On 28 March 2020, the first case of COVID-19 in a NSW prison was confirmed, a health care worker at Long Bay Hospital. All necessary measures have been taken to protect staff and inmates.*

*There are no other confirmed cases among staff or inmates in our prisons.*

#### ***Information for visitors to correctional facilities***

##### *Social visits*

*All social visits to adult correctional facilities in NSW have been suspended. This decision aligns with the joint-decision by the National Cabinet, made Friday 20 March, to suspend social visits to adult correctional facilities across Australia.*

*Visits will recommence as soon as it is safe to do so.*

##### *Legal and other professional visitors*

*To reduce the risk of COVID-19 entering out [sic] correctional facilities we are restricting entry.*

*Legal and other professional visitors, who require access to our facilities, are subject to additional screening.*

...

#### Virtual visits

*CSNSW are exploring options to increase the use of audio-visual links to continue personal visits.*

#### **Inmate health and safety**

*Like the rest of the community, it's critical we minimise the risk of COVID-19 entering our correctional facilities. We are doing this by:*

- *Advising inmates of appropriate hygiene practices*
- *Receiving regular briefings from Justice Health and Forensic Mental Health Network, and NSW Health, and following their expert advice*
- *Continuously updating existing contingency plans and adapting local operating procedures to ensure we are prepared in the event of a COVID-19 case in a NSW correctional facility.*

#### **Conditional release power**

*The NSW Government has made changes in response to COVID-19 which give the Commissioner for CSNSW authority to conditionally release some low risk and vulnerable inmates from prison, if this is necessary for the safety and effectiveness of our prisons.*

...

#### **Information for people reporting to Community Corrections**

*Community Corrections continue to manage and provide services to people on a court or parole order. To protect the safety of staff, offenders and the community, some changes have been made to normal services. For example, due to safe distancing policies, community work has been temporarily suspended.*

37. The 'conditional release power' referred to above is contained within legislation passed by the NSW Government on 25 March 2020.<sup>12</sup>
38. The [Explanatory Note](#) to the Act states that the legislation enables the Commissioner of Corrective Services to:
- a. Prohibit or restrict any person from entering or visiting a correctional centre if satisfied that it is reasonably necessary to protect the health of an inmate, any other person or the public, from the health risk posed by the COVID-19 pandemic; and
  - b. Grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the

<sup>12</sup> COVID-19 Legislation Amendment (Emergency Measures) Act 2020, available via this link: <https://www.parliament.nsw.gov.au/bill/files/3741/Passed%20by%20both%20Houses.pdf>.

good order and security of correctional premises arising from the COVID-19 pandemic.

39. These provisions apply for a minimum period of 6 months and may apply for a total of 12 months if the regulations prescribe a longer period.
40. In the [Second Reading Speech](#) in the Legislative Assembly on 24 March 2020, the Attorney General, Mark Speakman, stated:

*The bill creates a power for the Government to make regulations to determine a class of inmates for potential conditional release and allows the Commissioner of Corrective Services to grant parole to those inmates. This will be possible for eligible inmates, irrespective of whether their non-parole period has expired. However, certain classes of inmates will be automatically disqualified from being considered for parole. The Commissioner will not have the power to release an inmate serving a life sentence, a sentence of imprisonment for murder, a serious sex offence or a terrorism offence. I will shortly be providing a Government amendment that will list further exclusions.*

*While the Commissioner already has the power to release inmates into the community on temporary leave permits, the parole framework is being used as it is designed to manage the transition from Correctional Services to the community and includes supervision of inmates by Community Corrections and management by the State Parole Authority... These are broad and extraordinary powers, but necessary to respond to the grave risks posed by the COVID-19 pandemic and to control physical contact in places of detention.*

41. In appropriate cases, practitioners representing clients serving a term of full-time imprisonment and who have not yet been released to parole may wish to apply to the Commissioner of Corrective Services for release pursuant to this new power.
42. However, according to an [article](#) by Josh Butler on 10 Daily published on 7 April 2020:

*... Corrections NSW told 10 Daily it had “no immediate plans” to use the powers, despite concerns raised by academics and politicians over potential coronavirus outbreaks behind bars.*

...

*In a statement to 10 Daily, Corrections NSW defended its response to the coronavirus, but said releasing prisoners wasn’t an immediate priority.*

*“This new measure will only be used if deemed absolutely necessary for the safety and effectiveness of our prisons,” a spokesperson said.*

*“There are no immediate plans to release anyone using this emergency measure, but if it does become necessary it will be done so on a case by case basis and community safety will always be our number one priority.”*

43. Similarly, according to an [article](#) by Liz Farquhar and Anthony Scully on ABC News published on 3 April 2020:

...

*[Commissioner of Corrective Services Peter] Severin said that although he had special powers to release low-risk, vulnerable prisoners in the event of a coronavirus outbreak, he had not seen any need to use them as yet.*

*"I am very pleased that the opportunity is there if I ever need to use it – I hope I won't have to," he said.*

## **Justice Health response**

44. Justice Health has created a dedicated '[COVID-19 \(Novel Coronavirus\)](#)' website.

45. The website includes the following information:

*Justice Health and Forensic Mental Health Network has long-standing procedures in place to prevent and control communicable diseases, including treatment and isolation of affected inmates and patients, use of personal protective equipment (PPE), increased environmental cleaning and identifying individuals at increased risk from infection.*

...

*We are working closely with inmates and patients, partner agencies and the NSW Ministry of Health to prevent and control COVID-19 in our settings.*

### **What the Network is doing to control and prevent COVID-19**

*The Network is screening every inmate/patient, visitor and staff member that enters our facilities in line with current advice from NSW Health. We've also increased environmental cleaning and access to hand sanitiser, and have provided health promotion and education to staff and inmates/patients around hand hygiene, cough and sneeze etiquette, and alerting their nurse or manager if they become unwell.*

### **Managing suspected and confirmed cases**

*Any inmates or patients who are suspected cases are being immediately isolated and provided a mask to prevent transmission, while they undergo any necessary testing, treatment and monitoring. Any custodial or health staff and cleaners entering the room of a potential or confirmed COVID-19 case wear appropriate PPE, including masks, eye protection and disposable gloves and gown to protect themselves and prevent spread of the disease.*

### **Aged and vulnerable inmates**

*The Network has identified and is closely monitoring inmates at increased risk from infection, including those with a history of chronic illness and the aged. As an added precaution, all inmates with acute respiratory symptoms or fever are being tested for COVID-19, irrespective of whether they have been overseas or in contact with a confirmed COVID-19 case in the past 14 days.*

### **Visits are suspended until further notice**

*Personal visits have been suspended in the Forensic Hospital, as well as all NSW correctional and detention centres to reduce the risk of transmission.*



### **Confirmed COVID-19 cases in our settings**

#### Correctional centres and youth justice centres

*There have been no confirmed cases among inmates or young people in custody.*

*There has been one confirmed case among our health staff at Long Bay Hospital.*

#### The Forensic Hospital, Malabar

*There have been no confirmed cases among patients.*

*There has [sic] been two confirmed cases in health staff at the Forensic Hospital.*

*All appropriate health and safety measures in response to COVID-19 have been in place since late January 2020.*

*Following the diagnosis of two staff members at the Forensic Hospital and a staff member at the separate Long Bay Hospital with COVID-19, those staff members have undertaken self-isolation in their own home. Contact tracing has been undertaken with staff, inmates and patients, and those identified as close contacts of the three staff members have been placed in isolation and will undergo testing and monitoring.*

### **Risks posed by COVID-19 to people in custody**

#### *WHO paper*

46. On 15 March 2020 the WHO published a paper titled 'Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance'.<sup>13</sup>

47. In Part 1 of the paper, titled 'Introduction',<sup>14</sup> the WHO states that:

*People deprived of their liberty, such as people in prisons and other places of detention, are likely to be more vulnerable to the Coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time. Moreover, experience shows that prisons, jails and similar settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons. Prison health is therefore widely considered as public health. The response to COVID-19 in prisons and other places of detention is particularly challenging, requiring a whole-of-government and whole-of-society approach, for the following reasons:*

*1. Widespread transmission of an infectious pathogen affecting the community at large poses a threat of introduction of the infectious agent into prisons and other places of detention; the risk of rapidly increasing transmission of the disease within prisons or other places of detention is likely to have an amplifying effect on the epidemic, swiftly multiplying the number of people affected.*

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<sup>13</sup> Available via this link:

<[http://www.euro.who.int/\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1)>.

<sup>14</sup> At 1.

2. Efforts to control COVID-19 in the community are likely to fail if strong infection prevention and control (IPC) measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well.

...

4. People in prisons and other places of detention are already deprived of their liberty and may react differently to further restrictive measures imposed upon them.

48. In Part 2 of the paper, titled 'Rationale',<sup>15</sup> the WHO states that:

*People deprived of their liberty, such as people in prisons, are likely to be more vulnerable to various diseases and conditions. The very fact of being deprived of liberty generally implies that people in prisons and other places of detention live in close proximity with one another, which is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19. In addition to demographic characteristics, people in prisons generally have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as... poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.*

...

*... prevention of importation of the virus into prisons and other places of detention is an essential element in avoiding or minimizing the occurrence of infection and of serious outbreaks in these settings and beyond.*

...

*Prisons and other places of detention are enclosed environments where people (including staff) live in close proximity. Every country has a responsibility to increase their level of preparedness, alert and response to identify, manage and care for new cases of COVID-19...*

49. In Part 3 of the paper, titled 'Planning principles and human rights considerations',<sup>16</sup> the WHO states that:

*Enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages. Priority should be given to non-custodial measures for alleged offenders and prisoners with low-risk profiles and caring responsibilities...*

50. In Part 6 of the paper, titled 'General approach',<sup>17</sup> the WHO states that:

*Controlling the spread of infection in prisons and other places of detention is essential to preventing outbreaks of COVID-19 in such settings, protecting the health and well-*

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<sup>15</sup> At 2.

<sup>16</sup> At 3-5.

<sup>17</sup> At 8-9.

*being of all those who live and work in them and those who visit them, and protecting the outside community.*

...

*Decisions to limit or restrict visits need to consider the particular impact on the mental well-being of prisoners and the increased levels of anxiety that separation from children and the outside world may cause.*

...

*Prison/detention management should consider implementing measures to limit the mobility of people within the prison/detention system and/or to limit access of non-essential staff and visitors to prisons and other places of detention, depending on the level of risk in the specific country/area. 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.*

51. In Part 12 of the paper, titled 'Prevention measures',<sup>18</sup> the WHO states that:

*... All staff and people in prisons and other places of detention should have comprehensive awareness of COVID-19 prevention strategies, including adherence to hand hygiene measures, respiratory etiquette (covering coughs and sneezes), physical distancing (maintaining a distance of at least 1 metre from others), being alert to signs and symptoms of COVID-19, staying away from ill people, and (in the case of staff) staying home when ill.*

...

*It is recommended that the following general precautions for infectious respiratory diseases are taken to help prevent people (staff, visitors, vendors, detainees etc. in prisons) from catching and spreading COVID-19:*

- *Hands should be washed often with soap and water and dried with single-use towels; alcohol hand sanitizer containing at least 60% alcohol is also an option if available...*
- *Physical distancing should be observed;*
- *A disposable tissue should be used to cover mouth and nose when coughing or sneezing, then thrown in a bin with a lid;*
- *Touching of eyes, nose or mouth should be avoided if hands are not clean.*

*If possible, wall-mounted liquid soap dispensers, paper towels and foot-operated pedal bins should be made available and accessible in key areas such as toilets, showers, gyms, canteens and other high-traffic communal areas to facilitate regular hand hygiene. Security staff should assess whether such fixtures pose a security and safety risk to people in prisons and other places of detention prior to their installation.*

...

*Any detainee who has (a) travelled from or lived in an identified high-risk area, or (b) had contact with a known case of COVID-19, should be placed in quarantine, in single accommodation, for 14 days from the date of travel or last possible day of contact. If it is not possible to house the detainee in medical isolation, then detainees with similar risk factors and exposures may be housed together while they undergo quarantine...*

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<sup>18</sup> At 19-23.

...

*A temporary suspension of on-site prison visits will need to be carefully considered in line with local risk assessments and in collaboration with public health colleagues, and should include measures to mitigate the negative impact such a measure is likely to have on the prison population. The specific and disproportionate impact on different types of prisoners, as well as on children living with their parent in prison, must be considered. Measures to restrict movement of people in and out of the detention setting, including restricting transfers within the prison/detention system and limiting access to non-essential staff and visitors, need to be considered carefully in line with appropriate risk assessments, as such restrictions will have a wider impact on the functioning of the detention system. 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.*

### Health experts

52. According to an [article](#) by Dr Matthew Akiyama, Dr Anne Spaulding and Dr Josiah Rich in The New England Journal of Medicine – one of the most prestigious medical journals in the world – dated 2 April 2020 under the headline, ‘Flattening the curve for incarcerated populations – Covid-19 in jails and prisons’:

*Populations involved with the criminal justice system have an increased prevalence of infectious diseases such as HIV and hepatitis C virus (HCV) infections and tuberculosis. Disparities in social determinants of health affecting groups that are disproportionately likely to be incarcerated – racial minorities, persons who are unstably housed, persons with substance use disorders or mental illness – lead to greater concentrations of these illnesses in incarcerated populations. Yet implementation of interventions to address these conditions is often challenging in correctional settings owing to resource limitations and policy constraints. Therefore, comprehensive responses that straddle correctional facilities and the community often need to be devised.*

...

*“Social distancing” is a strategy for reducing transmission and “flattening the curve” of cases entering the health care system. Although correctional facilities face risks similar to those of community health care systems, social distancing is extremely challenging in these settings. Furthermore, half of all incarcerated persons have at least one chronic disease, and according to the U.S. Department of Justice, 81,600 are over the age of 60, factors that increase the risk of poor outcomes of infection. With limited ability to protect themselves and others by self-isolating, hundreds of thousands of susceptible people are at heightened risk for severe illness.*

...

*... we believe that we need to prepare now, by “decarcerating,” or releasing, as many people as possible, focusing on those who are least likely to commit additional crimes, but also on the elderly and infirm; urging police and courts to immediately suspend arresting and sentencing people, as much as possible, for low-level crimes and misdemeanors...*

*... To respond to this global crisis, we need to consider prisons and jails as reservoirs that could lead to epidemic resurgence if the epidemic is not adequately addressed in these facilities everywhere.*

*Lawyers, academics and justice advocates*

53. In an [open letter](#) to all Australian governments in relation to the impact of COVID-19 on the criminal justice system dated 21 March 2020, a group of more than 370 lawyers, academics and justice advocates wrote:

*We the undersigned are seeking your immediate action to reduce the risk of transmission of COVID-19 in the Australian criminal justice system, especially prisons and youth detention centres.*

*We know that COVID-19 spreads quickly in closed spaces and prisons are commonly [epicentres for infectious diseases](#). This is particularly a concern where there is overcrowding, with most Australian prisons operating at [over 100% of their design capacity](#). The World Health Organization (WHO) has identified [overcrowding](#) as a structural problem that contributes to the spread of infections.*

*In addition, many people who are incarcerated also have [chronic conditions](#), such as diabetes, cardiovascular disease and asthma, which makes them more vulnerable to more severe forms of COVID-19. [Research](#) on other diseases, such as tuberculosis (TB) and hepatitis, shows rates of infection among incarcerated populations are up to 100 times higher than outside of prisons.*

*It is only a matter of time before COVID-19 breaks out in our prisons and youth detention centres. This will then have a substantial flow-on effect to the community, including community health services. People are continually churning in and out of prisons and then being released to their communities. Significantly, [77% of people entering and 33% of people in prison are unsentenced](#) and [30% of sentenced prisoners are expected to serve less than 12 months](#).*

...

*Prisons experience a daily influx of correctional staff, healthcare workers, lawyers, educators, non-governmental support workers and visitors – all of whom can carry viral conditions at the prison back to their homes and communities and return the next day carrying them from home. In the current circumstances, it is unviable to preclude incarcerated people becoming infected with COVID-19 and spreading the virus beyond prison walls.*

*Healthcare in prisons is already overstretched, which creates a risk that people living and working in prisons will not be monitored regularly enough. Symptoms need to be addressed quickly. Isolating people suspected of having the virus will also be a major challenge.*

*People in prisons also may not be able to regularly wash their hands, which may promote the spread of disease. Hand sanitiser, which contains alcohol, may be considered contraband. Prisoners share bathrooms, laundry and areas where food is consumed. Most toilets do not have lids. Many cells are doubled-up and prisoners share rooms and cottages in low security prisons. Air circulation can be poor, as many windows do not open. Soap may only be available at a cost and many prisoners have no prison employment and no money for this.*

*To prevent prisons becoming COVID-19 [hotspots](#), the only logical response is decarceration. This emergency measure is necessary to protect the health and wellbeing of prisoners and the wider community. As the pandemic has widened, international measures have included Iran's release of [85,000 prisoners](#), [Ireland's proposal](#) to release prisoners with less than 12 months to serve and the [proposed release of high-risk inmates from Rikers Island](#) and elsewhere in the [United States](#) and [United Kingdom](#).*

*Prisons are the remaining sphere of Australian society that is denied the protection of infection control standards. Prisoners are forced into a possible site of contagion with no choice over the prison facility, or cell-mates with whom they will be detained. Imprisonment should not involve forced subjection to a deadly infection. Overcrowded prisons are simply incapable of quarantining people. [Policies need to be directed to releasing prisoners, and laws governing police, prosecution and judicial discretion need to be changed to prevent further imprisonment.](#)*

*We are therefore calling on all Australian governments to, as a matter of urgency:*

...

- *Provide for the early release of prisoners, including:*
  - *Those at high risk of harm from COVID-19, including those with pre-existing health conditions and older people;*
  - *Children and young people;*
  - *Those detained for summary offences (e.g. unlawful driving, public disorder, fine default), property crimes, non-violent drug offences, common assault and breach of justice procedures;*
  - *Those who are likely to be released in the next six months.*

54. In a [second open letter](#) to Australian governments dated 1 April 2020, a group of more than 400 lawyers, academics and advocates wrote:

*We the undersigned are again seeking your immediate action to reduce the risk of transmission of COVID-19 in the Australian criminal justice system, especially prisons and youth detention centres...*

...

*This national letter makes FIVE calls to decision-makers in criminal and penal justice:*

...

*5. The current information is that there is a risk to life and health in prisons and [youth detention centres], which in turn creates risks for the wider community. This requires every State and Territory to legislate for immediate release, where it is safe to do so. Priorities include:*

- a. *Aboriginal and Torres Strait Islander people – consistently identified as one of the most vulnerable groups.*
- b. *The vulnerable, including the elderly; peoples who are victims of domestic violence, coercive control and human trafficking; and those with additional health issues such as immunosuppression, respiratory illness and hypertension, addiction and/or mental health.*
- c. *Women.*
- d. *Children.*
- e. *Those serving sentences of less than 6 months or with 6 months or less remaining.*
- f. *Unsentenced people in prison.*

55. According to an [article](#) by Anna Flagg and Joseph Neff in The New York Times published on 31 March 2020 under the headline, 'Why jails are so important in the fight against coronavirus':

...

*Both in large jails located in virus hot spots like New York and Seattle and in smaller jails across the country, the churn of people moving in and out threatens to accelerate the spread of the disease, endangering the incarcerated, the staff and the larger community. Some states and jurisdictions have responded by releasing prisoners or cutting jail time, but many have not.*

...

*“It is hugely important that people understand the level of turnover in jails,” said Brandon Garrett, a professor at Duke Law School. “People may have quite short stays, and the turnover means constant cycling in and out of the community.”*

...

*Jails are transient. Most there have been charged with crimes but not convicted. Many are waiting to pay bail to be released until trial or can’t afford bail. The rest have misdemeanor convictions with sentences counted in months instead of years.*

*Preventing the spread of the virus in jails is challenging. Social distancing is crucial, but it’s virtually impossible in dormitories with rows of beds in a common room. The same is true of two people in a single cell, or group showers or bathrooms that serve dozens. All these dangers escalate when jails are overcrowded, filthy or understaffed.*

*Physical contact between staff and the incarcerated is often unavoidable: Officers fingerprint, handcuff and supervise prisoners, as well as escort them to court and drive them to medical appointments. Many other people flow in and out of jails, like family members who visit; volunteers who counsel or teach or preach; contractors who stock vending machines; and lawyers who meet their clients. Many jails have cut much of that traffic in response to coronavirus by limiting visits, services and vendors and by moving to online and phone communication.*

...

*“Density is bad – we know that,” said Barun Mathema, an infectious disease epidemiologist at Columbia University who was part of a team that [studied](#) the spread of tuberculosis in a prison in Brazil. The team found that people entered the prison with low rates of infection. Within six months, their rates had shot up 30 times, and remained elevated for years after release. The prison drove the disease not only inside its walls, but also in the neighboring community, according to models of the general population.*

*Dr. Mathema sees the parallel with coronavirus. People inside jails are more likely to be immune-compromised; they may have diabetes, hypertension, mental illness, substance use problems or other chronic health issues.*

*Crowded living conditions only increase the risk of infection. “We have to figure out ways to de-densify,” he said.*

...

*Roberto Potter, a professor of criminal justice at the University of Central Florida who worked with the [Centers for Disease Control and Prevention]’s corrections team, sees the spread into jails as inevitable. “It will only take that one asymptomatic case to come in and potentially spread the disease,” he said.*

...



*The way to “de-densify” a jail sounds simple: reduce bookings and accelerate releases, something over which sheriffs have limited control. Judges determine who exits jail by setting bond amounts and other conditions of pretrial release.*

...

*Medical experts say much more needs to be done to avert jailhouse equivalents of the plague. Wan Yang, an epidemiologist at Columbia, sees the grim numbers at Rikers Island as a warning to other jails.*

*“With very quick turnover, it’s going to increase the risk,” she said. “Prevention is the key.”*

56. In an [article](#) by Diane Nazaroff and Heidi Harrington-Johnson in the University of NSW (‘UNSW’) Newsroom, the authors quote Professor Eileen Baldry, Professor of Criminology at the UNSW:

*The potential conditional release of some NSW prisoners as soon as early April [pursuant to the Commissioner of Corrective Services’ new emergency powers] may prove an important boost to community safety, UNSW Professor of Criminology Eileen Baldry says.*

...

*Professor Baldry says if the virus were to take hold in prisons – with prisoners and staff likely to be infected in a incubation-like atmosphere similar to cruise ships – then prisoners who are released on their due release date, as well as staff coming and going from the prison, could spread it in the community...*

*“In NSW, over a quarter of our prison population is Aboriginal or Torres Strait Islander people. They have a much higher health vulnerability than the general population. If COVID-19 gets into the prison and people continue to be released, as they must be once their term comes to an end and they go into their communities, the COVID-19 virus will spread like wildfire unless they are isolated for 14 days.”*

...

*... around 30% of people in prison in NSW today are on remand, “which means that they are not under sentence, they are awaiting trial.*

*“At least half of those people on remand will not eventually receive a prison sentence because they are found not guilty, are sentenced to a community order or have been deemed to have served their sentence already. These prisoners are not serious threats to society, they are not violent offenders.”*

*Prof. Baldry says many prisoners commit “summary offences”, which carry less than a two-year prison sentence.*

*“Many of them would otherwise potentially be out on parole, or could be given a community order. Many of them might be in prison on remand because they are homeless; they might have had a long police record of summary offences, but not serious or violent offences.”*

...

*Prof. Baldry says overcrowded prisons are a “recipe for disaster” in regard to COVID-19 because people are in such close quarters.*



*“Many prisoners share cells. Very few prisoners have access to the kind of adequate hand washing and sanitising we are asking everyone in the community to observe. It is extraordinarily difficult for prisoners to observe physical distancing... everything that is needed in these COVID-19 circumstances.”*

*She says prisoners who can be released, should be released very soon to reduce the overcrowding.*

*“We should not be putting more people into prison, such as those on summary offense [sic] charges and people in on short sentences. That should not be happening during this period. People can be given an intensive community order [sic] or probation order. Community Corrections manage these kinds of orders but will need to rapidly pivot to virtual management.”*

...

*“Health services within prisons are already overwhelmed because the prisoner population has such need,” she says. “If they don’t reduce the number of people in prison and the overcrowding in prison, it is only a matter of time until prisons are hotspots for COVID-19.”*

### **Recent unrest in NSW correctional centres**

57. According to the article by Liz Farquhar and Anthony Scully on ABC News published on 3 April 2020, referred to above at para [43]:

*Efforts are underway to ease prisoner unrest in New South Wales correctional facilities after two fires broke out at a maximum security prison in the Hunter Valley [Shortland Correctional Centre at Cessnock] on the weekend.*

...

*Stewart Little, the general secretary of the Public Service Association representing prison officers, said the (COVID-19-related) restrictions had caused unrest among inmates...*

58. According to an [article](#) by Phoebe Loomes on news.com.au published on 9 April 2020 under the headline ‘Inmates riot at Goulburn Supermax over coronavirus restrictions’:

*A group of up to 17 prisoners climbed onto the roof of the facility in Goulburn... after becoming angered by social distancing restrictions in the prison that have been implemented to stop the spread of coronavirus, according to multiple reports.*

*The incident happened at 2pm today and involved up to 30 inmates... Some of the group were on the roof during the unrest, and reports have suggested there was a fire inside the facility during the incident.*

## The overseas experience

59. According to an [article](#) by an unnamed author under the headline, ‘Thousands of prisoners released from prisons in UK, France, US due to coronavirus’ in 112 International published on 5 April 2020:

*The British Department of Justice announced on Saturday a decision to release about 4,000 prisoners from their prisons to curb the spread of coronavirus, as [The Hill](#) reported.*

...

*France released 5,000 of its prisoners last week.*

*In the United States on Tuesday, the California Department of Corrections and Rehabilitation announced its intention to release 3,500 prisoners convicted of non-violent crimes from state prisons.*

*New York Mayor Bill de Blasio also said earlier this week that 900 prisoners were released from prisons in his city to avoid the risk of a dangerous virus spreading.*

60. According to an [article](#) by Diane Taylor and Jamie Grierson in The Guardian UK published on 4 April 2020, “the total number [of prisoners] to be released [in the UK] makes up roughly 5% of the prison estate in England and Wales”.
61. According to an [article](#) by Katie Canales in Business Insider published on 7 April 2020, “the number of incarcerated people in San Francisco jails has been reduced by nearly 50% since January 21, as non-violent offenders are released to prevent the spread of the coronavirus”.
62. These international examples may provide a precedent for the release of prisoners from NSW gaols – whether on bail, pursuant to community-based sentence orders, parole or by exercise of the Commissioner of Corrective Services’ new emergency powers – in order to curb the spread of COVID-19. If NSW were to release 5% of its inmate population, for example, that would amount to 681 adult prisoners and 13 children/young people.
63. The following paragraphs provide further information about the prevalence of COVID-19 in foreign correctional centres and the planned or completed release of prisoners in those jurisdictions.
64. According to an [article](#) by Timothy Williams and Danielle Ivory in The New York Times published on 8 April 2020:

*It started small. On March 23, two inmates in the sprawling Cook County jail, one of the nation’s largest, were placed in isolation cells after testing positive for the coronavirus. In a little over two weeks, the virus exploded behind bars, infecting more than 350 people.*

*The jail in Chicago is now the nation’s largest-known source of coronavirus infections...*

*The Cook County Sheriff’s Office, which operates the jail, said Wednesday that 238 inmates and 115 staff members had tested positive for the virus. But those figures*

*most likely downplay the actual problem, the jail acknowledged, because the vast majority of the jail's 4,500 inmates have not been tested.*

...

*... The most serious cases – about 17 on Wednesday – have been admitted to hospitals. One jail inmate has died of what officials believe is complications from the coronavirus...*

...

*The New York Times has identified at least 1,324 confirmed coronavirus cases tied to U.S. prisons and jails, including at least 32 deaths. Those numbers are most likely a vast undercount, because some state and local agencies have not released information, and others, including the federal Bureau of Prisons, which has had 337 positive cases and eight deaths, are not testing everyone who falls ill.*

*Concerns about the virus's spread have prompted authorities across the country to release thousands of inmates, many of whom were awaiting trial or serving time for nonviolent crimes. But those measures have not prevented a dizzying pace of infection among a population in in which social distancing is virtually impossible and access to soap and water is not guaranteed.*

*... Some facilities have placed inmates in solitary confinement, while some federal prisons and certain state facilities have kept prisoners locked inside their cells for more than 22 hours a day to restrict movement and possible transmission. Still others are shipping prisoners who test positive to hastily established microprisons.*

...

*... The Times has identified at least 41 clusters of two or more coronavirus cases centered on prisons or jails...*

*In New York City, which has borne the brunt of the U.S. outbreak, more than half of the jail population had been quarantined by Wednesday as the virus continued to spread through the jails on Rikers Island and in neighbouring boroughs. The Department of Correction said 287 inmates, 441 correction staff and 75 health care workers had tested positive, and nearly 1,600 inmates had been released to try to reduce the toll.*

*The disease has killed seven correction employees and one detainee in New York. More than 10 percent of correction officers have had to quarantine themselves.*

65. According to an [article](#) by Paige St John in the Los Angeles Times published on 31 March 2020:

*California is granting early release to 3,500 inmates in an effort to reduce crowding as coronavirus infections begin spreading through the state prison system.*

*Lawyers for Gov. Gavin Newsom on Tuesday told a panel of federal judges the state is taking "extraordinary and unprecedented protective measures" to slow the spread of the virus and protect those who live and work within California's 35 prisons...*

...

*In court filings, state lawyers said California intends to accelerate release and parole dates for 3,500 inmates serving terms for nonviolent crimes and already due to be*

*released within 60 days. The releases are to be conducted “within the next several weeks”.*

66. According to an [article](#) by Katie Benner in The New York Times published on 3 April 2020:

*Attorney General William P. Barr ordered the Bureau of Prisons on Friday to expand the group of federal inmates eligible for early release and to prioritize those at three facilities where known coronavirus cases have grown precipitously, as the virus threatens to overwhelm prison medical facilities and nearby hospitals.*

*Mr. Barr wrote in a memo to Michael Carvajal, the director of the Bureau of Prisons, that he was intensifying the push to release prisoners to home confinement because “emergency conditions” created by the coronavirus have affected the ability of the bureau to function.*

...

*“We are experiencing significant levels of infection at several of our facilities,” Mr. Barr said in the memo. He said that where appropriate the bureau must quickly “move vulnerable inmates out of these institutions”.*

...

*Last week Mr. Barr asked the bureau to identify and release all inmates who were eligible for home confinement, no longer posed a threat to the public and were particularly vulnerable to the coronavirus.*

*After that directive, 522 of the system’s 146,000 total inmates were moved to home confinement, according to the Bureau of Prisons.*

*On Friday, Mr. Barr expanded that cohort of people eligible for release to home confinement, exercising an authority granted to him by the \$2 trillion economic stabilization package that President Trump signed into law last week.*

*That expanded group includes “all at-risk inmates – not only those who were previously eligible for transfer,” Mr. Barr wrote in his memo.*

*Citing a lack of resources, he also authorized the bureau to release inmates to home confinement without electronic monitors, where appropriate.*

67. According to an [article](#) by an unnamed author in BBC News published on 2 April 2020, three inmates have so far died of COVID-19 in England and Wales.

68. According to the article Diane Taylor and Jamie Grierson in The Guardian UK, referred to above at para [60]:

*As many as 4,000 prisoners in England and Wales are to be temporarily released from jail in an effort to try and control the spread of coronavirus, the government has announced.*

...

*Eighty-eight prisoners and 15 staff have already tested positive for Covid-19. Three prisoners have died.*

69. According to an [article](#) by Andrew Wasike in Andalou Agency published on 2 April 2020:

*Kenya released nearly 4,000 inmates on Thursday as part of efforts to avert a COVID-19 outbreak in the country's prisons.*

*Wycliffe Ogallo, Kenya's commissioner general of prisons, said in a statement the move was aimed at protecting the prison population in the country.*

*"With a view to protecting the prison population against the coronavirus, the Kenya Prisons Service has released 3,837 prisoners and remandees in concurrence with the National Council on the Administration of Justice," read the statement.*

...

*"The decision is thus aimed at achieving the recommended one-meter social distancing within our facilities as part of the progressive review of our strategies in combating the global pandemic," said Ogallo.*

70. According to an [article](#) by Tracey Shelton in ABC News on 20 March 2020, "Iran has temporarily released 85,000 prisoners with 10,000 more slated to receive pardons, as fears mount the new coronavirus could sweep through the country's overcrowded prisons".

### **Additional COVID-19 resources**

71. You may find the following additional resources to be useful sources of information about COVID-19 and its potential impact on people in custody:
- a. Prison Insider 'Coronavirus: Prison Fever' [website](#);
  - b. Professor Richard Coker,<sup>19</sup> '[Expert report: Covid-19 and prisons in England and Wales](#)' 31 March 2020;
  - c. Professor Richard Coker, '[Report on Coronavirus and immigration detention](#)' 17 March 2020; and
  - d. Professor Richard Coker, '[Supplementary report on Coronavirus and immigration detention](#)' 18 March 2020.

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<sup>20</sup> The information provided and views expressed in this document are done so in my personal capacity as a solicitor practicing in criminal law in NSW, not in my capacity as an employee of Legal Aid NSW.