



**Victorian Equal Opportunity  
& Human Rights Commission**

# **Affected communities: Prisons and youth justice**

**SELECTIONS FROM THE 2020 REPORT ON  
THE OPERATION OF THE CHARTER OF  
HUMAN RIGHTS AND RESPONSIBILITIES**

## While the COVID-19 virus does not discriminate, its impacts have been felt more harshly by people and communities who already experience discrimination and disadvantage.

The pandemic has shone a light on systemic and structural disadvantages that serve to further entrench inequality:

- **Multicultural and multifaith communities:** Multicultural and multifaith communities experienced increased vilification and discrimination. The pandemic also highlighted the broader systemic failure to provide multicultural and multifaith communities with access to the resources and supports to understand and comply with public health directives and remain safe. See discussion in Chapter 8.<sup>147</sup>
- **People with disabilities:** People with disabilities and their carers were often more disadvantaged by service closures and lockdowns. People with disabilities also encountered discrimination in shops, clinics and at work from the inflexible application of the requirement to wear masks.<sup>148</sup> See case studies on pages 52-53.
- **People in closed environments:** People in prisons and mental health facilities had little or no face-to-face access to family as a result of measures necessary to protect health and safety. Changes in the management of custodial settings implemented to prevent the spread of the virus also meant that people had less access to fresh air, education and welfare programs. At times, people entering prison were subject to up to 14 days 'protective quarantine'.<sup>149</sup> See discussion in Chapter 7.
- **Young people:** Young people in youth justice facilities and out-of-home care had face-to-face access to family paused for significant periods during the pandemic; however, phone and online contact with family was possible. Educational and vocational activities in youth justice facilities were also disrupted or transferred online. More generally, across Victoria (and particularly in Greater Melbourne and Mitchell Shire) school learning was conducted online for most students for long periods of time during 2020, causing disruption to education. Young people have had their education significantly disrupted, experienced social isolation, experienced changes to their family lives and weekly schedules, and been placed at greater risk of mental ill-health.<sup>150</sup> On 23 July 2021, the Commission for Children and Young People released findings on the impact of COVID-19 following consultations with more than 600 children and young people and more than 170 workers supporting them.<sup>151</sup> The findings detail huge impacts on the lives of children and young people in Victoria across safety, mental health and education, revealing a picture of growing uncertainty and isolation, combined with diminished visibility. The findings can be accessed at <https://ccyp.vic.gov.au/upholding-childrens-rights/covid-engagement/>.

- **Older people:** Older Victorians were increasingly isolated, often cut off from family and supports, and at greater risk of hospitalisation and death, causing considerable distress. Between January and December 2020, 655 Victorians in residential aged care died from COVID-19.<sup>152</sup> This accounted for over 95 per cent of Australia's total aged care deaths in 2020.<sup>153</sup>
- **Women:** Women shouldered a disproportionate burden of increased unpaid caring responsibilities during the lockdown.<sup>154</sup> The pandemic, and measures taken in response, also exposed and exacerbated existing workplace gender inequalities, in particular in relation to employment entitlements, pay systems and the value the community places on feminised work and unpaid labour. These effects are discussed in Chapter 9.
- **People with insecure housing or work:** People with insecure housing or work suffered disproportionate economic impacts during 2020.

This is by no means a comprehensive list. Other groups that were disproportionately affected included: people living alone who were more isolated during lockdown; Aboriginal people; people experiencing homelessness or sleeping rough, who had more difficulty complying with Chief Health Officer Orders; small business owners who were forced to close their businesses and their casual employees who lost shifts as a result; people forced to defer surgery as hospitals pivoted to treating COVID-19 patients; pregnant women with limited supports when giving birth; healthcare and frontline workers who were exposed to infection at higher rates; and, of course, the people who contracted the virus and their loved ones.

It is not possible to cover all these issues in the scope of this report. Instead, we focus on three areas that are within the strategic priorities of the Commission and in which the Commission has been more deeply engaged. This section of the report:

- considers the human rights impacts on people in closed environments (Chapter 7)
- draws on research and community engagement by the Commission to understand the impact of COVID-19 on multicultural and multifaith communities (Chapter 8)
- provides the Commission's research findings on flexible work (Chapter 9).



## 7. Prisons and youth justice

### At a glance

- The Victorian Government implemented a suite of measures that successfully prevented COVID-19 outbreaks within Victorian prisons and youth justice facilities.
- While these measures successfully protected life and health, they impacted on the rights of adults and young people in these settings.
- At certain times, in line with health advice adults and young people were placed in protective quarantine for up to 14 days on entering prisons and youth justice facilities. This was challenging for people with existing vulnerabilities.
- For lengthy periods from March 2020 and into 2021, in-person personal visits to people in prisons and youth justice facilities were transitioned to online visits in response to community outbreaks. The Commission heard from community groups that the inability to have in-person visits with loved ones significantly impacted on those in closed environments.
- DJCS implemented safeguards to mitigate the impacts of these measures, including increased access to technology to facilitate contact with family and community, and proactive mental health and wellbeing checks.
- The Commission commends the decrease in the Victorian prison population that occurred in 2020. Community groups seek further decreases to prison populations including through early release of prisoners and changes to bail laws.

The COVID-19 pandemic has presented complex challenges for the Victorian Government in meeting its duty of care to people living and working in the prison and youth justice systems.

Correctional facilities are high-risk environments for COVID-19 transmission and many people in custody are particularly vulnerable to poor health outcomes if they contract COVID-19. These include Aboriginal and Torres Strait Islander Peoples, the elderly and those with underlying health conditions.<sup>155</sup>

The consequences of an outbreak of COVID-19 in prisons and youth justice facilities would be devastating. This was demonstrated internationally; for example, in the USA at the start of the pandemic, infection rates in closed environments were reported to be five times higher than the national average and death rates three times higher.<sup>156</sup> In countries where COVID-19 has entered the prison system or where COVID-19 has had a significant impact on staff, prisons have been placed into prolonged lockdown – prisoners locked in their cells for at least 23 hours a day, with limited access to education and employment.<sup>157</sup>

People in prison are at greater risk of death or serious harm if they contract COVID-19. In Australia, almost one-third of people entering prison live with a disability or have a chronic medical condition like asthma, cancer, cardiovascular disease or diabetes.<sup>158</sup> The risk and potential for serious harm are multiplied by the fact that access to the complex health care required to treat COVID-19 is limited in custodial settings.

In April 2020, the Premier announced measures designed to protect people's lives and health during the pandemic, while also maintaining flexible and effective administration of justice and assisting essential services to continue to operate.<sup>159</sup>

Emergency measures issued under the COVID-19 Omnibus Act included measures to be applied where appropriate, to prevent the virus from entering prison settings and from spreading inside, including:

- at certain times, requiring all adults entering prisons to undertake protective quarantine for up to 14 days<sup>160</sup>
- power to quarantine a young person in a youth justice facility for the minimum period of time that is required to detect, prevent or mitigate the transmission of COVID-19 or other infectious diseases, up to a maximum of 14 days<sup>161</sup>
- at certain times, suspending face-to-face personal visits for all people in prisons and youth justice facilities and replacing these with virtual visits and telephone calls<sup>162</sup>
- at certain times, replacing some face-to-face legal and health professional visits with virtual visits
- in some cases, halving the time people in custody are outside their cells
- reducing access to face-to-face training programs within prisons and youth justice facilities, and replacing these with online programs in some cases
- use of personal protective equipment and increased signage and instructions relating to the virus.<sup>163</sup>

Importantly, the COVID-19 Omnibus Act also included ways to mitigate some of the harm caused by isolating prisoners, including increased communication for people in prisons and youth justice facilities by telephone, video conference, letters and parcels.<sup>164</sup>

The COVID-19 Omnibus Act measures successfully contributed to Victoria avoiding a major outbreak in prisons and youth justice facilities. While there were reports of isolated cases of community-acquired COVID-19 within the prison<sup>165</sup> and youth justice populations,<sup>166</sup> these were limited. Within prisons, during 2020 only six staff tested positive to COVID-19, as well as one prisoner transport officer, one healthcare worker and one office-based Corrections Victoria staff member. All these cases were acquired in the community, not from within prisons or youth justice facilities.<sup>167</sup>

Nevertheless, the measures required people in custody to live without face-to-face visits from their families and loved ones for lengthy periods in 2020. They also reduced the opportunities for people in prisons to participate face to face in courses directed towards their rehabilitation or to engage in meaningful work.<sup>168</sup> In addition, many people were subjected to quarantine in prisons.<sup>169</sup>

While bodies such as VALS have documented some of the negative effects of these measures,<sup>170</sup> comprehensive research is needed to fully understand the effects of COVID-19 measures on the mental health and wellbeing of children and adults in closed environments.<sup>171</sup> The outcomes of this research will be

particularly relevant given the overlap of the prison population with cohorts who may be particularly vulnerable to isolation, including Aboriginal and Torres Strait Islander Peoples and people with disabilities and mental health issues.

The restrictions inside facilities took many forms. This report focuses on the use of protective quarantine and separation from families.

**"According to our clients, access to critical things like out-of-cell time, contact with family and legal representatives and complaints bodies, health and medical treatment and therapeutic programs during COVID was – and remains – very patchy and inconsistent from prison to prison. These rights were by no means consistently delivered during the pandemic."**

**Karen Fletcher, Senior Lawyer, Prison Advocacy, Fitzroy Legal Service**

## Protective quarantine

**"The introduction of Victoria's quarantine response was based on up-to-date health advice, and was in line with recommended approaches internationally, nationally and locally. The unprecedented pandemic conditions, particularly the speed of transmission and asymptomatic cases, required the Department of Justice and Community Safety to act quickly and decisively to protect the health and safety of people in custody and those working in prisons. These measures have been critical in preventing the catastrophic outcomes that were being reported within prisons in jurisdictions around the world."**

**Department of Justice and Community Safety<sup>172</sup>**

On 28 March 2020, Corrections Victoria established 'protective quarantine' across five prisons "as a preventative measure to reduce the risk of COVID-19 coming into the prison system".<sup>173</sup> From 28 March 2020, all adults entering custodial facilities were required to quarantine for up to 14 days in a protective quarantine unit.<sup>174</sup> People in protective quarantine are in cells by themselves and their access to other people is significantly reduced. On 20 August 2020, DJCS also introduced 'transfer quarantine' for prisoners transferring into prison custody from locations considered to be a transmission risk.

These measures affected many people – at any one time, about 400 adults in the corrections system were in protective quarantine.<sup>175</sup> From 1 April to 31 December 2020, over 8000 adults were subject to protective quarantine within the prison system.<sup>176</sup> In addition, people were subject to quarantine in police cells and young people were quarantined in the youth justice system. Many of these measures are still occurring in 2021.<sup>177</sup>

In relation to youth justice facilities, decisions on the minimum period of time required in order to detect, prevent or mitigate the spread of COVID-19 or other infectious diseases, up to a maximum of 14 days,<sup>178</sup> are made by the Secretary or other authorised person.<sup>179</sup> The length of COVID-19-related quarantine for young people varied based on health advice at the time. For example, DJCS advised the Commission that where a young person was admitted to custody during times of no reported community transmissions of COVID-19, they might be released from quarantine after providing one negative COVID-19 test result. Further, DJCS advised the Commission that between 2019–20 and 2020–21 there has been a significant decrease in the use of isolation in youth justice settings.<sup>180</sup>

## Concerns about the operation of protective quarantine

Without safeguards, quarantine can be akin to solitary confinement and particularly harmful for people in custody with known vulnerabilities to isolation including Aboriginal and Torres Strait Islander Peoples, young people, people with mental health issues, victim/survivors of family violence and other trauma, and people living with a disability.<sup>181</sup> The international standard – the Nelson Mandela Rules – defines solitary confinement as the “confinement of prisoners for 22 hours or more a day without meaningful human contact”.<sup>182</sup>

DJCS and health advice confirmed that quarantine arrangements were the most effective strategy implemented to prevent COVID-19 entering the prison system.<sup>183</sup> Despite the strong justification for protective quarantine, the practice impacts on rights to humane treatment when deprived of liberty, freedom of movement, protection of families and children, and cultural rights. The community raised concerns about these rights as a result of conditions in quarantine.

### Access to fresh air

The Deputy Commissioner of Corrections Victoria’s instructions note that prisons “will, unless it is not operationally possible, provide time out of cell for all prisoners”.<sup>184</sup> Similarly, a child or young person placed in quarantine in response to the COVID-19 pandemic is entitled to access outdoors and undertake outdoor recreation activities and that outdoor access is to occur at least once each day and for a reasonable period of time.<sup>185</sup>

The Commission heard some concerns about a lack of time out of cells and access to fresh air for some adults in protective quarantine. The Victorian Ombudsman received over 130 complaints relating to quarantine conditions including access to fresh air.<sup>186</sup> Fitzroy Legal Service reported that the amount of time their clients received out of their cells varied between custodial settings.<sup>187</sup> More research is required to understand the extent to which adults and young people in protective quarantine have had daily access to fresh air, which is a minimum requirement for the humane treatment of people in custody.

### Increased risks of quarantine for people with existing vulnerabilities

Protective quarantine raises increased risks for:

- people with mental and physical disabilities whose conditions could be exacerbated by quarantine conditions<sup>188</sup> – 40 per cent of people entering prison have been diagnosed with a mental health condition at some stage in their life and 30 per cent have been told they have a chronic physical health condition<sup>189</sup>
- pregnant and breastfeeding women, infants and children<sup>190</sup>
- Aboriginal and Torres Strait Islander Peoples, who continue to be overrepresented in the prison system.<sup>191</sup>

During 2020, VALS called for greater transparency about how the protective quarantine program was being operationalised and for additional safeguards that might minimise the impacts on incarcerated people’s rights and wellbeing.<sup>192</sup>

DJCS reported assisting VALS to facilitate welfare checks on behalf of people’s families and friends in the community.<sup>193</sup> DJCS also reported that throughout 2020, Aboriginal Wellbeing Officers continued to actively support Aboriginal

and Torres Strait Islander Peoples in quarantine. Youth Justice reported an increased emphasis on cultural support plans to strengthen young people’s connections to family, community and culture. This involved enhancing the cultural support planning process through the provision of cultural items, activities and virtual visits.<sup>194</sup>

## Human rights safeguards in closed environments and in protective quarantine

DJCS and Corrections Victoria reported that they used the Charter to consider the impacts of protective quarantine on human rights and to ensure those impacts were reasonable and demonstrably justified.<sup>195</sup> The DJCS policy approach to protective quarantine rested on three major pillars: public health, operational safety and human rights.<sup>196</sup> The length of time a prisoner spent in protective quarantine was limited to the amount of time deemed necessary, based on expert public health advice, to reduce the risk of transmission of COVID-19.<sup>197</sup>

The Charter also supported DJCS to develop and implement supports and safeguards to mitigate the impact of COVID measures – including protective quarantine – and to ensure that any limitations on human rights would be as minimal as possible while achieving the purposes of reducing the risk of transmission of COVID-19 within the prison system and maintaining operational safety.<sup>198</sup> Examples of these safeguards include supporting prisoners to maintain the following rights:

**Rights to family and social connections.** DJCS introduced tablets and mobile phones, and expanded wi-fi into prisons, allowing prisoners access to phone and video visits in cells (discussed further below). DJCS also funded the Victorian Association for the Care and Resettlement of Offenders to provide support to prisoners’ families to access video visits. Individual prisons also worked to support prisoners’ families during the pandemic. For example, prisoners in Barwon Prison had the opportunity to record Christmas storybooks to send to their children. DJCS also arranged televisions and activity packs translated into several languages.

**Rights to fair hearings and criminal proceedings.** Court appearances were facilitated through remote court facilities wherever possible. DJCS worked together with legal service providers, including Victoria Legal Aid, community legal centres and VALS, to ensure that they could continue to deliver services remotely to vulnerable people in custody.

**Rights to humane treatment when deprived of liberty.** DJCS advised the Commission that health and other support services continued to operate across all custodial settings, including through remote delivery. Specifically, DJCS provided proactive psychological wellbeing services to adults through the protective quarantine support service, including daily access to general and mental health nursing staff. DJCS reported that between 1 April 2020 and 31 May 2021, 40,705 sessions were provided to 8353 individual service users in public and private prisons.<sup>199</sup> Where possible and appropriate, DJCS facilitated access to remote education, offending behaviour programs, and drug and alcohol programs.

Youth Justice reported to the Commission that young people in youth justice centres received proactive professional welfare checks. Youth Justice also reported that legislation has safeguards in relation to the use of protective quarantine for young people, including that a young person must be closely supervised and observed at least every 15 minutes and that any isolation and reasonable use of force used to place a young person in isolation must be reported and recorded.<sup>200</sup>

## Connection with family and loved ones on the outside

**"In addition to restrictive regimes of lockdowns, quarantine and isolation, everyone in detention has been impacted by the suspension of programs and personal visits, the anxiety in relation to contracting COVID 19 in the high risk environment of prison, and the distress of not being able to support and be with their families during this difficult time."**

**Victorian Aboriginal Legal Service<sup>201</sup>**

From 28 March 2020, in-person personal visits within adult prisons were suspended and replaced with online video visits as a measure to reduce the risk of an outbreak of COVID-19. This meant that these prisoners were unable to be visited in person by family, friends or community members. Professional visits, including from lawyers, medical staff and psychiatrists, were also conducted remotely where possible.

Similarly, from 28 March to 11 December 2020 family visits for young people in youth justice facilities transitioned to virtual visits through secure tablet devices. DJCS advised the Commission that since that time, personal visits have transitioned between in-person and virtual as required, in line with health advice.<sup>202</sup> In March 2020, DJCS also introduced changed arrangements for professional visits, permitting only essential visits to occur in person, subject to rigorous screening procedures including temperature checks on arrival. All other professional visits were conducted virtually.<sup>203</sup>

The restriction of in-person visits appears to have been successful in helping to prevent a major outbreak within prisons. However, the policy has placed a huge burden on people who were detained who had been separated from family and loved ones. The Federation of Community Legal Centres highlights below how the suspension of in-person visits impacted on family relationships and, for some mothers – particularly Aboriginal and Torres Strait Islander mothers – affected contact with children, which could jeopardise future family reunification efforts:

**"Suspension of personal visits has made it almost impossible for people to communicate with young children and babies and those with complex communication needs. The suspension of personal visits is also impacting on the ability of women, particularly Aboriginal women, to maintain contact with children subject to Child Protection Orders. There is a risk that barriers to communicating with children during this time will weaken a woman's case for family reunification. In some cases, this is being viewed as the mother's lack of interest in maintaining contact, rather than as a result of the complex impacts of COVID-19 on women in prison. This is a real issue for parents facing a Permanent Care Order being made."**

**Federation of Community Legal Centres<sup>204</sup>**

The suspension engages a number of human rights protected by the Charter, including the protection of families and children, the right to humane treatment when deprived of liberty, the right to equality and, in the case of Aboriginal and Torres Strait Islander Peoples, cultural rights.

The Premier acknowledged that a suspension of in-person personal visits engaged the human right to the protection of families and children, but that limitations on these rights were "mitigated to some extent" by the provision of other non-physical forms of communication, and therefore justified and proportionate, because no less restrictive means were available.<sup>205</sup>

Despite the increased availability of secure tablets to connect with family, there were numerous reports that virtual visits with family could be infrequent.<sup>206</sup> Fitzroy Legal Service's clients reported that requests for out-of-cell time to contact family, legal representatives or bodies such as the Ombudsman, the Health Complaints Commissioner or the Commission were "commonly denied" for reasons including technical difficulties and lack of available devices.<sup>207</sup>

The Victorian Ombudsman received many complaints on this issue from people in prison – more than one-third referring to the cancellation of contact visits.<sup>208</sup>

The Commission welcomed the increased availability of technology to facilitate video calls with loved ones during the COVID-19 pandemic. This is an important innovation that should be retained in addition to in-person visits due to the benefits to mental health and social wellbeing. In some cases, the availability of video calls has increased contact between people in custody and their children, particularly for families who live interstate or overseas.<sup>209</sup> DJCS also advised the Commission that Youth Justice data shows some young people had more contact with family through virtual visits than they did previously with face-to-face visits.<sup>210</sup> However, remote visits are not a substitute for seeing loved ones face to face. Nor is it possible for some people to successfully reach their family and community remotely.<sup>211</sup>

## Decarceration

### Early release of people in custody

"Congregate settings like prisons provide an optimal setting for an outbreak and the prison population may be naive to the seriousness of COVID-19."

Prof. Richard Coker, Emeritus Professor of Public Health, London School of Hygiene and Tropical Medicine, in evidence before the Supreme Court<sup>212</sup>

As the COVID-19 pandemic began, concerns grew globally about the dire consequences for closed environments if COVID-19 were to enter. In response, in some parts of the world governments amended laws and policies to allow for the early release of some people in custody.<sup>213</sup> In New South Wales, for example, an early release program was established<sup>214</sup> which allowed for release where a person satisfied particular criteria and where the Commissioner was satisfied that release was reasonably necessary because of the risk to public health or to the good order and security of the facility.<sup>215</sup>

The DJCS Secretary has two existing powers to release people from custody. The first is early release on health grounds by issuing a corrections administration permit under section 57(A) of the *Corrections Act 1986*. The second is deducting EMDs from a person's sentence because they have suffered "disruption or deprivation" under section 58(E) of the *Corrections Act*. The Commissioner of Corrections Victoria determined that during the COVID-19 emergency, the number of EMDs granted would be close or equivalent to the number of days of deprivation or disruption experienced (including being placed in protective quarantine).<sup>216</sup> EMDs are discussed in detail on page 81.

Advocates called for powers to be introduced in Victoria to allow adults and young people in custody with particular vulnerabilities to be released and for fast-tracking of bail reform to make bail more accessible to those on remand yet to be found guilty of criminal offending and who pose a low risk to the community if released.<sup>217</sup> However, Victoria did not pass any such laws.

To date, the powers under section 57(A) have not been exercised although, in 2020, a case in the Supreme Court sought to require the Secretary to use her powers to release a person on health grounds.



### CASE STUDY

## *Rowson v Department of Justice and Community Safety*<sup>218</sup>

Mr Mark Rowson suffers from numerous respiratory and heart conditions. In 2020, he was serving a sentence of more than five years at Port Phillip Prison for fraud offences.

Mr Rowson sought Orders in the Supreme Court to release him from prison early under section 57(A) of the *Corrections Act* because of his specific health risks, including the risk that he would die if he became infected with COVID-19. Counsel for Mr Rowson submitted that, as a person unable to protect himself in prison, he was a "sitting duck" for the virus.<sup>219</sup> Mr Rowson argued that DJCS, the Commissioner of Corrections Victoria and the State of Victoria (the defendants) owed him a duty of care to take reasonable steps to ensure that he did not suffer serious injury or death from COVID-19. He also argued that the defendants had acted incompatibly with his human rights under the Charter, specifically his rights to:

- recognition and equality before the law (section 8)
- life (section 9)
- humane treatment when deprived of liberty (section 22).

Mr Rowson's evidence included examples of poor standards of hygiene, lack of risk assessment of the virus and limited enforcement of social-distancing measures. Mr Rowson also relied on expert evidence indicating he had an increased risk of developing COVID-19 and dying from it.

The defendants outlined various measures taken to prevent the virus from entering the prisons and controlling the spread if it did enter, including:

- the quarantining of people entering prisons and those returning from overseas
- halving of the time people in prison were outside their cells
- increased signage and instructions relating to the virus.

## Decision

The case only went to an interlocutory hearing. The judgment considered detailed expert evidence on the risk of COVID-19 entering Port Phillip Prison. Although no findings of fact were made, the evidence before the court suggested that, at that time, the risk of infection to a person in prison was lower than the risk of infection in the general community but, should an outbreak occur in prison, the risk to a person in prison would be higher than to the general population.<sup>220</sup> At the time (1 May 2020), community transmissions were low – only three new cases had been acquired within the past 24 hours.<sup>221</sup>

Without making a finding of fact, the court noted Mr Rowson’s concerns about the management of the risk, including that the prison had not conducted a risk assessment. It noted that “on Mr Rowson’s evidence, there appears to be a gap between what policy anticipates should occur and what is actually occurring”.<sup>222</sup> This included prisoners with symptoms being sent to the quarantine unit for testing and then being allowed to return to the unit despite having a high temperature, no advice being given to prisoners about existing prevention and management measures, and a lack of temperature testing.<sup>223</sup>

The court did not order Mr Rowson’s release in the interlocutory hearing. Factors weighing against release were that Mr Rowson had a significant proportion of his sentence left to serve, that it was unclear where he would live and still be under the Secretary’s care and control, and that there had been no positive cases of COVID-19 within the prison to date.

Instead, the court ordered Port Phillip Prison to carry out a risk assessment examining the COVID-19–related risks to people in prison and to ensure that any resulting recommendations were implemented.

## Outcome

The ensuing review by Infection Prevention Australia concluded that “overall, the findings of the inspection indicate that the facility has a robust system in place to minimise risk to any individual”.<sup>224</sup> Some room for improvement was found, including better use of personal protective equipment in the protective quarantine units.<sup>225</sup>

The court did not rule out that people in prison could be released by court order because of COVID-19 under different circumstances.<sup>226</sup>

## Emergency Management Days

As noted above, the DJCS Secretary holds a power to grant EMDs under section 58(E) of the Corrections Act. This discretionary power allows for people in prison to have days deducted from their sentence when they suffer disruption or deprivation during an emergency, industrial dispute or other special circumstance. Throughout the COVID-19 pandemic, people who were held in protective quarantine or other forms of isolation, and who had not demonstrated poor behaviour, were considered for EMDs.<sup>227</sup> The number of EMDs granted was to be close to equivalent to the number of days of disruption or deprivation.<sup>228</sup> This scheme acknowledges the impact of the pandemic on people who are serving sentences or on remand.

Corrections Victoria implemented an EMD coordinator at each prison, as well as a statewide EMD Coordinator, to support the EMD process through 2020.<sup>229</sup> However, feedback from those monitoring the EMD scheme and prisoner advocates showed that, in practice, the process has not been clear. Agencies have reported a number of issues arising in applying the policy:

- Of the 300 complaints from people in prison received by the Victorian Ombudsman, 250 related to EMDs. Common complaints included people experiencing delays in being awarded EMDs for time spent in isolation, having applications denied or receiving fewer days than they considered they should have.<sup>230</sup>
- VALS reported that Corrections Victoria did not provide adequate information for both detained people and their advocates regarding when and how EMDs would be applied or explanations for decisions refusing them.<sup>231</sup> VALS argued that information provided by DJCS (a fact sheet on EMDs) was confusing and would have been ambiguous for prisoners with low literacy.<sup>232</sup> Prisoner Legal Help reported to the Commission that the onus tended to be on prisoners to chase up EMDs where they thought these had been calculated incorrectly. Sometimes assistance from advocates led to EMDs being granted when a prisoner had previously been told they were not entitled to any or only to a few days.<sup>233</sup> DJCS does not support the view that EMDs have been calculated incorrectly, but noted that in many cases prisoners did not agree with the decision on the number of EMDs granted to them.<sup>234</sup>
- The Federation of Community Legal Centres raised concerns that some people did not receive EMDs in a timely way. The federation recommends that those on remand or with short sentences and subject to quarantine or otherwise in lockdown should have their EMDs applied immediately so that they do not lose the opportunity to have these credited against their sentence.<sup>235</sup> VALS also observed that, in practice, EMDs were assessed once every two weeks. This meant a prisoner serving a 28-day sentence who had spent 14 days in quarantine did not receive any reduction, even though they had submitted an EMD application on the first day of their sentence and followed up multiple times.<sup>236</sup> DJCS advised the Commission that consideration of EMDs occurred on a regular basis. Each matter was assessed on a case-by-case basis, including consideration of whether the prisoner was of good behaviour. Sufficient time was also required to administer this process.<sup>237</sup>
- PAEC recommended the implementation of a scheme like EMDs for children and young people, as a comparable process does not exist in the youth justice system.<sup>238</sup> PAEC stated that this is critical for young people, who are particularly



vulnerable to the mental health impacts of isolation and deprivation within custody.<sup>239</sup> In response, DJCS (Youth Justice) advised the Commission that the youth parole system is flexible, offering the opportunity for the parole of young people based on the decision-making of an Independent Youth Parole Board.<sup>240</sup>

## Reducing the prison population

Although there was no specific legislative reform to do so, in 2020 there was a decrease in the number of people held in prison in Victoria, which is strongly supported by the Commission. The adult prison population decreased from 8101 on 31 December 2019 to 7082 on 31 December 2020.<sup>241</sup>

Although the decrease in the prison population is welcome, the number of people on remand remains unacceptably high: as at 31 December 2020, over 38 per cent (2738) of people in custody were waiting for their case to be heard, a slight increase from 36 per cent at the start of the year.<sup>242</sup>

The decrease in prison numbers is partially understood by reference to judges and magistrates using their discretion to grant bail in response to COVID-19 measures. Recent Superior Court decisions have shown that decision-makers had regard for the impact of incarceration on an accused person applying for bail during the pandemic. For example, delay in trials due to COVID-19 established exceptional circumstances<sup>243</sup> or compelling reasons<sup>244</sup> to grant bail, particularly where delays would lead to an accused person spending more time on remand than the sentence.<sup>245</sup> Judges also had regard for cultural and community factors relevant to Aboriginal and Torres Strait Islander offenders,<sup>246</sup> the impact of COVID-19 spreading into the prison system<sup>247</sup> and health risks and restrictions on visitations.<sup>248</sup> There are not yet accurate figures on the number of bail applications that raised COVID-19.<sup>249</sup>

Victoria Legal Aid, Djirra, Australian Lawyers Alliance and the Law and Advocacy Centre for Women have been among those groups calling for systemic changes to Victoria's bail laws to reduce the number of people held on remand. These organisations have noted the particularly detrimental effect that current bail laws have on women.<sup>250</sup>

**"At the front end, it's still left to judges and magistrates to decide things like whether to grant bail on a case-by-case basis – there has been no systemic change to say, for example, let's rethink the provisions of the Bail Act that have caused an upsurge in the prison population recently, particularly for non-violent offenders."**

**Elena Papas, lawyer and co-founder of Law and Advocacy Centre for Women**

The reduction in prison numbers is welcome progress that should be sustained in the recovery phase of COVID-19. However, the high proportion of remanded people remains a concern:

**"It's incredible to see the number of Aboriginal people in prison going down during COVID, particularly Aboriginal women who had been the fastest-growing prison population. This is something we should hold on to, after the pandemic is over. If diversion can happen during COVID, why can't it happen as a matter of course?"**

**Antoinette Braybrook, Chief Executive Officer, Djirra**

**"There is a real opportunity to think about how reducing the flow of people into the corrections system that has been happening because of COVID can be sustained to make the criminal justice system work more effectively."**

**Dan Nicholson, Executive Director, Criminal Law, Victoria Legal Aid**

## Scrutiny of new measures in corrections

Measures in the COVID-19 Omnibus (Emergency Measures) Bill addressing the risk of transmission of COVID-19 in prisons included powers to:

- prohibit in-person prison visits, at certain times, where necessary<sup>251</sup>
- introduce protective quarantine of up to 14 days for adults entering custody, where necessary<sup>252</sup>
- at certain times, isolate people in prisons and youth justice facilities to prevent the spread of COVID-19, including new powers enabling the isolation of children and young people in youth justice detention.<sup>253</sup>

As required under the Charter, the Victorian Government provided a Statement of Compatibility with the Bill in which it outlined the rights impacted on by these measures – including the rights to liberty, humane treatment when deprived of liberty, freedom of movement, a fair trial, privacy and reputation, and the protection of families and children.<sup>254</sup>

The Statement of Compatibility justified the limitations on rights, stating that they were necessary to protect and promote the right to life of all Victorians. It noted that the Bill sought to reduce the risk of transmission of a potentially fatal virus and to ensure that health services were not overwhelmed.

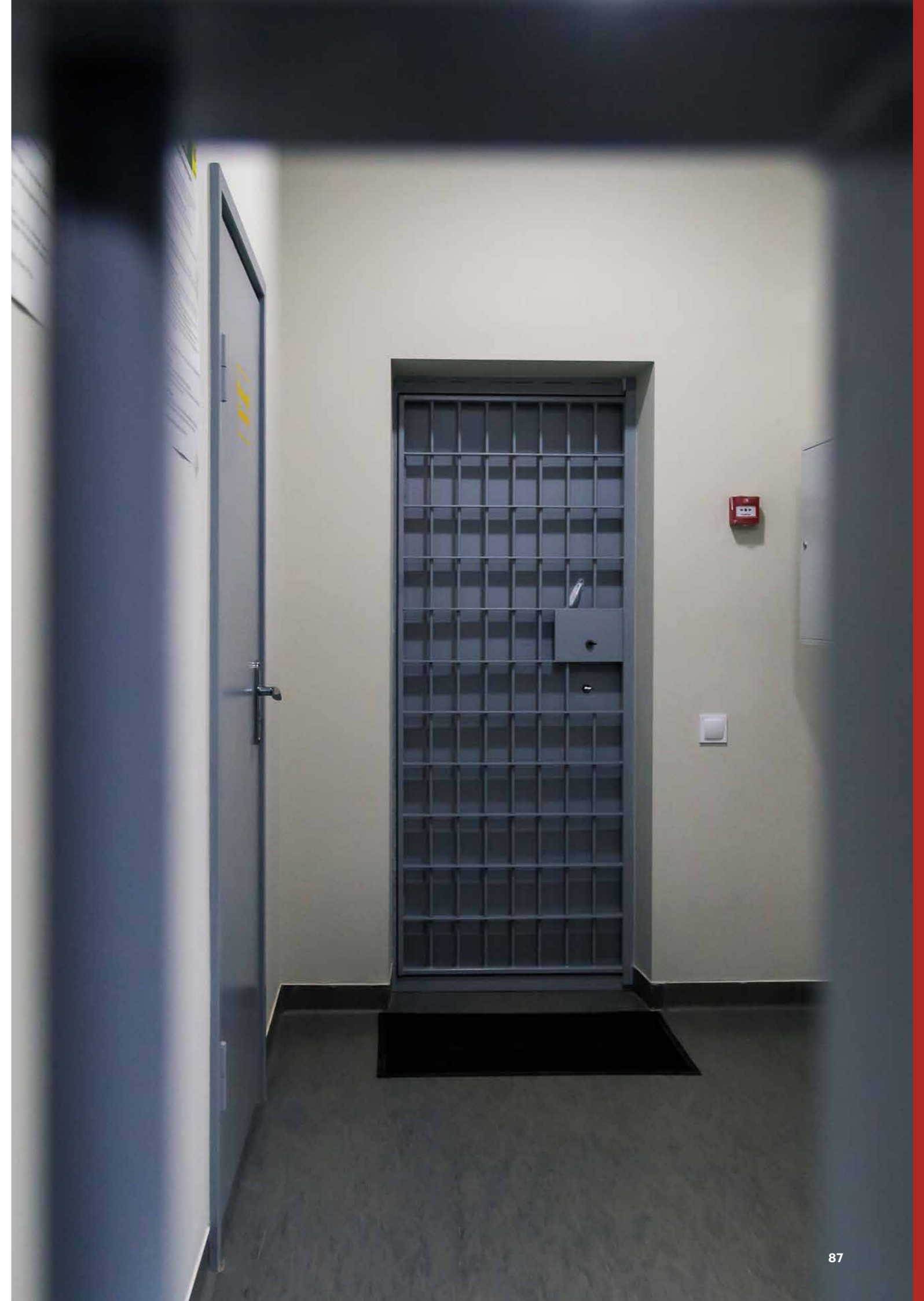
The Charter requires the parliamentary SARC to consider every Bill introduced into Parliament and report to Parliament as to whether a Bill is compatible with human rights. However, the speed of the emergency response to COVID-19 meant that SARC was not able to scrutinise this Bill until after it had been passed.<sup>255</sup>

On 2 June 2020, SARC published its detailed consideration of the COVID-19 Omnibus Act. SARC noted that the Act authorises separation, quarantine or isolation of a prisoner from some or all adults and young people in custody to prevent, detect or mitigate the risk of COVID 19 and related health risks.<sup>256</sup> SARC noted the effect of the new provisions could be to isolate a young person for up to 14 days and requested further information from the Premier about this. SARC also noted that the Statement of Compatibility did not address the compatibility of these new sections with the Charter right of a child offender to be “treated in a way that is appropriate for his or her age” and wrote to the Premier seeking further information about this.<sup>257</sup> The Premier’s detailed response on 29 June 2020 included the following:

**"It is expected that most periods of isolation under these new sections will be substantially less than 14 days. For example, in practice, isolation for new admissions, without symptoms or other risk factors, is several hours at most (the time taken to undertake health checks)... The period of 14 days was chosen on the basis of expert advice as to the incubation period for COVID-19 (which is on average 5–6 days but can be up to 14 days) and is the maximum period at any one time that a person needs to be isolated if, for example, they have been diagnosed with the virus."<sup>258</sup>**

**The Hon. Daniel Andrews, Premier**

The Premier also provided a detailed response with respect to the new provisions that allow isolation of young people for the purpose of preventing or detecting COVID-19 and their compatibility with Charter rights. He concluded that the provisions are compatible with rights, including because appropriate safeguards are in place and because the provisions protect young people and others from the spread of COVID-19.<sup>259</sup>



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