



Prisoner isolation

Unresolved complaint under
section 88 *Human Rights Act 2019*

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Introduction

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

¹ *Human Rights Act 2019* s 58.

² *Human Rights Act 2019* ss 8, 13.

Summary of the complaint

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

Details of the complaint

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

13. On 23 March 2020, in light of the Public Health Direction, the QCS Commissioner made a decision pursuant to section 157 (1A) of the *Corrective Services Act 2006 (CS Act)* to suspend visitor access approvals for personal visitors. The direction limiting access to other non-personal visitors was made pursuant to the QCS Commissioner's powers under sections 263(2) and 268(4) of CS Act. On 26 March 2020, the QCS Commissioner, with the Minister's approval, exercised his power pursuant to s 268 of the CS Act to declare that an emergency existed in relation to all prisons in Queensland as a result of the COVID-19 pandemic and specifically the threat the virus posed to the safety and welfare of prisoners and employees at all prisons. The declaration was made following advice from the Chief Health Officer (**CHO**) who believed it was necessary to give this declaration to assist in containing, or to respond to, the spread of COVID-19 within the prison and the wider community.
14. While a declaration of emergency is in force pursuant to section 268 of the CS Act the QCS Commissioner may relevantly:
- restrict any activity in, or access to, the prison; or
 - order that prisoner's privileges or a stated prisoner's privileges be withheld.
15. On 30 March 2020, C was received into reception at a prison managed by QCS.
16. Pursuant to s 268(4) of the CS Act, the QCS Commissioner issued the *Managing Prisoner Reception and Transfer COVID-19 Policy* which came into effect on 8 April 2020 (April Isolation Policy). QCS submits that:
- The April Isolation Policy was the product of very careful consideration and consultation with Queensland Health (QH) and contemporaneous public health advice from the CHO.
- The April Isolation Policy was introduced at a time when the COVID-19 transmission rate was quickly climbing in Queensland. In the period between 1 April to 8 April 2020, the number of COVID-19 cases in Queensland had risen from 778 to 943 and the cases were continuing to rise.
17. QCS further notes that the April Isolation Policy relevantly provided:

Application

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

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

...

Definitions

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

Management of Prisoners

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

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

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

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

Outline of response

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

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

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

³ *Human Rights Act 2019* s 15.

⁴ *Human Rights Act 2019* s 17.

⁵ *Human Rights Act 2019* s 30.

⁶ *Human Rights Act 2019* s 26.

⁷ *Human Rights Act 2019* s 28.

⁸ *Human Rights Act 2019* s 37(2).

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

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

Actions taken to try and resolve the complaint

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

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

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

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

Discussion

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

Basis for period of isolation

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

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

Policy change

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

Application

...

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

Definitions

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

...

Management of Prisoners

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

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

...

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

Isolated Prisoners – 14 day parameters

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

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

...

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

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

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

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

Compatibility with human rights

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

Humane treatment when deprived of liberty

46. Section 30 of the HR Act provides:

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

...

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

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

¹⁰ *Human Rights Act 2019* s 17.

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

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

Extent of the right

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

Isolation

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

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

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

¹⁵ Ibid [3]

¹⁶ Ibid [4]

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

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

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

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

Restrictions, discipline and sanctions

Rule 36

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

Rule 43

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

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

Rule 44

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

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

¹⁹ Mandela Rules 44 and 45

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

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

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

56. Further, guidance material on the rules state:

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

57. In 2011, the Special Rapporteur on Torture defined solitary confinement as 'the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day'. That report considers situations where solitary confinement takes place other than because of disciplinary breaches, noting 'persons with disabilities are held in solitary confinement in some jurisdictions as a substitute for proper medical or psychiatric care or owing to the lack of other institutional housing options.'
58. The Special Rapporteur notes that 15 days is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.²¹
59. The UN Office on Drugs and Crime has said that 'under no circumstances whatsoever must COVID-19 measures in prisons amount to inhumane or degrading treatment'.²² Similarly, the UN Subcommittee on the Prevention

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

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

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

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

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

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

Health care

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

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

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

Visits and family contact

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

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

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

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

²⁶ Mandela Rules, rule 58.

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

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

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

Access to lawyers

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

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

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

Access to relevant oversight procedures and to make complaints

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

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

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

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

³⁰ Mandela Rules, rule 61.

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

Access to cultural support

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

Daily fresh air and exercise

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

Assessment of compatibility

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

³¹ Mandela Rules, rule 56

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

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

³⁴ Mandela Rules 14(a), 23(1), 42.

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

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

Periods of isolation

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

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

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

Proper purpose – s 13(2)(b)

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

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

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

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

The AHPPC's [Australian Health Protection Principal Committee] advice to National Cabinet on 30 March 2020 was that 'given the transmission characteristics of the virus' correctional and detention facilities were considered 'at higher risks of outbreaks of COVID-19'. The AHPCC, also recognised that correctional and detention facilities housed a considerable population of vulnerable persons. The people identified by the AHPPC as falling within this category included Aboriginal and Torres Strait Islander people 50 years and older, with one or more chronic medical conditions, people 65 years and older with chronic medical conditions, people 70 years and older and people with compromised immune systems.³⁸

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

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

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

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

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

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

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

Suitability - s 13(2)(c)

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

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

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

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

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

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

Necessity – s 13 (2) (d)

80. Regarding necessity, QCS submit:

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

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

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

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

⁴¹ 2020 NLSC 125

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

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

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

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

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

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

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

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

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

⁴² [2020] FCA 1221

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

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

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

Compatibility of duration of isolation

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

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

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

...

Management of Prisoners

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

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

...

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

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

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

Compatibility of entitlements while in isolation

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

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

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

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

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

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

Compatibility of access to fresh air while in isolation

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

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

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

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

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

Conclusion

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

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

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

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

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

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

Recommendations

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

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