Protecting human rights in locked environments during COVID-19

In these challenging times, it is important that we effectively manage critical public and individual health risks, while still maintaining the human rights we should expect in a democratic society based on human dignity, equality and respect.

In particular, it is important that we focus on protecting communities that will be most vulnerable to COVID-19.

People held in locked facilities, such as prisons, watchhouses, youth detention, mental health wards and aged care facilities are at particular risk. They are at greater risk of infection, due to limitations on their ability to physically distance themselves, use of common areas, and pre-existing health conditions that might make them more susceptible to infection. They are also more vulnerable to human rights violations given they are not free to leave and rely on others for their care and essential goods and services.

Everyone in Queensland has human rights. As measures are put in place by government to control the spread of COVID-19, human rights will be limited. These limitations will be compatible with human rights provided they are reasonable, necessary and proportionate to achieve a legitimate purpose. However, even in these extraordinary times when the right to life of all Queenslanders is sought to be protected, government and public entities still have a responsibility to strike a balance between that purpose and maintaining individual rights, and to consider the relevant rights of all people impacted.

The following information outlines the rights of people in ‘locked environments’ in Queensland, and the rights of their families and staff. ‘Locked environments’ refers to accommodation from which a person is not physically free to leave at any time. This includes people who are required by government to self-quarantine or self-isolate, and people in Queensland whether or not they are a resident or an Australian citizen. It does not relate to the acts or decisions of private entities.

What is deprivation of liberty?

A person is deprived of liberty if they are physically detained without their consent. They do not have to be locked into a place; a person who is under continuous supervision and control and is not free to leave will have been deprived of their liberty.

A person who lives in the community and is free to go out during the day, but must return to a particular place at night has not been deprived of liberty. A person who voluntarily participates, and knows they are free to leave at any time, also has not been deprived of liberty. However, consent must be freely given. A person who feels compelled to stay because of, for example, the threat of criminal charges, may be deprived of liberty.
People who were not previously deprived of liberty, may now be deprived of liberty due to emergency measures put in place because of COVID-19. For example, a resident of an aged care facility who is not allowed to leave has been deprived of liberty. A person who must self-isolate under a direction of the Chief Health Officer has been deprived of liberty.

**When will deprivation of liberty be compatible with human rights?**

To be compatible with human rights an act or decision of a public entity that deprives someone of their liberty must:

- be authorised by law;
- follow the procedures the law sets out;
- not be arbitrary; and
- be reasonable and justifiable.

Arbitrary means where a decision is random and not based on any reason or rationale. An act or decision to detain someone may be arbitrary if:

- there is no clear criteria of who will be detained and in what circumstances;
- there are no proper rules about what procedures will be followed;
- there is no genuine purpose for detaining the person;
- the period of detention is indefinite or excessively long;
- there are no regular reviews to decide if detention is still necessary.

If the purpose of the detention is to slow the spread of COVID-19, factors that may be relevant to whether the detention is reasonable and justified include:

- whether detention will help achieve that purpose;
- whether there are less restrictive ways to achieve the purpose;
- whether the detention is for the shortest period possible;
- whether there are safeguards in place to ensure the detention is reviewed and does not become arbitrary;
- other actions the government is taking so that people may be released from detention as soon as possible;
- the balance between the importance of the purpose of the detention and importance of preserving the right to liberty.

Currently, there are strong public and individual health reasons to respond to COVID-19 which may justify a person’s detention if it is necessary to achieve that purpose. However, that detention would still have to be authorised by law, in accordance with procedures and not be arbitrary.

**Rights while deprived of liberty**

A person who has been deprived of liberty still has human rights, and in particular has the right to:

- protection from real and immediate risks to life;
- to not have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with;
- be treated with humanity and with respect for their inherent dignity;
- for children, access to education appropriate to their needs; and
- access health services without discrimination.
International law and principles provide that a public entity responsible for a person deprived of liberty during the COVID-19 pandemic should:

- sufficiently monitor health, including mental health, of detainees;
- tell the person they have been detained and the reasons for it, including precisely defined restrictions;
- if needed, provide access to an interpreter;
- allow the person to access their lawyer;
- enable the person to notify their family or other persons of their detention and their place of detention;
- allow the person to communicate with family and the outside world;
- not deny the person access to family for more than a few days;
- ensure access to necessary health care, including mental health care, and treatment;
- allow the person to exercise in the open air (for prisoners in Queensland, there is a minimum standard of 2 hours per day);
- if the person is held by themselves, ensure they have access to meaningful human contact;
- provide living conditions that are safe, hygienic, and not overcrowded including sufficiently clean accommodation including sanitary fixtures such as a toilet and wash-basin;
- provide accommodation with sufficient light to enable the person to work or read, and with reasonable airflow;
- ensure access to information, if needed in an easy to read format, about developments on COVID-19;
- enable the person to seek review of decisions about their detention; and
- ensure there is independent oversight and monitoring of the locked environment.

These rights are not absolute and may be subject to reasonable and justifiable limitations.

**For persons in group or crowded environments**

For environments such as prisons, aged care facilities and locked mental health wards, where people live in close proximity, human rights may further require that public entities:

- put in place positive measures to reduce exposure to COVID-19, including testing criteria, other forms of screening, access to soap and running water to wash hands, introducing social distancing measures, access to cleaning products, and regular cleaning of common areas;
- have specific measures to identify and protect people more at risk, for example, providing the person with a single occupancy room;
- have in place appropriate measures should a case of COVID-19 be detected, to protect the health and safety of staff, visitors and other residents, and provide access to appropriate health services for the person who tested positive;

**Rights of family**

As already mentioned, a person deprived of liberty still has the right to communicate regularly with their families and communities. Families also have the right to maintain contact with family members in locked environments.

Restrictions on face to face visiting to stop COVID-19 from entering a locked environment may currently be a reasonable and justified restriction on human rights. However, public entities in control of locked environments must explore other ways to respect the right to family, and to maintain the humane treatment of the person while deprived of liberty.

One way to achieve this is through the use of videoconferencing, phone and email. Access to technology may be limited in environments such as prisons, mental health wards and aged care.
facilities. Other barriers which may arise, both for the detainee and their family, are cost, lack of skills to use the technology, and fear or reluctance to use technology.

Nevertheless, it may be the responsibility of the public entity to do their best overcome these barriers, particularly if a person is entering palliative care or whose mental health is at risk.

Subject to the person’s privacy, families should also have the right to receive information about decisions that affect their loved ones, both under their right to freedom of expression, and also to increase accountability and transparency of decisions being made.

Rights of staff

People who work in locked environments also have human rights. Staff are potentially exposed to COVID-19 and may be required to share medical information with their employers. They have the additional stress of having to enforce the restrictions put in place. They may be more vulnerable to the disease because of health conditions or age, but cannot perform the work from home and are at risk of losing their jobs.

Public entity employers must consider the human rights of their staff. Key rights include the right to life, privacy and reputation, liberty and security, and freedom of association.

Measures that respect these rights include:

- positive measures that reduce exposure to COVID-19 for all people in the locked environment, including testing and screening of staff, access to soap and running water to wash hands, introducing social distancing measures, access to cleaning products, and regular cleaning of common areas;
- having an emergency preparedness plan that can be readily implemented;
- prompt sharing of appropriate information to all employees by senior staff;
- exploring alternative work arrangements with employees whose right to life is at real risk;
- only requiring disclosure of personal information that is necessary for protecting the health and safety of the person or others, or for another legitimate reason, and ensuring that appropriate safeguards are in place to protect that information;
- monitoring the health, including mental health, of staff and providing relevant supports to staff and their families; and
- providing staff with sufficient training on new procedures and infection control, including hand washing.

Other measures

Other measures that will help to protect the rights of people in locked environments are:

- training on human rights to front line workers and providing them with the resources they need to best support the people in their care;
- paying particular attention to the position of vulnerable communities (for example, people with disability, children, Aboriginal and Torres Strait Islander people, and older persons) and developing responses that target the benefit and reduce the adverse impacts upon them;
- enabling people affected by decisions to participate in the decision making process and make their views known;
- publishing decisions which restrict rights in writing for transparency; and
- collecting and publishing data that help people to remain informed and understand the value of the decisions and actions being taken.