



Shane Rattenbury MLA, Attorney-General

Mick Gentleman MLA, Minister for Corrections, Minister for Police and Emergency Services

Cc: Emma Davidson MLA, Minister for Justice Health

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Dear Attorney-General and Minister Gentleman

Steps required by all justice sector agencies to keep AMC custody numbers low during COVID-19

We write to echo recent calls by ACTCOSS, the ACT Chapter of the Justice Reform Initiative and others for urgent steps to be taken to reduce the number of people in custody at the Alexander Maconochie Centre (AMC), noting that COVID-19 has now entered the prison system with two confirmed cases amongst the detainee population.

The grave dangers of a COVID-19 outbreak in a prison environment to both detainees and staff alike have been well documented. While we appreciate that ACT Corrective Services has acted quickly to manage the two current cases, we are concerned that the fast spreading and easily transmissible nature of the Delta variant creates a real risk of a wider outbreak within the AMC, particularly in light of the high churn rate of detainees, such as those on remand. Notwithstanding the best efforts of ACT Corrective Services to prevent further transmission, it must be recognised that the complexity and difficulty in managing COVID-19 is greatly increased in closed environments such as prisons. Precautionary measures are also likely to result in more severe conditions of detention and make it harder to humanely quarantine detainees.

It is important to recognise that managing the risk of an outbreak in the AMC is not the responsibility of ACT Corrective Services alone, but requires a collective response from all actors in the justice sector, including police, prosecutors, courts, and the government. We therefore urge you to consider the following suite of measures to reduce the detainee population at the AMC.

(i) Bail considerations

As noted by the JRI, 86% of people entering and 61% of those exiting the AMC in the June 2021 quarter were unsentenced, both of which were higher than the national rates (79% and 45% respectively).¹ Data from the last six quarters shows that the proportion of unsentenced detainees in the AMC has been consistently above the national rates.² Focusing efforts on reducing the remand population would be an effective way of getting custody numbers down during the pandemic, especially for those charged with less serious offences and subject to appropriate bail conditions to ensure community safety.

While the ACT courts have recognised that the impact of COVID-19 on an accused can be taken into account for the purposes of a bail application,³ we believe that there would be benefit in legislating the criteria that courts must consider when assessing the risk that the current pandemic would present to an

¹ Australian Bureau of Statistics (2021). *Corrective Services, Australia, June quarter 2021*. Cat no 4512.

² Ibid.

³ See, for example, *R v Stott (No 2)* [2020] ACTSC 62; and *The Queen v Stacker* [2020] ACTCA 34 (30 June 2020).

accused if remanded, including whether the accused's trial date would be delayed and whether the remand experience would be made harsher because of the impact of COVID-19. Consideration should also be given to whether remanding an accused would result in particular hardship on the accused's family related to the pandemic. Such guidance would not be a fundamental change in the approach to bail principles, but would recognise the current exceptional circumstances. Legislated criteria would help to ensure that a principled and consistent approach is taken, which properly balances public safety requirements, including the interests of victims of crime, with the need to reduce, to the extent possible, the detention population during the pandemic period.

We suggest that express consideration should also be given to the current elevated risk of a COVID-19 outbreak in the AMC when determining whether it is strictly necessary for someone to be held in custody before a bail hearing.

(ii) Early release and temporary leave

The use of early release mechanisms and temporary leave passes can be an important way to keep detainee numbers down during the pandemic. We suggest that serious consideration should be given to facilitate the early release of detainees who are particularly vulnerable in light of COVID-19, including Aboriginal and Torres Strait Islander detainees, detainees who are elderly or have disabilities, pregnant women, new mothers, and those who may need to care for children or other family members.

We note that amendments were made to the *Corrections Management Act 2007* last year to enable the Commissioner to grant extended leave permits to detainees for up to 28 days or up to three months for the purpose of receiving long-term medical or palliative care.⁴ Additional amendments were also introduced last year to enable COVID-19 leave to be granted to non-serious offenders towards the end of their sentence. We are concerned the latter provisions still remain uncommenced,⁵ and to date no guidelines have been published on their operation and implementation as required under the legislation.⁶

(iii) Protocols for handling breaches of isolation or quarantine orders

It has come to our attention that there may not be any specific protocols currently in place between ACT Policing and ACT Health for dealing with breaches of COVID-19 isolation or quarantine orders. As individuals who are subject to isolation or quarantine orders are known to be infectious or potentially infectious, it would appear self-evident that using a criminal justice response to deal with isolation or quarantine breaches must be undertaken with great care, and only as a measure of last resort. Arresting, transporting, and detaining someone who is known to be infectious or potentially infectious in the watchhouse and subsequently at the AMC undermine the purpose of such orders, namely, to contain the spread of COVID-19.

We strongly recommend that police powers for enforcing isolation or quarantine orders must be informed by public health considerations, and that they must be subject to clear partnership and collaborative decision-making arrangements with ACT Health. The purpose of such powers is to support the public health goals of avoiding further COVID-19 transmission. We therefore suggest that it would be appropriate, in the first instance, for police to either direct or remove the person to the place where they are isolating/quarantining, or to another location on advice from a public health officer. Taking the person into custody will only be appropriate in exceptional circumstances.

Police should also be encouraged to issue warnings or cautions and not charge for any alleged ancillary minor and non-violent offences, and particularly alleged minor and non-violent administration of justice

⁴ *Corrections Management Act 2007*, s 205(2A), inserted by the *COVID-19 Emergency Response Act 2020*, and extended by the *COVID-19 Emergency Response Legislation Amendment Act 2021*.

⁵ *COVID-19 Emergency Response Legislation Amendment Act 2020*, Sch 1, Pt 1.4.

⁶ *COVID-19 Emergency Response Legislation Amendment Act 2020*, s 216G.

offences such as bail condition breaches, where there is no risk to community safety and with particular consideration of risks in family violence matters.

Making COVID-19 vaccination mandatory for correctional staff

We are aware of calls to make COVID-19 vaccination a mandatory condition of employment for correctional staff, similar to conditions that were recently placed on the employment of aged care workers. Making vaccination mandatory is a serious step as it amounts to involuntary medical treatment. It would also impact on a person's right to work, and their rights to equality and non-discrimination.

In addition to the requirement for limitations on rights to be reasonable, necessary and proportionate, s 28 of the HR Act requires such limitations to be set by laws. We have previously cautioned that we do not consider s 120 of the *Public Health Act 1997* provides a sufficiently lawful basis for the Chief Health Officer to direct a class of persons to be vaccinated. In our view, in order to comply with the HR Act, measures of such a significant nature must be based on clear and explicit powers set out in primary legislation. Express provision in primary legislation would ensure that the exercise of these powers is subject to proper scrutiny and accompanied by robust safeguards, including appropriate exemptions.

We would welcome the opportunity to discuss these matters further with you.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner



Karen Toohey
Discrimination, Health Services, and Disability and
Community Services Commissioner

Cc: Minister for Human Rights