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COVID-19 Provincially Incarcerated Individuals - A Policy Report

Adelina Iftene

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MEMORANDUM

To: The Hon Mark Furey, Minister of Justice; The Hon Randy Delorey, Minister of Health and Wellness; The Hon Chuck Porter, Minister of Municipal Affairs and Housing; The Hon Kelly Regan, Minister of Community Services

Cc: The Hon Stephen McNeil; The Hon Tony Ince, Minister of African Nova Scotian Affairs; The Hon Kelly Regan, Minister responsible for the Advisory Council on the Status of Women; Director, Correctional Services, John Scoville; Executive Director, Correctional Services, Chris Collett; VP - Health Services, Quality and System Performance, NSHA, Colin Stevenson; Director – Mental Health and Addictions, NSHA, Samantha Hodder; Director – Mental Health and Addictions, NSHA Central Zone, Rachel Boehm.

From: Dr. Adelina Iftene (Assistant Professor Schulich School of Law, Associate Director of the Health Law Institute) (with Brock Morrison JD'22)

Subject: The Impact of the Pandemic on Provincially Incarcerated Individuals – Assessment and Preparation for Subsequent Waves

Date: August 2020

This document is the result of an investigation into the impact of the COVID-19 pandemic on provincially incarcerated individuals and the Nova Scotia government's responses relating to its prison population. It was supported by the Nova Scotia COVID-19 Health Research Coalition.

In this memorandum, we describe the results of the investigation and propose solutions to better prepare for the second wave of COVID-19 or an alike pandemic situation.

Background

The importance of preventing outbreaks in prisons during a pandemic cannot be overstated. Incarcerated individuals tend to present a high number of risk factors that make them more susceptible to contracting the infection and developing severe complications, with those complications including death. Prison infrastructure and its congregated living nature can also lead to difficulties in implementing preventive measures like social distancing. The risk of the infection spreading rapidly once inside these institutions is much higher. Moreover, the virus is unlikely to be contained within the prison walls, regardless of the measures taken. The consistent movement of incarcerated people and staff means a prison outbreak will likely prolong the life of the infection in the community as well.¹

Numerous international health and human rights agencies expressed concerns regarding the increased vulnerability of incarcerated individuals to COVID-19 and the ability of prisons, as

¹ "Position Paper: COVID-19 preparedness and responses in prisons", (31 March 2020), online (pdf): *United Nations Office on Drugs and Crime* <https://www.unodc.org/documents/Advocacy-Section/UNODC_Position_paper_COVID-19_in_prisons.pdf?fbclid=IwAR28hq62RK8AfCu8-2VnXeqg-V8_VDJQjDD5rEuo_ZisEQwYN3dCgoAy00E> [<https://perma.cc/D49K-JHGR>] [*Position Paper*].

institutions, to adequately respond to the pandemic.² They have issued statements stressing the importance of upholding human rights in places of detention, even during a pandemic. The most common recommendations put forth emphasized a need for alternatives to incarceration, bolstering of health care services, prevention and control measures that are human-rights compliant, as well as providing support for released individuals.

Nova Scotia has been one of the most successful provinces in preventing prison outbreaks. The court systems, the Department of Justice (DOJ), and advocates worked together to ensure the release to the community of almost half the incarcerated population. In place of four institutions operating at full capacity, there are now only two, and both have been operating significantly under-capacity during the pandemic. They are the Central Nova Scotia Correctional Facility (CNSCF) and the Northeast Correctional Facility. Only one incarcerated person is known to have been infected, and detection came soon after admission, while they were in isolation, reportedly to treat a pre-existing injury. This incredible result is likely to be attributable to both the swift decarceration efforts and the DOJ and Nova Scotia Health Authority (NSHA)'s work with Dr. Lisa Barrett, the Authorized Prescriber for COVID-19 in corrections, who created the COVID-19 protocols.

Other Canadian jurisdictions have not been as successful. In places where decarceration was not pursued, and the status quo continued, notably at the federal level, and in Ontario and Quebec³, the consequences for prisoners, staff, and the community have been devastating.⁴ This is a testimony to both the importance of decarceration actions and the difficulty of containing the spread of the disease once there is institutional transmission. Thankfully, Nova Scotia's ability to contain the spread of COVID-19 in the corrections setting has not been tested. Even if incarceration numbers remain low, given the risks posed by the prison environment, it should not be taken for granted that outbreaks will be prevented during future waves simply by replicating what was done during the first wave.

The purpose of this memorandum is to inform governmental stakeholders of the potential weaknesses identified in the government's response to the pandemic as it relates to prisons and to recommend measures that would strengthen these responses in preparation for future waves. Using the model offered by international agencies, we organize our concerns and

² OHCHR & WHO, Inter-Agency Standing Committee, *Covid-19: Focus on Persons Deprived of Their Liberty* (circulated on 27 March 2020), online: *IASC* <https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf?fbclid=IwAR2xB-uXSWw2LVybcNDW-M0n8uB1miUg_zEHofVmzwWwf09gDx2OUfkQcnM> [*OCHR & WHO*].

³ "Carceral Depopulation During the COVID-19 Pandemic" (19 May 2020), online: *Tracking the Politics of Criminalization and Punishment in Canada* <http://tcp-canada.blogspot.com/2020/05/carceral-depopulation-during-covid-19_19.html> [<https://perma.cc/CH2Q-AQLY>].

⁴ "Confirmed COVID-19 Cases Linked to Canadian Carceral Institutions" (29 May 2020), online: *Tracking the Politics of Criminalization and Punishment in Canada* http://tcp-canada.blogspot.com/2020/05/confirmed-covid-19-cases-linked-to_29.html [<https://perma.cc/FM6H-9ZWN>].

recommendations based on three interrelated issues: (i) The preventative measures taken inside prisons (ii) The decarceration efforts and (iii) The support individuals received upon release.

Preventative Measures Taken Within Nova Scotia Correctional Institutions

Information on protocols and practices

Based on media and some governmental reports, several practices were undertaken to prevent the spread of COVID-19 inside institutions: facilities were closed to all visitors, including lawyers;⁵ prisoners, correctional officers, third party contractors and NSHA staff were screened for COVID-19;⁶ staff were provided with personal protective equipment for use during interactions with prisoners;⁷ and additional cleaning materials were supplied for enhanced cleaning regimes and increased sanitation measures.⁸ The prisoners had access to soap and water for hand washing throughout the day with hourly reminders to wash their hands.⁹ Regular medical updates to all staff and prisoners, including advice on cleaning and social distancing, became part of the daily operations.¹⁰ Seventeen prisoners at Central Nova Scotia Correctional Facility were tested for COVID-19.¹¹ It is unclear why these seventeen were tested. The one infected incarcerated individual remained in a healthcare cell until they were cleared by health officials to return to general population.¹² Flu vaccine clinics were offered to any prisoners who wished to participate.¹³ There were also measures taken in an attempt to minimize the disconnect between prisoners, their friends and family, and the supportive services they rely upon. There

⁵ Nova Scotia Provincial Government, "Correctional Facilities Take Further Action to Prevent Covid-19" (18 March 2020), online: <<https://novascotia.ca/news/release/?id=20200318003>> [perma.cc/88YE-68FX] [*Prov Gov*].

⁶ El Jones, "A prisoner at Burnside has tested positive for COVID-19; El Jones speaks with another prisoner about it", *Halifax Examiner* (20 April 2020), online: <<https://www.halifaxexaminer.ca/province-house/a-prisoner-at-burnside-has-tested-positive-for-covid-19-el-jones-speaks-with-another-prisoner-about-it/>> [perma.cc/F8QB-K5B9] [*Examiner 1*].

⁷ *Ibid.*

⁸ EL Jones, "Nova Scotia's Director of Correctional Services suggests that being in jail is safer than being in the broader community. That's just false" *Halifax Examiner* (29 March 2020), online: <<https://www.halifaxexaminer.ca/province-house/nova-scotias-director-of-correctional-services-suggests-that-being-in-jail-is-safer-than-being-in-the-broader-community-thats-just-false/>> [perma.cc/8XHW-YXSB] [*Examiner 2*].

⁹ Karen Hudson, "NS Deputy Minister Response", online (pdf): Department of Justice <<https://documentcloud.adobe.com/link/track/?pageNum=1&uri=urn%3Aaaid%3Aascds%3AUS%3A7047fc5e-951b-422d-90ca-f0f14c366536>> [perma.cc/XD46-VGXW] [*DOJ*].

¹⁰ *Ibid.*

¹¹ *Examiner 1, supra* note 6.

¹² *Ibid.*

¹³ *DOJ, supra* note 9.

was access to two free calls per week.¹⁴ Skype was examined for video visitation, but it is unclear if it was implemented.¹⁵

We located one relevant policy document. The DOJ Pandemic Situation¹⁶ is a generic policy document that mandates, in the case of a pandemic, Correctional Services should create and communicate contingency plans for admissions, kitchen services, laundry services, isolation, quarantine, supplies, and conditional release. The policy requires that these plans be consistent across institutions and that they are sufficient. It is unclear if the contingency plans referenced in the Pandemic Situations directive even exist or what their content is. We have filed an Access to Information request with DOJ (Access Request 2020-00854-JUS – Decision) regarding these documents. We did not receive any contingency plans in response, which makes us believe they do not exist. We were told that some contingency plans (like enhanced cleaning) do not exist in a written form, but rather were communicated orally. It is unclear if any public health authority has reviewed these oral instructions for institutional prevention measures.

We located two publicly available NSHA protocols related to health care in places of detention during COVID-19. The “East Coast Forensic Hospital and Offender Health Services Screening for COVID-19 by Swab Collection”¹⁷ is essentially a testing and isolation protocol applicable in provincial NS places of detention. It provides the conditions under which medical personnel may swab patients for COVID-19, as well as the manner in which the swab ought to be conducted. This directive mandates that while waiting for results, the individual, whether symptomatic or not, must be placed in isolation and droplet precautions taken. Furthermore, even if the test is negative, the individual will continue to remain in isolation for 14 days. Further instructions are provided on the ordering and requisition of tests following a swab. The document also sends to a pre-existing protocol (not restricted to sites of detention), Droplet Precautions, that is to be applied together with this specific swab collection protocol.¹⁸ The Covid-19 Assessment Chart¹⁹ for East Coast Forensic Hospital and Offender Health is also

¹⁴ Nova Scotia Provincial Government, News Release, "Changes to Correctional Facilities Visits to Prevent COVID-19" (14 March 2020), online: <<https://novascotia.ca/news/release/?id=20200314002>> [perma.cc/RQ24-C4BF] [*Prov Gov 2*].

¹⁵ DOJ, *supra* note 9.

¹⁶ Nova Scotia, Department of Justice "Contingency Plans: Pandemic Situations" (*Correctional Services Policy & Procedures*) (revised 19 December 2019).

¹⁷ Nova Scotia Health Authority, "Mental Health & Addiction Services Care Directive" (29 April 2020) online (pdf): <http://policy.nshealth.ca/Site_Published/NSHA/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=76691> [perma.cc/MBM4-9ZCD] [*Care Directive*].

¹⁸ Nova Scotia Health Authority, "Infection Prevention and Control Policy, Droplet Precautions," (8 August 2017) online: <http://policy.nshealth.ca/Site_Published/nsha/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=76028> [https://perma.cc/LM4L-BPMT].

¹⁹ Nova Scotia Health Authority, "East Coast Forensic Hospital & Offender Health COVID-19 Assessment Chart" (23 April 2020) online (pdf): <http://policy.nshealth.ca/Site_Published/covid19/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=77425> [perma.cc/ZP8M-2XED] [*Assessment Chart*].

public. The Chart is a document to be filled in by the medical professional at the time when they assess and/or swab the patient.

No other directives, protocols, regulations, guidelines or COVID-19 contingency plans for prisons appear to be publicly available either from DOJ or NSHA.

Quality of existing protocols

There was only one infected prisoner during the first wave of Covid-19. This prisoner was isolated in a health-care cell since admission to the facility due to a pre-existing injury. The result was an uncommon situation where a prisoner had minimal contact with others between the time they entered custody and the positive test.²⁰ This does not discount the effectiveness of any of the aforementioned measures. Rather it is to assert that the measures cannot be labeled as flawless due to a single incident where the transmission of COVID-19 was halted. This is especially true given that any procedures and regulations that identify specific preventative measures were not made public so their adequacy cannot be assessed. The lack of transmission could very well have been due to these measures, but it could also have been the result of them not being tested by an outbreak. Regardless of the why, the inference is that it is vital these measures are re-visited pre-second wave, and a trial by fire scenario is not created.

Implementation of measures and transparency

Incarcerated people have a right to be safe and secure. They are also owed a heightened duty of care due to their legal status and dependency upon, and thus vulnerability to, state decision-making. They must have access to adequate protection and health care services.²¹ Anything less is a violation of international human rights²² and national laws²³ that guarantee the prisoner's right to being treated with dignity, safety, and to the provision of at least the same level of care (including preventative) as available in the community. To ensure that these rights are upheld during a pandemic and to increase accountability, the United Nations Human Rights Office of the High Commissioner (OHCHR) and the World Health Organization (WHO) have noted that

²⁰ *Examiner 1*, supra note 6.

²¹ Penal Reform International, "Coronavirus: Preventing harm and human rights violations in criminal justice systems" (14 July 2020), online (pdf): *Penal Reform International* < <https://cdn.penalreform.org/wp-content/uploads/2020/07/Coronavirus-briefing-July-2020.pdf> > at 6-9 [<https://perma.cc/7B6L-NVVC>] [*Penal Reform Long*].

²² *The United Nations Standard for Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2015) at Rules 24–35 ; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 Aug 1985, United Nations, Treaty Series, vol 1465, p 85, art 2 (entered into force 26 June 1987, in accordance with article 27 (1)) ; *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol 993 p 3 (entered into force 3 January 1976, in accordance with article 27).

²³ *Canadian Charter of Rights and Freedoms*, ss 7, 12, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c 11 ; *Correctional Services Act*, SNS 2005, c 37, ss 25-30.

“authorities should also guarantee maximum transparency in the adoption of preventive measures and constant monitoring of their application.”²⁴ Independent monitoring needs to exist, and indeed, it is perhaps more important than ever during a pandemic.²⁵

We commend the Correctional Services for supporting East Coast Prison Justice Society’s (ECPJS) initiative to create a 1-800 number for prisoner complaints. However, there are logistical and privacy barriers for prisoners in accessing this route. This mechanism is also very narrow as it relies only on self-reported information from prisoners and ECPJS’s recommendations are non-enforceable. There is also no obligation to inform ECPJS of whether or not Correctional Services has adopted the recommendations.

There is a dearth of reporting on how the measures advertised by the DOJ and NSHA, as well as the protocols made public, were implemented. The anecdotes emerging from prisons raise some concerns that many of the measures described above were not consistently applied. For instance, ECPJS has received regular reports that the staff did not wear masks in their interactions with prisoners, and the prisoners themselves did not receive any PPE. Prisoners expressed concern about the lack of COVID-19 testing and about the fact that their food was prepared and delivered by people who did not wear masks. Prisoners also noted that they did not have access to a physician during the pandemic, that their addiction or mental health care was discontinued, and that their medical procedures were indefinitely postponed. If this is true, then the institutional practices fall short of the prescribed measures for places of detention issued by WHO and other organizations.²⁶

²⁴ OCHR & WHO, *supra* note 2.

²⁵ Council of Europe, CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, CPT/Inf(2020)13, online (pdf): *Council of Europe* <<https://rm.coe.int/16809cfa4b>> [<https://perma.cc/8446-DJZJ>]; Alexis Comminos, “COVID-19 in prison”, *Association for the Prevention of Torture* (12 March 2020), online: <<https://www.ap.t.ch/en/blog/covid-19-prison>> [<https://perma.cc/MEZ6-ER38>]; Penal Reform International, “Coronavirus: Healthcare and human rights of people in prison” (16 March 2020), online: *Penal Reform International* <<https://cdn.penalreform.org/wp-content/uploads/2020/03/FINAL-Briefing-Coronavirus.pdf>> at 9 [<https://perma.cc/9HCC-XAGN>] [*Penal Reform Short*]; *Penal Reform Long*, *supra* note 19 at 20.

²⁶ OCHR & WHO, *supra* note 2 at 4; *Penal Reform Long*, *supra* note 19; Commonwealth Human Rights Initiative, “Covid-19 and Prisons in the Commonwealth: Ensuring an Effective Response” (2020), online (pdf): <<https://www.humanrightsinitiative.org/download/1586326581COVID%2019%20and%20Prisons%20in%20the%20Commonwealth.pdf>> at 7 [<https://perma.cc/3TM8-GSPW>] [*Commonwealth*]; UN, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee to States parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN Doc CAT/OP/10, 7 April 2020 at 3 [*UN Subcommittee*]; OHCHR & WHO, Inter-Agency Standing Committee, *Covid-19: Focus on Persons Deprived of Their Liberty* (circulated on 27 March 2020), online: IASC <https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf?fbclid=IwAR2xB-uXSWw2LVybcNDW-M0n8uB1miUg_zEHofVmzwWwf09gDx2OUfkQcnM> at 3 [<https://perma.cc/FC8X-9HWY>]; International Committee of the Red Cross, News Release, “COVID-19: Authorities must protect health of detainees, staff and ultimately surrounding communities” (7 April 2020), online: ICRC <<https://www.icrc.org/en/document/covid-19-places-detention-must-protect-health-detainees-staff-and-ultimately-surrounding>> [<https://perma.cc/MZ25-PCYX>]; “COVID-19 pandemic: urgent steps are needed to protect the rights

Since the beginning of the pandemic, there were only two voluntary news releases from the province concerning corrections. The majority of information obtained was from a letter written by the Deputy Minister of Justice, in response to calls from advocates.²⁷ The remaining information came from media releases that were often inconsistent and contradictory. Media information varied depending on the outlet, source, or interviewee. The information provided by the DOJ or NSHA was vague. Using broad terms in releases like “enhanced cleaning” or “screening” provides little detail and leaves many unanswered questions. The protocols made public expressed what needed to be accomplished but did not have the processes included on how to accomplish it. These processes were presumably left to each institution, and that information was unattainable. While we are aware that the NSHA and DOJ benefited from Dr. Barrett’s expertise in designing the swabbing protocol, it is unclear if the institutional measures taken and their implementation have been overseen by any public health expert.

The anecdotes, in combination with the lack of information made available, raises concerns that the avoidance of an outbreak during the first wave was in part due to luck. As the second wave of COVID-19 approaches, the DOJ and NSHA should work on ensuring that relevant policies and procedures: a) exist; b) are made public; c) have specific reporting criteria; and d) that their continuing application is overseen by independent public health experts who have authority to require remedial action and make further recommendations or directions.

Measures raising human rights concerns

Human rights cannot be an afterthought during a pandemic. As indicated repeatedly by all human rights agencies, the pandemic cannot be an excuse to derogate human rights. All measures taken must be compliant with national and international human rights requirements. For instance, given the well-documented consequences of isolation, individuals should not be isolated for prolonged periods as a routine preventative measure. Alternative preventative measures ought to be taken where necessary. Medical isolation (when the individual is sick) should not result in de facto solitary confinement.²⁸

Indiscriminately isolating everyone for two weeks upon admission to an institution, as appears to be the practice in Nova Scotia, may raise legal and ethical issues. We are told that currently every new prisoner, as well as anyone suspected of having COVID-19, is isolated for two weeks. According to the NSHA protocols reviewed, this practice is recommended for those

of prisoners in Europe”, *Council of Europe Commissioner for Human Rights* (6 April 2020), online: *COE* <https://www.coe.int/en/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe?fbclid=IwAR12qkhKv_YPN4IM5GeFUUSAMBDGVjIsZXuSCyvNtBcQjIMwLU9oP2WSw48> [<https://perma.cc/932J-HDW4>] [*Council of Europe*].

²⁷ *DOJ*, *supra* note 9.

²⁸ *OCHR & WHO*, *supra* note 2 at 5; *Council of Europe*, *supra* note 24 ; *Prevention of Torture*, *supra* note 23 ; *Penal Reform Long*, *supra* note 19 at 14-20.

who are already incarcerated and are suspected of having COVID-19, but these protocols are silent regarding new admissions suggesting a lack of authority for such actions. It is not clear if there are any other isolation protocols outside those.

Regardless of the source, based on the accounts we received, the practice of isolation is concerningly similar to the solitary confinement regime. Any existing isolation protocols and their application will need a significant review and must be brought in accordance with human rights norms before the second wave. An isolation protocol must include all situations where isolation may be mandated and how this is practically different than solitary confinement, as well as any measures taken to mitigate the potential negative consequences of isolation. As noted by International Penal Reform (IPR), crisis preparedness and response directives must strictly regulate the use of isolation practices (including lockdowns, quarantines, and isolation) based on international standards.²⁹

The Decarceration Effort

By mid-March, corrections released 41 people serving intermittent sentences with temporary absences.³⁰ By May 21st that number had increased to 81 with both intermittent and continuous prisoners being released on temporary absence certificates.³¹ The releases included many short duration releases, that is individuals who were within the last 10-30 days of their sentences. A total of 58 short duration releases expired their term of custody while out on their temporary absence certificates.³²

On April 22nd, it was reported that the total jail population reduced from 452 people in custody before mid-March down to 251, either through temporary absence certificates (for those serving a sentence) or bail orders (for those awaiting trial in custody).³³ There were a total of 322 release orders issued between March 13th and May 31st for individuals with remand status.³⁴ The court's contribution was led by Chief Judge Pamela Williams, who kept the courtroom open over the weekend to process emergency bail orders from all over Nova Scotia,³⁵ and release

²⁹ *Ibid*, at 21.

³⁰ *Prov Gov*, *supra* note 5.

³¹ Email from Tracy Sabean, A/Coordinator, Administration and Support Services, Correctional Services, to Brock Morrison (20 May 2020) (communication with author on file).

³² *Ibid*.

³³ Ryan Haley, "Nova Scotia jail population almost cut in half under COVID-19 measures Social Sharing", CBC News (22 April 2020), online: <<https://www.cbc.ca/news/canada/nova-scotia/jail-population-cut-in-half-new-covid-19-measures-1.5541732>> [perma.cc/ZJ2P-YJF7].

³⁴ Email from Teri R LeDrew, Research and Statistical Officer, NS Department of Justice, to Brock Morrison (23 July 2020) (communication with author on file).

³⁵ EL Jones, "Clearing out the jails: In an extraordinary effort to avoid a COVID-19 outbreak, many prisoners were released this weekend" *Halifax Examiner* (24 March 2020), online: <<https://www.halifaxexaminer.ca/province-house/clearing-out-the-jails/>> [perma.cc/X3NZ-Y9P5].

individuals from remand. Sentencing and arraignment matters were also adjourned, unless ordered otherwise, for scheduling to June 15th.³⁶

Nova Scotia Correctional Institutions had an approximate decarceration rate of 45%. Jurisdictions that did not reduce the numbers of their incarcerated population, had significantly more people infected. For instance, the federal correctional system undertook no decarceration efforts. As of June 2020, federal facilities had 360 confirmed cases³⁷ and two prisoner deaths.³⁸ These numbers do not include the positive tests incurred by staff as those numbers were not officially reported by CSC.³⁹ However, media reports indicate that just under 90 staff members have tested positive in Quebec alone.⁴⁰ The amount of cases connected to federal institutions is likely significantly higher. The rate of infection was 13 times higher than in the community,⁴¹ while for women the rate of infection was 77 times higher than in the community.⁴²

These numbers highlight the importance of continuing to keep incarceration levels low to avert significant consequences. We are concerned that the number of incarcerated people in NS will increase before a second wave, at which point the decarceration efforts will need to recommence. Below, we discuss how one of the reasons the numbers may increase is the lack of support for those released during the first wave.

Community Supports Upon Release

Decarceration is the first step of a sustainable public health plan that can keep both vulnerable individuals and communities out of harms' way.⁴³ The presence of the trifecta of support - housing, income assistance, and access to health care - is what makes a release sustainable. Without these factors, it is simply moving the problem from jail into the community. Released individuals are at a higher risk of living with mental illnesses, addictions, and

³⁶ *R v Denny*, [2020] NSJ No 148, 2020 NSPC 14.

³⁷ Office of the Correctional Investigator, "Covid-19 Update for Federal Corrections – June 19, 2020" (2020) at para 2, online (pdf): *Government of Canada: Office of the Correctional Investigator* <<https://www.ocibec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20200619-eng.pdf>> [<https://perma.cc/LJJ8-LCAZ>].

³⁸ *Ibid*, at para 2.

³⁹ *Ibid*, at para 4.

⁴⁰ Katelyn Thomas, "More than 100 inmates, 90 employees test positive for COVID-19 at federal prisons in Quebec", *CTV News* (21 April 2020), online: <<https://montreal.ctvnews.ca/more-than-100-inmates-90-employees-test-positive-for-covid-19-at-federal-prisons-in-quebec-1.4905173>> [<https://perma.cc/6T37-4ERZ>].

⁴¹ Anthony N. Doob, *Understanding Imprisonment in the Time of COVID-19, Report* [unpublished], (Toronto: University of Toronto, 11 May 2020)

⁴² Anthony N. Doob and Jane B. Sprott, *Why isn't the Trudeau government doing something about the fact that women prisoners are disproportionately affected by COVID-19 in Canada's penitentiaries?*, Report [unpublished], (Toronto: University of Toronto, 23 April 2020)

⁴³ *UN Subcommittee*, *supra* note 24 at 3; *Position Paper*, *supra* note 1 at 4 ; *Commonwealth*, *supra* note 24 at 6 ; UNODC et. al., "UNODC, WHO, UNAIDS and OHCHR Joint Statement on Covid-19 in Prisons and Other Closed Settings" (2020), online (pdf): *UNODC* <https://www.unodc.org/documents/Advocacy-Section/20200513_PS_covid-prisons_en.pdf> [<https://perma.cc/EE4W-WTGS>] at 1 [*UNODC & WHO*] ; *Penal Reform Long*, *supra* note 19 at 31.

homelessness. If unsupported, it is unlikely that they will be able to respect the public health preventive measures put in place in the community, and some of them will end up on the streets or in overcrowded shelters. In such an environment, they will continue to be at risk of contracting and spreading the infection, and are also more likely to be returned to prison on account of breaching their conditions of release (including, for instance, having a designated place of residence, not associating with certain people, avoiding alcohol or drugs, etc.). Returning people to prison on administrative breaches is detrimental to the decarceration efforts that have taken place. Thus, ensuring proper supports upon release is both a human right and public health issue.

International organizations have included housing support for those released among their priority recommendations.⁴⁴ The United Nations Office on Drugs and Crime (UNODC) and WHO emphasized the importance of ensuring that all released individuals have adequate accommodation:

For those who may not have a residence upon release, the state should take measures to provide adequate housing and reasonable accommodation. This may require the implementation of extraordinary measures as appropriate in a state of emergency, including using vacant and abandoned units and available short-term rentals.⁴⁵

There are few governmental supports available to people exiting prison. Individuals are supposed to receive one month of medication upon release and are entitled to apply for income assistance once back in the community. Individuals are removed from income assistance during incarceration and then not eligible to apply until after release. From the moment they apply, it takes at minimum two weeks to receive the first payment. This means that, for at least two weeks, these individuals may have zero income. Further, to apply for social assistance they must include a place of residence. Many freshly released individuals have not secured a residence and as a result, cannot receive financial support. Without financial support, they cannot secure housing. This is a vicious cycle in which many individuals get caught. Professor Sheila Wildeman has submitted the report of her investigation into this specific issue, as well as a set of legal and policy recommendations for its remediation. We endorse her conclusions.

The main support for released individuals during the first wave of the pandemic came from not-for-profit organizations. In supporting released individuals, John Howard Society Nova Scotia (JHSNS) had expenses exceeding \$40,000 in 4 months. Elizabeth Fry, in providing groceries alone to 54 families, spent in excess of \$65,000. Even so the consensus amongst these

⁴⁴ OCHR & WHO, *supra* note 2 at 4 ; Council of Europe, *supra* note 24 ; “Human Rights Dimensions of COVID-19 Response”, *Human Rights Watch* (19 March 2020), online: <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response?fbclid=IwAR3apY-H-mur8QeqEsg9Bj_AJUuFkWzPwN2joH6H1pZzW1Ggw5SEYzaShTI#_Toc35446581> [<https://perma.cc/E59S-3KLA>] ; *Penal Reform Long*, *supra* note 19 at 36 ; *Commonwealth*, *supra* note 24 at 6.

⁴⁵ UNODC & WHO, *supra* note 42.

organizations was that the largest cost incurred is still for medication, with the lack of access to medications being a major reason people end up back in jail. They noted that not all released individuals received their one-month supply, and even for those who did, this was often not sufficient.

During the pandemic, the amount of funding provided to these societies has been inadequate. The United Way Halifax was a consistent contributor. A federal government program called “Reaching Home” had a small amount of funds allocated into provincial programs. At the time of writing, the province had not contributed any funds during the pandemic, outside of a \$15,000 contribution from the Nova Scotia Advisory Council on the Status of Women (“Status of Woman Nova Scotia”). Agencies serving men have not seen any provincial contribution.⁴⁶

With the funds received through Reaching Home, three organizations (JHSNS, E Fry Mainland, and Coverdale Courtwork Society (“Coverdale”)) launched an emergency housing project (“JEC”) which safely housed, in hotel rooms, 20 people exiting jail during the pandemic, for a total of over 30 people.⁴⁷ JEC was the result of these agencies sharing resources and expertise, without the traditional competition for funding. The individuals housed through JEC are just a small segment of the people who relied on these societies for support. JEC became an addition to these societies’ reintegrative casework of about 60 plus individuals per society. This placed an incredible strain on their already stretched thin resources.⁴⁸ JEC offered staffing from 9:00pm to 11:00pm, 7 days a week, including wellness checks on the people staying in the hotels. These checks were to deal with any immediate issues. Halifax Public Library staff offered assistance on-site, at the hotels. JEC offered three meals a day, with other supports being provided by the agencies themselves to the extent the limited funding would allow. Every client was also supported by a specific JEC caseworker. The caseworkers deal with long term housing issues, mental health supports, access to medication, medical appointments, etc. Addiction support was also provided by peer mentors, who themselves were formally incarcerated.⁴⁹ None of the individuals that were decarcerated and supported through JEC breached their conditions of release.

JEC was the only housing support available to released individuals in Nova Scotia. Their funding ran out at the end of June 2020. The provincial government did not finance or otherwise support this housing initiative, nor did they provide other forms of emergency housing to those released.

⁴⁶ Consultation with Leisha Seymour (John Howard Society Nova Scotia), Emma Halpern (Elizabeth Fry Society), Ashley Avery (Coverdale Courtwork Society), Executives Directors, (10 June 2020) (notes from consultation on file) [*Consultation*].

⁴⁷ *Consultation, supra* note 45 ; “Media release: Emergency housing project launched for people exiting jail during COVID-19”, *Nova Scotia Advocate* (13 May 2020), online: <https://nsadvocate.org/2020/05/13/media-release-emergency-housing-project-launched-for-people-exiting-jail-during-covid-19/> [perma.cc/C64Z-LWWD].

⁴⁸ *Consultation, supra* note 45.

⁴⁹ *Ibid.*

Recommendations

Institutional measures, protocols, and transparency

1. We commend the DOJ and NSHA for appointing Dr. Lisa Barrett as the Authorized Prescriber for Corrections and working with her to create some of the protocols, and recommend that this role remain staffed. However, it is unclear what protocols, directives, and measures she has consulted on, other than the one NSHA protocol and the assessment chart made public.

All existing protocols, procedures, guidelines, and contingency plans should be reviewed against the public health measures taken in the community and against the guidelines for public health and human rights during a pandemic. These guidelines are provided by international agencies, including “*Coronavirus: preventing harm and human rights violations in criminal justice systems*” (International Penal Reform, July 2020), “*Interim Guidance, COVID-19: Focus on persons deprived of their liberty*” (ONCHR and WHO, March 2020), “*Operational Toolbox: COVID-19 Preparedness and responses in places of detention*” (International Red Cross, 2020); “*Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention*” (WHO, 2020); “*Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*” (WHO, March 2020).

2. Correctional Services should work with the NSHA and independent experts (like Dr. Barrett) to create adequate institutional procedures for implementing the broader-level protocols discussed above. These institutional procedures should exist in writing and should detail how each protocol will be implemented (including issues such as staff-prisoner interactions, provision of PPE to staff and prisoners, food handling, who has the responsibility to clean objects in the common space areas etc.), what are the instructions staff must receive, as well as what the consequences are for staff not following the procedures. The implementation of all procedures and protocols should be overseen by independent public health experts.
3. Correctional Services must issue a directive detailing the strict regulation of isolation during the pandemic (including lockdowns, medical isolation, quarantine, etc.), the measures taken to alleviate its negative consequences, and identify alternatives to the use of isolation. This directive must comply with international norms and guidelines.
4. Correctional Services’ plans, preventative measures, assessment tools, and processes must be made accessible to the public to the fullest extent possible. Regular press releases should be provided, with details related to the application of the existing protocols, as well as the testing and other measures taken. A directive should be issued, detailing the public information process for the duration of the pandemic.

5. Correctional Services should work with the Nova Scotia Human Rights Commission, public health agencies, as well as the existing civil societies (such as ECPJS, EFry, Coverdale, and JHSNS) to help ensure some form of consistent and independent oversight of the measures taken during the pandemic, as well as how human rights are being enforced at this time. An agreement between these parties, providing the details of the oversight during the pandemic should be made public, as well as the reports of the oversight groups.

Decarceration

6. It is important not to forget the success associated with the 45% decarceration rate, should there be a second wave. However, as noted above, the decarceration process was rushed. As we anticipate the second wave, the assessment of incarcerated individuals on a case by case basis, and the preparation of reintegration plans and community supports must start sooner.

Community Supports Upon Release

Short-Term Recommendations

7. We endorse the recommendations made by Sheila Wildeman in her report regarding social assistance.⁵⁰ In particular, the Minister of Community Services should issue a directive to caseworkers pursuant to her authority under the *Employment Support and Income Assistance Act*,⁵¹ mandating emergency assistance for persons released from provincial jails in the face of a second wave of COVID-19. As noted by International Penal Reform, “Access to financials (such as setting social welfare benefits) and accommodation before release and, while physical offices remain closed or travel to them is restricted, information (phone numbers and where possible a mobile phone with pre-loaded information) should be provided for people leaving prison to enable access to vital support services.”⁵²
8. We urge the NSHA to ensure that there is a proper plan in place for individuals released, in terms of their medical needs. Each individual should be at all times provided with sufficient medication (at least a month, but depending on their needs, it may need to be more) and transferred into the care of a community physician and mental health professional. Failing to ensure that the medical needs of these people are met is a public health and safety hazard, especially during a pandemic.

⁵⁰ Sheila Wildeman, “Timely Access to Income Assistance on Release from Prison/Jail – During and After COVID-19,” August 2020.

⁵¹ *Employment Support and Income Assistance Act*, SNS 2000, c 27.

⁵² *Penal Reform 37*, *supra* note 19 at 36.

9. Correctional Services should work with the relevant departments and agencies (including NSHA, the Department of Municipal Affairs and Housing and the Department of Community Services), as well as with community organizations to create emergency release plans for everyone released during the pandemic. A directive needs to be issued detailing these plans, which at a minimum must include: “housing/accommodation, facilitating transport, financial support, measures to ensure personal safety especially for women and children, and links with community-based support organizations.”⁵³
10. The DOJ and the Department of Municipal Affairs and Housing should work together to create a funding program that will support civil organizations assisting decarcerated individuals during the pandemic. With proper funds, the JEC framework for supporting and housing people in hotel rooms will succeed during the second wave of COVID-19. JEC's funding should continue for at least one year, with the possibility of renewal. The amount provided should be sufficient to support the majority of those released, who do not have housing. This investment is practical because the release of a high number of prisoners means a significant reduction in correctional costs. A portion of the saved funds should be directed towards emergency housing (which will cost less per person than incarceration).

Long-Term Recommendations:

11. Reintegration and post-release plans should be established at the beginning of a sentence or period of detention. The major practical barriers for a person released must be identified and solutions resourced, particularly around housing/accommodation, transport, and medical needs. These plans should be the result of the Correctional Services, NSHA, and other relevant departments working together. We recommend that the *Correctional Service Act, SNS 2005, c 37* be amended to include the government’s obligation to develop these plans. Emergency preparedness and response plans should be developed or enhanced to include post-release support for persons released from detention.⁵⁴
12. A housing strategy for newly released and other criminalized or at-risk individuals should be developed, preventing future housing crises such as this. The Nova Scotia Agreement for Investment in Affordable Housing between Canada and Nova Scotia never referenced newly released individuals as one of the targeted groups of the program. Given that the new agreement was signed in 2019, for 10 years, we recommend that this group is added.⁵⁵

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ “Governments of Canada and Nova Scotia Sign 10-Year Housing Agreement” (20 Aug 2019), online: *Canada Mortgage and Housing Corporation* < <https://www.cmhc-schl.gc.ca/en/media-newsroom/news-releases/2019/governments-canada-nova-scotia-sign-10-year-housing-agreement> > [<https://perma.cc/H8FN-NTD6>].

13. *Housing Nova Scotia Act*, RSNS 1989, c 213, the legislation that gives formal authority to the province to provide financial housing to individuals, should be amended to include supporting the housing needs of formerly incarcerated persons as an objective in section 7(d). Ensuring that most newly released individuals do not return to the streets or homeless shelters should be listed as a priority.
14. Housing Nova Scotia should be mandated by the Department of Municipal Affairs and Housing to create a program, in collaboration with the municipalities, to secure and provide financial housing support for those newly released.
15. We recommend that all policy and financial initiatives for long term housing support for newly released individuals be done in collaboration with the DOJ, community organizations (such as Coverdale, E Fry, and JHSNS), the Nova Scotia Advisory Council on the Status of Women, Aboriginal Affairs, and African Nova Scotian Affairs to ensure gender and culturally appropriate housing and support planning and implementation, as well as wrap-around social and reintegrative services.