

COVID-19, Human Rights and Public Health in Prisons:
A Case Study of Nova Scotia's Experience during the First Wave of the Pandemic

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I. Introduction

The importance of preventing outbreaks in prisons during a pandemic, such as COVID-19, 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 that can even result in death.¹ Prison infrastructure and its congregated living nature can also lead to difficulties in implementing preventive measures such as social distancing. The risk of the infection spreading rapidly once inside these institutions is much higher than in the community.² 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 increases the likelihood of a prison outbreak prolonging the life of the infection in the community as well.³

International health and human rights agencies, such as the World Health Organization (WHO), United Nations Human Rights Office of the High Commissioner (OHCHR), The United Nations Office of Drugs and Crime (UNODC), and International Penal Reform (IPR), expressed concerns regarding the increased vulnerability of incarcerated individuals to COVID-19, and the ability of prisons to adequately respond to the pandemic.⁴ Early into the pandemic, they also issued statements stressing the importance of upholding human rights in places of detention, even in times of crisis. Their main recommendations included:

¹ Laura Hawks et al, “COVID-19 in Prisons and Jails in the United States” (Published online, 2020) *JAMA Intern Med*; World Health Organization, “Infection prevention and control during health care when novel coronavirus (nCoV) infection is suspected” (19 March 2020), online (pdf): *World Health Organization Publications* <<https://perma.cc/5WNC-7URB>>; Andre Montoya-Barthelemy, et al, “COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health” (2020) 58:6 *Am J Prev Med* 888 at 890-893 [“Montoya-Barthelemy et al”].

² Talka Burke, “Prisons are ‘in no way equipped’ to deal with COVID-19” (2020) 395:10234 *Lancet* at 1411; Matthew J Akiyama, Anne C Spaulding & Josiah D Rich, “Flattening the Curve for Incarcerated Populations: Covid-19 in Jails and Prisons” (2020) 382:22 *New Eng J of Med* 2075 at 2075 [“Akiyama, Spaulding and Rich”]; Brenda Vose, Francis T Cullen & Heejin Lee, “Targeted Release in the COVID-19 Correctional Crisis: Using the RNR Model to Save Lives” (2020) 45 *Am J Crim Jus* 769 at 770-773.

³ “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] [“UN, Position Paper”]; Naomi Thomas, “Jails can spread coronavirus to nearby communities, study finds” (4 August 2020), online: *CNN Health* <<https://www.cnn.com/2020/08/04/health/jails-nearby-communities-coronavirus-spread-study/index.html>> [https://perma.cc/WJ89-B5MZ]; Stuart A Kinner et al, “Prisons and custodial settings are part of a comprehensive response to COVID-19” (2020) 5:4 *The Lancet Public Health* 188-189 ([https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30058-X/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30058-X/fulltext).)

⁴ 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> [https://perma.cc/FC8X-9HWY] [“OHCHR & WHO”].

- depopulating to the broadest extent possible,⁵
- limiting pre-trial detention,⁶
- providing accommodation and other supports for released individuals in need,⁷
- adopting public health measures at institutional levels (such as hand washing, social distancing, etc.),⁸
- ensuring that the adopted preventative measures do not infringe prisoners' rights and have minimal negative consequences on their mental health (e.g. ensuring prisoners can keep in touch with family remotely, keeping the complaint system in place, replacing removed group activities with electronic entertainment, limiting isolation of any kind, and guaranteeing that medical isolation does not become solitary confinement).⁹

⁵ Michelle Bachelet, "Urgent action needed to prevent COVID-19 'rampaging through places of detention' – Bachelet", *United Nations Human Rights Office of the High Commissioner* (25 March 2020), online (video): <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E&fbclid=IwAR3Tq8cHH26epgLPyJxCqX3toIKcoNa49wmdQ13QdjPNQUYhjW33gO5Y9Go>> [<https://perma.cc/B3TD-3KAH>]; 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, *supra* note 4 at 3; 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>] ["Red Cross"]; Council of Europe, "COVID-19 pandemic: urgent steps are needed to protect the rights 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>] ["COE, Urgent Steps"].

⁶ OHCHR & WHO, *supra* note 4 at 3; 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 11 [<https://perma.cc/9HCC-XAGN>] ["Penal Reform International 1"]; Commonwealth Human Rights Initiative, "Covid-19 and Prisons in the Commonwealth: Ensuring an Effective Response" (2020), online *CHRI* (pdf): <<https://www.humanrightsinitiative.org/download/1586326581COVID%2019%20and%20Prisons%20in%20the%20Commonwealth.pdf>> at 18 [<https://perma.cc/3TM8-GSPW>] ["Commonwealth Human Rights Initiative"].

⁷ OHCHR & WHO, *supra* note 4 at 4; COE, *Urgent Steps*, *supra* note 5; Human Rights Watch, "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-Hmur8QeqEsg9Bj_AJUuFkWzPwN2joH6H1pZzW1Ggw5SEYzaShTI#_Toc35446581> [<https://perma.cc/E59S-3KLA>] ["Human Rights Watch"]; 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 36 [<https://perma.cc/7B6L-NVVC>] ["Penal Reform International 2"].

⁸ UN Subcommittee, *supra* note 5 at 3.

⁹ OHCHR & WHO, *supra* note 4 at 5; World Organisation Against Torture, "Building Our Response on Covid-19 and Detention: Guidance brief to the SOS-Torture Network and partner organizations" (15 April 2020), online (pdf): *OMCT SOS-Torture Network* <https://www.omct.org/files/2020/04/25784/omct_covid19_prisonresponse_en.pdf> at 11, 13 [<https://perma.cc/NWG5-F4BT>] ["World Organization Against Torture"]; Penal Reform International 1, *supra* note 6 at 6 & 8-9; Penal Reform International 2, *supra* note 7 at 20; COE, *Urgent Steps*, *supra* note 5; 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>] ["COE, CPT"]; Council of Europe, PC-CP WG, *Covid-19 Related Statement by the Members of the Council for Penological Co-operation Working Group*, PC-CP (2020) 5, online (pdf): *Council of Europe* <<https://rm.coe.int/pc-cp-wg-covid-19-statement-17-04->

- Ensuring independent monitoring agencies continue to operate during the pandemic.¹⁰

In July 2020, IPR reported that most countries have failed to adequately respond to the early calls of international human rights and health organizations to take swift action and protect detained individuals against COVID-19.¹¹ During the first wave of the pandemic, the failure to act has led to the infection of at least 102,537 liberty deprived individuals in 88 countries, and the death of at least 1,569 prisoners in 36 countries.¹² These numbers illustrate the level of marginalization faced by incarcerated people worldwide, and the equity gaps prevalent in most societies.¹³

Canada is one of these countries that failed to take robust action – including, but not limited to, prison depopulation - to protect its incarcerated population, contributing to the globally high rates of both infection and death in custody during the pandemic. In Canada, correctional authority is divided between the federal and provincial governments. Individuals sentenced to more than two years in prison serve their time in federal penitentiaries. Those serving less than two years, or awaiting trial, are incarcerated in provincial jails. Collectively, Canada did a poor job at preventing outbreaks in its prisons, even though some jurisdictions appear to have performed worse than others.

The federal correctional system, run by Correctional Service Canada (CSC), did not undertake any decarceration efforts. Since the beginning of the pandemic, over the span of one year, the numbers of those in federal custody has gone down by -10%, but that is because fewer people were admitted to custody during the pandemic.¹⁴ The number of monthly releases is consistent with historic averages and has not increased.¹⁵ The one year reduction thus achieved is still lower than the reduction achieved by any provinces in one month between March and

2020/16809e2e55?fbclid=IwAR0fbH9_VypjeND03o3pqQkLgBST3fENH9UjEYceuaaOaGu3xbmNNDhdHlk> at 4 [https://perma.cc/NJ4G-KWPH] [“COE, PC-CP WG”]; Red Cross, *supra* note 5; Human Rights Watch, *supra* note 7; Commonwealth Human Rights Initiative, *supra* note 6 at 11; Alexis Comminos, “COVID-19 in prison”, *Association for the Prevention of Torture* (12 March 2020), online: <https://www.apr.ch/en/blog/covid-19-prison> [https://perma.cc/MEZ6-ER38] [“APT”].

¹⁰ Penal Reform International 2, *supra* note 7 at 20; WHO, Regional Office for Europe, *Preparedness, Prevention and Control of COVID-19 in prisons and other places of detention* (15 March 2020), Online: *Euro WHO* https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1 at 19 [https://perma.cc/QJS8-DMQZ] [“WHO, *Preparedness Prevention and Control*”]; UN, Institute for Training and Research, “Operational Toolbox: Covid-19 Preparedness and Response in Places of Detention” (2020), online(pdf): *United Nations Institute for Training and Research* <https://www.unitar.org/sites/default/files/media/file/Operational%20Toolbox%20Full.pdf> [https://perma.cc/PV3J-DQX4] [“UN, *Operational Toolbox*”].

¹¹ Penal Reform International 2, *supra* note 7 at 2.

¹² *Ibid.*

¹³ On this issue, see also: Akiyama, Spaulding and Rich, *supra* note 2 at 2077.

¹⁴ The total number those federally incarcerated has decrease by 1,319 people, bringing the total to 12,500 as of February 28, 2021, due to the slowing down of new admissions. Office of the Correctional Investigator, “Third COVID-19 Status Update,” Feb 23, 2021, Online: <https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20210223-eng.pdf>, at 8-9.

¹⁵ *Ibid.* at 9.

April 2020. By July 2020, federal facilities had 360 confirmed cases¹⁶ and 2 prisoner deaths.¹⁷ These numbers indicated a rate of infection 13 times higher than in the community,¹⁸ while the infection rate for women was 77 times higher than in the community.¹⁹ During the second wave of the pandemic (that began in November 2020), things have not improved, but have in fact gotten worsen. As of February 23, 2021, the total number of infected federally incarcerated people was 1,230 (344 during the first wave and 886 during the second wave) and 4 people died (2 deaths were registered during the second wave).²⁰ In addition, as of January 8, 2021, 261 CSC staff have been infected.²¹

The provinces have decarcerated people to varying degrees, in particular those serving intermittent (weekend) sentences, very-short sentences, or awaiting trial on remand. The provincial rates of infection have also been lower than the federal rates. The table below illustrates the reduction in the prison population across jurisdictions between February and April 2020 and the rates of infection at the end of the first wave of the pandemic.

| | Average Daily Prison Count | | | Positive COVID cases (prisoners) | |
|---------------------------|----------------------------|------------------|-----------|----------------------------------|---------------------------------|
| | Feb 2020 count | April 2020 count | Reduction | Provincial prisons | Federal prisons (as of July 14) |
| Newfoundland and Labrador | 310 | 205 | -34.0% | 0 (Jul 8, 2020) | N/A |
| Prince Edward Island | 114 | 80 | -30.0% | 0 (Jun 6, 2020) | N/A |
| Nova Scotia | 440 | 260 | -41.0% | 1 (Jul 9, 2020) | 0 |

¹⁶ Office of the Correctional Investigator, “Covid-19 Update for Federal Corrections – June 19, 2020” (19 March 2020), online (pdf): *Government of Canada: Office of the Correctional Investigator* <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20200619-eng.pdf> > at para 2-3 [<https://perma.cc/LJJ8-LCAZ>].

¹⁷ *Ibid*, at para 3.

¹⁸ Anthony Doob, *Understanding Imprisonment in the Time of COVID-19, Report* [unpublished], (Toronto: University of Toronto, 11 May 2020).

¹⁹ 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).

²⁰ Office of the Correctional Investigator, “Third COVID-19 Status Update,” Feb 23, 2021, Online: <https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20210223-eng.pdf>, at 2-5.

²¹ Prison Pandemic Partnership, “reported COVID-19 Cases Linked to Correctional Service Canada Penitentiaries Before and After 1 December 2020, January 8, 2021, online: <https://ccla.org/ccla-covid-prisons/>.

| | | | | | |
|-----------------------|--------|--------|--------|--------------------|-----|
| New Brunswick | 450 | 358 | -21.0% | 0 (Jul 9, 2020) | 0 |
| Quebec | 4,381 | 3,742 | -15.0% | 103 (Jul 16, 2020) | 231 |
| Ontario | 8,260 | 5,859 | -29.0% | 131 (Jul 6, 2020) | 8 |
| Manitoba | 2,238 | 1,775 | -21.0% | 0 (Jun 11, 2020) | 0 |
| Saskatchewan | 1,984 | 1,531 | -23.0% | 0 (Jun 29, 2020) | 0 |
| Alberta | 3,384 | 2,482 | -27.0% | 5 (June 2, 2020) | 0 |
| British Columbia | 2,193 | 1,630 | -26.0% | 1 (Jul 6, 2020) | 121 |
| Yukon | 56 | 38 | -32.0% | 0 (Jul 9, 2020) | N/A |
| Northwest Territories | 143 | 116 | -19.0% | 0 (Jul 8, 2020) | N/A |
| Nunavut | 122 | 1051 | -14% | Unknown | N/A |
| Federal (CSC) Total | 13,891 | 13,720 | -1.0% | N/A | 360 |
| Provincial total | 24,085 | 18,181 | -25.0% | 241 (Jul 14, 2020) | 241 |

Sources: Statistics Canada, August 12 2020, [Changes in federal, provincial and territorial custodial populations during the COVID-19 pandemic, April 2019 to April 2020 \(statcan.gc.ca\)](#); CBC News, [COVID-19 taking a toll in prisons, with high infection rates, CBC News analysis shows | CBC News](#), Jul 17, 2020.

Nova Scotia was one of the provinces that avoided an outbreak in its provincial jails during the first wave of the pandemic, having registered only one infected person. As with any other province that averted a prison outbreak, it is difficult to attribute this phenomenon to any one factor due to the lack of reliable evidence on the implementation of pandemic measures inside prisons. Yet, what makes Nova Scotia's preventative measures stand out when compared to other jurisdictions is the quick and sustained depopulation that the province engaged in, made possible by the coordinated efforts of the government and non-profit organizations. With a depopulation

rate of 41%, Nova Scotia decarcerated by far the largest proportion of people.²² Uniquely, the court systems, the Department of Justice (DOJ), and advocates worked together to ensure the release of almost half the incarcerated population to the community. As a result, only two of the four provincial institutions have been operational during the pandemic. Both of these institutions, the Central Nova Scotia Correctional Facility (CNSCF) and the Northeast Correctional Facility, are also operating significantly under capacity.

This article documents the Nova Scotia provincial prison system's experience in dealing with COVID-19 during the first wave, including its uniquely swift decarceration efforts. The sources for this investigation varied. I reviewed the protocols, policies, news releases, advocacy letters, and bail orders that were made public. I obtained other information by filing an Access to Information request with the DOJ and filing a request with the Nova Scotia courts. I interviewed service providers (Elizabeth Fry (EFry), Coverdale Courtwork Society (Coverdale), and John Howard Society (JHS)) that have worked with released individuals during the pandemic. My research assistant has corresponded with court clerks who provided some of the information referenced in this article. I also drew upon the information collected by the East Coast Prison Justice Society (ECPJS) through their 1-800 prison complaint number (discussed below.) Even so, putting together a timeline of events and measures was challenging, as a lack of transparency continues to plague prison systems. I filled-in informational gaps with media reports, which have spotlighted this issue during the pandemic. The table in the appendix illustrates a timeline of the COVID-19 prison-related responses of Nova Scotia between March and June 2020, covering the first wave of the pandemic. The analysis of this information is informed by international human rights and public health instruments, some emerging foreign scholarship on this issue, as well as national laws and policies.

In reviewing Nova Scotia's response to the pandemic, a couple of positive steps are apparent and may be instructive for other jurisdictions in times of crisis. However, Nova Scotia's overall response to the pandemic has exhausted its already stretched thin resources and it has not been without its flaws. This is partly due to pre-existing issues that became obvious during this crisis. In addition, the decarceration efforts did not prove sustainable. After the first wave of the pandemic the number of people in custody has gone up again,²³ which overshadows some of the positive steps taken during the first wave. Thus, it is a good opportunity to reflect on some of the systemic issues that plague Nova Scotia's (and other jurisdictions') criminal justice systems and which have rendered responding to a crisis significantly more difficult. These issues – including overcrowding, high rates of pre-trial detention, lack of support upon release, lack of transparency of prison systems, etc. – can no longer be ignored and ought to be addressed with priority.

One goal of this investigation is to identify a set of best practices that can help Canadian prisons systems with their short-term responses to crisis in a manner that is compliant with both

²² “Changes in federal, provincial and territorial custodial populations during the COVID-19 pandemic, April 2019 to April 2020” (12 August 2020), online: *Statistics Canada* < <https://www150.statcan.gc.ca/n1/daily-quotidien/200812/dq200812a-eng.htm>>[<https://perma.cc/7YBK-J45R>].

²³ <https://globalnews.ca/news/7582002/prison-justice-coronavirus-nova-scotia-jails/>

international and national public health policies and human rights. Another goal of this investigation, based on the systemic weaknesses highlighted by the pandemic, is to advance longer-term recommendations that would improve the criminal justice system and help maintain lower levels of incarceration.

II. Responses to the Pandemic in Nova Scotia's Provincial Prisons

Nova Scotia's response to the first wave was unique in that it involved an unprecedented amount of collaboration and a swift depopulation of its prisons. Many initiatives discussed below came as a result of the advocacy of community groups²⁴ such as ECPJS, JHS, EFry, Wellness Women Within, and Coverdale. The DOJ was also receptive to this advocacy and coordinated with these groups to plan the depopulation of the prisons.²⁵ Organizations such as JHS, EFry, and Coverdale, which normally compete for funding, joined efforts to create a novel program to support released individuals (discussed below).²⁶ The police have been much more cooperative during the pandemic, and have worked with non-governmental organizations (NGOs) to secure housing and supports for individuals they pick up off the street (who may be intoxicated, for instance). These individuals would previously have ended up in the drunk tank or jail. The DOJ and Correctional Services have worked with ECPJS to facilitate some basic forms of independent oversight of the conditions of confinement during the pandemic.²⁷ Finally, the Nova Scotia Health Authority (NSHA), which is responsible for health care in provincial prisons, worked with an independent infectious disease specialist to create testing and isolation protocols for incarcerated people.

That said, after reviewing the information available regarding Nova Scotia's responses, the concerns that remain are significant and cast doubt over the impact of the positive efforts that have been taken in provincial jails. Drawing upon the main recommendations found in the international instruments described in the previous section, what follows is a step-by-step review of how Nova Scotia followed guidelines during the first wave of the pandemic.

²⁴Sheila Wildeman, "SHEILA WILDEMAN: COVID-19 and disability institutions: Time to act is now", *The Chronicle Herald* (15 April 2020), online: <https://www.thechronicleherald.ca/opinion/local-perspectives/sheila-wildeman-covid-19-and-disability-institutions-time-to-act-is-now-437259> [<https://perma.cc/ZM2D-7RV8>]; Taryn Grant, "Advocates call for temporary release of some inmates amid COVID-19 pandemic", *CBC News*, (16 March 2020), online: <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-jails-inmates-covid-19-1.5499417> [perma.cc/5R3B-4UTQ]; John McPhee, "COVID-19: Curb jail populations in Nova Scotia, advocates urge", *The Chronicle Herald*, (19 March 2020), online: <https://www.thechronicleherald.ca/news/local/covid-19-curb-jail-populations-in-nova-scotia-advocates-urge-426600/> [perma.cc/X77T-54YH] ["The Chronicle Herald"].

²⁵EL 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] ["Jones, *Clearing Out Jails*"].

²⁶*Ibid.*

²⁷ EL Jones, "New phone line helps monitor conditions in jails during COVID-19", *Halifax Examiner* (29 May 2020), online: <https://www.halifaxexaminer.ca/featured/new-phone-line-helps-monitor-conditions-in-jails-during-covid-19/> [<https://perma.cc/6ATG-XRJS>] ["Jones, *Phone Lines*"].

i. Depopulation measures

Decarceration has been deemed one of the most important preventative steps and an essential public health measure during a pandemic.²⁸ A notable outcome of the collaborations in Nova Scotia was the unparalleled level of prison depopulation. On April 22nd, it was reported that the total jail population had been reduced from 452 people in custody before mid-March, down to 251, by using temporary absence certificates (for sentenced individuals) or bail orders (for individuals awaiting trial in custody).²⁹

By mid-March, corrections, with the support of advocates and community organizations, released 41 people serving intermittent sentences by way of 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 Most of the released individuals were within the last 10-30 days of their sentences. A total of 58 individuals with short duration releases expired their term of custody while out on the aforementioned certificates.³²

In addition to the use of temporary absence certificates, bail orders were granted to release 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 contributions were led by Chief Judge Pamela Williams, who even kept the courtroom open over the weekend to process emergency bail orders from all over Nova Scotia to ensure that individuals could be released from remand.³⁵

ii. Institutional measures, policies, and protocols

Very early into the pandemic, NSHA contracted Dr. Lisa Barrett, an independent infectious disease and public health specialist with experience working with criminalized individuals, to help create and oversee the measures and protocols implemented. Dr. Barrett was the Authorized Prescriber in prisons for COVID-19 and she helped with the creation of the testing and isolation protocols.

²⁸Montoya-Barthelemy et al, *supra* note 1 at 896; Akiyama, Spaulding and Rich, *supra* note 2 at 2076; Brinkley-Rubinstein, et al, "Covid-19 Exposes Need for Progressive Criminal Justice Reform" (2020) 110 American Journal of Public Health 967, online: <<https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.305707>>.

²⁹Ryan 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]. ["Haley"]

³⁰Nova 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] ["Nova Scotia Government"].

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

³²*Ibid.*

³³Haley, *supra* note 26.

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

³⁵Jones, *Clearing Out Jails*, *supra* note 22.

Based on media and some governmental reports, several steps (listed chronologically in the appendix) were allegedly taken to prevent the spread of COVID-19 inside Nova Scotian institutions. Some of these measures included: closing facilities to all visitors (including lawyers);³⁶ screening of prisoners, correctional officers, third-party contractors, and NSHA staff;³⁷ providing staff with personal protective equipment (PPE) for use during interactions with prisoners;³⁸ and supplying additional cleaning materials for enhanced cleaning regimes and increased sanitation measures.³⁹ The prisoners had access to soap and water for handwashing throughout the day with hourly reminders to wash their hands.⁴⁰ Regular medical updates to all staff and prisoners, including advice on cleaning and social distancing, became part of the daily operations.⁴¹ Seventeen prisoners at CNSCF were tested for COVID-19 but only one individual tested positive. This individual remained in a healthcare cell until they were cleared by health officials to return to the general population.⁴² Flu vaccine clinics were offered to any prisoners who wished to participate.⁴³ There were also measures taken in an attempt to minimize the disconnect between prisoners, their friends and family, and the supportive services they relied upon. There was access to two free calls per week⁴⁴ and Skype was considered as a viable method for video visitation, although it is unclear if it was ever implemented.⁴⁵

The sources of these measures, and how they were implemented, are much harder to identify. I located one relevant policy document: the DOJ Pandemic Situation document⁴⁶, which is a generic policy that mandates, in the case of a pandemic, that provincial Correctional Services create and communicate contingency plans for admissions, kitchen services, laundry services, isolation, quarantine, supplies, and conditional release. This policy requires that the plans be consistent across institutions and that they are sufficient. It is unclear whether the contingency plans referenced in the Pandemic Situation directive exist or what their content is. My research assistant and I filed an Access to Information request, but the response we received did not

³⁶ Nova Scotia Government, *supra* note 27.

³⁷ 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] ["Jones, *Burnside COVID-19*"].

³⁸ *Ibid.*

³⁹ 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].

⁴⁰ 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"].

⁴¹ *Ibid.*

⁴² Jones, *Burnside COVID-19*, *supra* note 34.

⁴³ DOJ, *supra* note 37.

⁴⁴ 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].

⁴⁵ DOJ, *supra* note 37.

⁴⁶ Nova Scotia, Department of Justice "Contingency Plans: Pandemic Situations" (*Correctional Services Policy & Procedures*) (revised 19 December 2019).

provide clarification on this issue.⁴⁷ Rather than the contingency plans that we requested, we instead received the general Pandemic Situation document.⁴⁸ In response to our specific question about the institutional sanitation instructions, we were told such instructions do not exist in a written form.⁴⁹ It is thus possible that there are no written contingency plans as per the Pandemic Situation directive, and it is unclear whether any of the oral instructions used were assessed by public health agents.

Two NSHA protocols related to health care in places of detention during COVID-19 were made publicly available. The “East Coast Forensic Hospital and Offender Health Services Screening for COVID-19 by Swab Collection”⁵⁰ is essentially a testing and isolation protocol applicable to Nova Scotia places of detention that are under provincial jurisdiction. 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. Additional instructions are provided for the ordering and requisition of tests following a swab. The document refers to a pre-existing protocol (not restricted to sites of detention), known as “Droplet Precautions,” that is to be applied simultaneously with this specific swab collection protocol.⁵¹

The Covid-19 Assessment Chart⁵² for East Coast Forensic Hospital and Offender Health is also public. The Chart is a document to be filled in by the medical professional at the time 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 the DOJ or NSHA.

⁴⁷ Email from Crystal McGraw, Team Lead / IAP Administrator , Information Access and Privacy (IAP) Services, to Brock Morrison (11 August 2020) (File Number - 2020-00854-JUS) (Communications on File) [“FOIPOP”].

⁴⁸ Nova Scotia, Department of Justice “Contingency Plans: Pandemic Situations” (*Correctional Services Policy & Procedures*) (revised 19 December 2019).

⁴⁹ FOIPOP, *supra* note 44.

⁵⁰ Nova Scotia Health Authority, “Mental Health & Addiction Services Care Directive” (29 April 2020), online NSHA (pdf):

<http://policy.nshealth.ca/Site_Published/NSHA/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=76691> [perma.cc/MBM4-9ZCD] [“NSHA, *Care Directive*”]

⁵¹ Nova Scotia Health Authority, “Infection Prevention and Control Policy, Droplet Precautions” (8 August 2017), online NSHA:

<http://policy.nshealth.ca/Site_Published/nsha/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=76028> [https://perma.cc/LM4L-BPMT].

⁵² Nova Scotia Health Authority, “East Coast Forensic Hospital & Offender Health COVID-19 Assessment Chart” (23 April 2020), online NSHA (pdf):

<http://policy.nshealth.ca/Site_Published/covid19/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=77425> [perma.cc/ZP8M-2XED].

iii. Measure Implementation, Transparency and Oversight

To ensure that the rights of prisoners are upheld during a pandemic, and to increase accountability, the OHCHR and WHO have noted that “authorities should also guarantee maximum transparency in the adoption of preventive measures and constant monitoring of their application.”⁵³ Independent monitoring needs to exist, and indeed, it is perhaps more important than ever during a pandemic.⁵⁴

The federal prison system has a statutory independent oversight mechanism, the Office of the Correctional Investigator (OCI).⁵⁵ The OCI’s work over the last three decades has been crucial in increasing transparency and holding the CSC accountable. However, a corresponding mechanism does not exist at provincial levels. The provincial Ombudsperson and Human Rights Commissions have, in some provinces such as Ontario, stepped into this role in recent years. Unfortunately, that has not been the case in many other provinces, including Nova Scotia, where the work of these institutions has been inconsistent and overall marginal.

At the beginning of 2020, ECPJS received approval from Nova Scotian Correctional Services to start regular institutional visits. The purpose of these visits is to monitor the conditions of confinement and make recommendations to correctional authorities for improvement. During the pandemic, this model has shifted to a phone line service, available free of charge to prisoners. Prisoners can call and complain about confinement conditions and/or rights infringements.⁵⁶ A similar model preceding the pandemic, Jail Accountability and Information Line (JAIL), was created by faculty and students at the University of Ottawa, for use at the Ottawa-Carleton Detention Centre in Ontario.⁵⁷

The effort of Correctional Services in Nova Scotia in supporting ECPJS’ initiative to create a 1-800 number for prisoner complaints is commendable. However, there are logistical and privacy barriers for prisoners in accessing this route, and this mechanism is very narrow. The main characteristics of an oversight mechanism are independence, accessibility to those who need it, and enforceability of remedies.⁵⁸ ECPJS’ access to individuals and prisons depends on the benevolence of Correctional Services, hence their independence is limited. More importantly, ECPJS’ recommendations are non-enforceable and Correctional Services has no obligation to respond with information on how they implemented these recommendations. Thus, while this initiative is valuable in increasing transparency, it cannot replace a statutorily mandated

⁵³ OHCHR & WHO, *supra* note 4.

⁵⁴ COE, CPT, *supra* note 9; APT, *supra* note 9; Penal Reform International 1, *supra* note 6 at 9; Penal Reform International 2, *supra* note 7 at 20.

⁵⁵ Office of the Correctional Investigator, “Who We Are: Dr. Ivan Zinger Correctional Investigator of Canada” (01 April 2017), online: < <https://www.oci-bec.gc.ca/cnt/bio-eng.aspx> > [<https://perma.cc/TLS7-DD4P>].

⁵⁶ Jones, *Phone Lines*, *supra* note 24.

⁵⁷ “Jail Hotline” (10 August 2020), online: *Criminalization and Punishment Education Project* <<https://cp-ep.org/tag/jail-hotline/>> [<https://cp-ep.org/tag/jail-hotline/>].

⁵⁸ Debra Parkes and Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48:2 CJCCJ 251 at 267.

oversight mechanism, with unlimited access to prisons and recommendations that are enforceable.⁵⁹

The lack of strong monitoring and oversight mechanisms have significant consequences. There is a glaring discrepancy between the information available at the federal level, as a result of the OCI, and the information available from the provinces/territories.⁶⁰ Specifically, in Nova Scotia, there is a dearth of information on the implementation of the measures advertised by the DOJ and NSHA (as described in the section above), as well as the few protocols made public. The anecdotes emerging from prisons raise concerns that many of the measures described in the previous section were not consistently applied. For instance, ECPJS has received reports⁶¹ that the prisoners did not receive any masks even if they asked for them. While they reported receiving some cleaning supplies, they noted that no brushes or rags were made available to them, so they had to use their personal towels to clean surfaces, including toilets. Apparently, Correctional Services pays a prisoner to clean the common surfaces, but he receives only \$10 bi-weekly. This is not much of a motivator to do a thorough job. The most used objects, like telephones, are cleaned only every second day (when in the community for instance, objects like credit or debit machines are cleaned after each use).

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.⁶² If these concerns are true, these institutional practices fall short of the prescribed measures for places of detention issued by the WHO and other organizations.⁶³

It is very difficult to verify how measures are implemented in prisons and corroborate prisoner claims because, as discussed above, aside from the NSHA testing protocol, no other policy or contingency plans have been made public. Since the beginning of the pandemic, there have only been two voluntary news releases from the province concerning corrections. The majority of information available comes from a letter written by the Deputy Minister of Justice

⁵⁹ On the importance of an independent prison oversight mechanism generally, see: Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press Scholarly Publishing Division, 2019) at 136-144 [“Iftene, *Punished for Aging*”]; Sandra Lehalle, Pierre Landrevill & Jean-Paul Cere, “La Comite europeen de prevention de la torture: Mecanisme de controle des etablissements de detention” (2006) 48:2 CJCCJ 223.

⁶⁰ That said being said the OCI’s recommendations are also not enforceable, which significantly diminishes its effectiveness as an oversight mechanism, see: Iftene, *Punished for Aging*, *ibid* at 136-139.

⁶¹ Sheila Wildeman on behalf of East Coast Prison Justice Society, Letter to Superintendent Adam Smith Re Visiting Committee Report on Calls Received , September 9, 2020 [unpublished]; Sheila Wildeman on behalf of East Coast Prison Justice Society, Letter to Superintendent Young Re Visiting Committee Report on Calls Received , September 9, 2020 [unpublished].

⁶² *Ibid*.

⁶³ OHCHR & WHO, *supra* note 4 at 3-4; Penal Reform International 2, *supra* note 7 at 19; Commonwealth Human Rights Initiative, *supra* note 6 at 7; UN Subcommittee, *supra* note 5 at 3; Red Cross, *supra* note 5; COE, *Urgent Steps*, *supra* note 5.

early in the pandemic, in response to calls from advocates.⁶⁴ Further, the little information that has been provided is vague. Using broad terms in news releases like “enhanced cleaning” or “screening” provides little detail and leaves many unanswered questions. While the NSHA and DOJ may have benefited from Dr. Barrett’s expertise in designing the testing protocol, it is unclear if the institutional measures taken and/or their implementation has been overseen by any public health experts.

The anecdotes, in combination with the lack of information made available, raise concerns that the avoidance of an outbreak during the first wave was partially due to luck. As subsequent waves of COVID-19 arrive (at the time of writing Canada is the middle of the second wave), the DOJ and NSHA, as well as correctional authorities in other jurisdictions, should work on ensuring that relevant policies and procedures: a) exist; b) are made public; and c) that their continuing application is overseen by independent public health experts.

iv. 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. 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.⁶⁵ They must have access to adequate protection and health care services.⁶⁶ Anything less is a violation of international human rights⁶⁷ and national laws.⁶⁸

The strict limits on the use of prolonged isolation remain in place.⁶⁹ Given the well-documented consequences of isolation, individuals should not be segregated for prolonged periods as a routine preventative measure. Alternative preventative measures ought to be taken when possible. Medical isolation (when the individual is sick) should not result in *de facto* solitary confinement.⁷⁰ In addition, even though in-person visits may have to be restricted,

⁶⁴ DOJ, *supra* note 37.

⁶⁵Penal Reform International 2, *supra* note 7 at 6-9.

⁶⁶*Ibid.*

⁶⁷The 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) [“Nelson Mandela Rules”]; 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).

⁶⁸*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, ss 7, 12, 15 [“*Charter*”]; *Correctional Services Act*, SNS 2005, c 37, ss 25-30. On the potential impact of the pandemic on prisoner *Charter* rights see Adelina Iftene, “COVID-19 in Canadian Prisons: Policies, Practices and Concerns,” in Colleen M. Flood, Vanessa MacDonnell, Jane Philpott, Sophie Theriault, and Sridhar Venkatapuram (eds.), *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: University of Ottawa Press, 2020) at 376-379.

⁶⁹UN, *Position Paper*, *supra* note 3 at 3; Penal Reform International 1, *supra* note 6 at 7; Penal Reform International 2, *supra* note 7 at 20.

⁷⁰OHCHR & WHO, *supra* note 4 at 5; COE, *Urgent Steps*, *supra* note 5; APT, *supra* note 9 at 23; Penal Reform International 2, *supra* note 7 at 14-20.

prisoners still have a right to be in touch with their family. All efforts should be made to ensure remote visits.⁷¹ Individuals should have access to daily outdoor times,⁷² and the reduction of group activities should be replaced with other forms of entertainment.⁷³ Access to lawyers should be unobstructed.⁷⁴ Finally, health care remains a basic right in prison,⁷⁵ and while some services may take longer during the pandemic, essential health care should be available,⁷⁶ while mental health care should be significantly enhanced.⁷⁷

As noted by IPR, countries have done an extremely poor job in terms of upholding human rights of prisoners during the pandemic. One of the most common responses has been prolonged lockdowns and extensive use of medical isolation and segregation.⁷⁸ Canada is no exception to this trend. Federally, extensive segregation with little to no stimuli or family contact has been the most common response to the pandemic in penitentiaries. Infected or presumptively infected people have been locked up in medical isolation.⁷⁹ In institutions where there were active outbreaks, even individuals who were not presumed infected were held for up to 24 hours in their cells. When permitted to go outside their cell for 20 minutes each day, incarcerated individuals had to choose whether they would call their families, their lawyers, or take a shower.⁸⁰ In some institutions without outbreaks, individuals who were not presumptive COVID-19 cases were allowed outside between two to four hours daily.

⁷¹APT, *supra* note 9; COE, *Urgent Steps*, *supra* note 5; COE, CPT, *supra* note 9; COE, PC-CP WG, *supra* note 9 at 4; Red Cross, *supra* note 5; Human Rights Watch, *supra* note 7; World Organization Against Torture, *supra* note 9 at 11; Penal Reform International 1, *supra* note 6 at 6.

⁷²*Correctional Services Act*, SNS 2005, c 37, s 57(2).

⁷³COE, PC-CP WG, *supra* note 9 at 4; Commonwealth Human Rights Initiative, *supra* note 6 at 11.

⁷⁴OHCHR & WHO, *supra* note 4 at 5; World Organization Against Torture, *supra* note 9 at 13; Penal Reform International 1, *supra* note 6 at 8; Penal Reform International 2, *supra* note 7 at 20.

⁷⁵*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); Nelson Mandela Rules, *supra* note 64.

⁷⁶UN, *Position Paper*, *supra* note 3 at 3; Penal Reform International 1, *supra* note 6 at 7; Penal Reform International 2, *supra* note 7 at 20; Commonwealth Human Rights Initiative, *supra* note 6 at 6.

⁷⁷Penal Reform International 2, *supra* note 7 at 20; Montoya-Barthelemy et al, *supra* note 1 at 897.

⁷⁸Penal Reform International 1, *supra* note 6; Penal Reform International 2, *supra* note 7.

⁷⁹*Ibid.*

⁸⁰Justin Ling, "Inmates With Coronavirus Are Being Thrown Into 'Extremely Difficult' Confinement: Prison Watchdog" *Vice News* (27 April 2020), online: <<https://perma.cc/DZ2K-6PQE>>.

Similar reports of extensive segregation for preventative purposes have been reported in the provincial prison system in Quebec,⁸¹ Ontario,⁸² Saskatchewan,⁸³ Alberta,⁸⁴ and Northwest Territories.⁸⁵ This regime has been, at least at times, a breach of international norms and human rights, according to which prolonged isolation (more than 14 days of being locked up for 22 hours or longer in a cell) and indefinite isolation (without a clear end) constitute torture under all circumstances.⁸⁶

These reactionary measures to the pandemic are highly problematic. In Nova Scotia, the need for reactionary measures was reduced because of the high level of depopulation that helped prevent institutional transmissions. Even still, due to a shortage of staff (an issue which preceded the pandemic), individuals have been reporting frequent lockdowns and limited access to any kind of activity or entertainment.⁸⁷ Similar to other parts of the country,⁸⁸ access to lawyers has been challenging during the pandemic, as in-person visits have been suspended.⁸⁹ While phone calls have generally been available, connecting via phone with a lawyer may be challenging. Prisoners may only use the phone for short periods of time when not in lockdown. There is no opportunity for lawyers to return missed calls. Finally, access to health care has been particularly problematic during the pandemic, especially access to mental health care.⁹⁰ These all raise human rights concerns.

⁸¹ Valérie Ouellet and Joseph Loiero, “COVID-19 taking a toll in prisons, with high infection rates, CBC News analysis shows” *CBC News* (17 July 2020), online: <<https://www.cbc.ca/news/canada/prisons-jails-inmates-covid-19-1.5652470>>; Steve Rukavina, “Bordeaux jail not following COVID-19 public health guidelines”, *CBC News* (06 August 2020) online: <<https://www.cbc.ca/news/canada/montreal/bordeaux-detention-jail-inmates-masks-1.5673976>> [<https://perma.cc/38YM-83XX>]

⁸² “Ottawa jail inmates argue anti-COVID measures a breach of charter rights”, *The Canadian Press* (02 July 2020) online: <<https://www.abbeynews.com/news/ottawa-jail-inmates-argue-anti-covid-measures-a-breach-of-charter-rights/>> [<https://perma.cc/AM44-JX8V>].

⁸³ Thia James, “No positive test results in Sask. inmates so far: authorities”, *Saskatoon Star Phoenix* (13 May 2020) online: <<https://thestarphoenix.com/news/local-news/covid19-testing-federal-provincial-inmates-sask/>> [<https://perma.cc/T2M8-T4QE>].

⁸⁴ Jonny Wakefield, “COVID-19 has — so far — been kept out of Alberta jails and prisons”, *Edmonton Journal* (24 April 2020) online: <https://edmontonjournal.com/news/crime/covid-19-has-so-far-been-kept-out-of-alberta-jails-and-prisons/> [<https://perma.cc/5YJY-F4UF>].

⁸⁵ Northwest Territorial Government, News Release, “Information about NWT Corrections facilities and COVID-19 readiness” (25 March 2020) online: <<https://www.justice.gov.nt.ca/en/corrections-facilities-and-covid-19-readiness-q-and-a/>> [<https://perma.cc/X4MU-ZFMH>].

⁸⁶ Nelson Mandela Rules, *supra* note 64 Rules 44 and 43(a).

⁸⁷ *ECPJS-Smith*, *supra* note 58; *ECPJS-Young*, *supra* note 58.

⁸⁸ Office of the Premier of New Brunswick, News Release, “Update on Covid-19” (17 March 2020) <https://www2.gnb.ca/content/gnb/en/news/news_release.2020.03.0132.html> [perma.cc/LA4A-XFYA]; Will Reimer, “Manitoba’s correctional centres making adjustments to prevent spread of COVID-19”, *Global News* (09 April 2020) online: <<https://globalnews.ca/news/6802835/manitoba-correctional-centres-adjustments-covid-19/>> [<https://perma.cc/M2LF-VK44>] [“Reimer”].

⁸⁹ The Chronicle Herald, *supra* note 21.

⁹⁰ *ECPJS-Smith*, *supra* note 58; *ECPJS-Young*, *supra* note 58.

In addition, quarantine and medical isolation practices create a challenging situation. In Nova Scotia, as in some other provincial systems,⁹¹ it is reported that everyone is segregated for two weeks upon admission to an institution.⁹² While some international organizations recommend a 14-day quarantine zone for all new admissions because of public health concerns, it is clear that this can never amount to solitary confinement.⁹³

It is unclear how in Nova Scotia, for instance, this practice is different than segregation. The fact that there is no public protocol or policy regulating the use of isolation or quarantine for new admissions makes it impossible to assess. The only public isolation protocol available⁹⁴ describes the situation when individuals can be medically isolated (and it does not include new admissions). It also does not describe what this kind of isolation presupposes, or how differs from solitary confinement.

In Nova Scotia and Canada-wide, isolation protocols and their application will need to be created, or, if already in existence, they will need significant review to be brought in accordance with human rights norms. An isolation protocol needs to include all situations where isolation may be mandated, describe how it is practically different than solitary confinement, and indicate any measures taken to mitigate the potential negative consequences of isolation. As noted by IPR, crisis preparedness and response directives must strictly regulate the use of isolation practices (including lockdowns, quarantines, and isolation) based on international standards.⁹⁵

v. Lack of governmental support for release

Released individuals are at a higher risk of living with mental illnesses, addictions, and homelessness.⁹⁶ If unsupported, it is unlikely that they will be able to respect the public health

⁹¹ Leigha Farnell, “P.E.I. reports 1 new case of COVID-19, bringing total number of cases to 22” *CTV Atlantic* (2 April 2020) online: < <https://atlantic.ctvnews.ca/p-e-i-reports-1-new-case-of-covid-19-bringing-total-number-of-cases-to-22-1.4879454> > [<https://perma.cc/Y7YC-B7YD>]; Quebec Government, News Release, “Questions and answers concerning legal and correctional services during the COVID-19 pandemic” (8 July 2020) online: < <https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/answers-questions-coronavirus-covid19/legal-correctional-services-covid-19-pandemic/#c54102> > [<https://perma.cc/8354-4G2D>]; Reimer, *supra* note 85; Thia James, “What Saskatchewan jails are doing to prevent the spread of COVID-19 “, *Saskatoon Star Phoenix* (02 April 2020) online: <<https://thestarphoenix.com/news/saskatchewan/what-saskatchewan-jails-are-doing-to-prevent-the-spread-of-covid-19>> [<https://perma.cc/DS56-P2A3>]; Sarah Rieger, “Defence lawyer fears outbreak as 2nd Calgary inmate tests positive for COVID-19”, *CBC News* (10 May 2020) online: <<https://www.cbc.ca/news/canada/calgary/inmate-covid-19-1.5563873>> [<https://perma.cc/2UT5-G87P>]; Emma Tranter, “Nunavut has released 23 inmates since April 1 due to the COVID-19 pandemic”, *Nunatsiq News* (12 May 2020) online: < <https://nunatsiq.com/stories/article/90418/>> [<https://perma.cc/HNS3-NN5V>] [“Tranter”].

⁹² *ECPJS-Smith*, *supra* note 58; *ECPJS-Young*, *supra* note 58; Tranter, *ibid*.

⁹³ UN, *Operational Toolbox*, *supra* note 10.

⁹⁴ NSHA, *Care Directive*, *supra* note 47.

⁹⁵ Penal Reform International 2, *supra* note 7.

⁹⁶ See e.g. Adelina Iftene, “Incarceration in Canada Risks to and Opportunities for Public Health,” in Tracey M. Bailey, C. Tess Sheldon and Jacob J. Shelley (eds.), *Public Health and Policy in Canada*, 4th ed (Toronto: LexisNexis, 2019) at 506.

preventive measures put in place within 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. They are also more likely to return to prison on account of breaching their conditions of release (including, for instance, having a designated place of residence, not associating with certain individuals, 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 a public health issue. International organizations have included housing support for those released among their priority recommendations.⁹⁷ The 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.⁹⁸

There are few governmental supports available to people exiting prison anywhere in Canada.⁹⁹ Housing and support for release remain the biggest issue released individuals face across the country. This has been particularly exacerbated during the pandemic.¹⁰⁰

⁹⁷ OHCHR & WHO, *supra* note 4 at 4; COE, *Urgent Steps*, *supra* note 5; Human Rights Watch, *supra* note 7; Penal Reform International 2, *supra* note 7 at 37; Commonwealth Human Rights Initiative, *supra* note 6 at 6.

⁹⁸ 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].

⁹⁹ In some provinces there some pre-pandemic private fundraisers created to support individuals in need who have been recently released: Ontario (Prisoner Emergency Support Fund) and Saskatchewan, Alberta and Manitoba (Prairie Province Support Fund), as well as Quebec (mutual aid funds ran by anti-carceral groups): “Prisoner Emergency Support Fund : Support Prisoners In Ontario During Covid-19”, *GoFundMe* (2 April 2020) online: <<https://www.gofundme.com/f/prisoner-emergency-support-fund>> [https://perma.cc/H6VT-K28T] ; “Prairie Province Prisoner Support Fund”, *GoFundMe* (1 May 2020) online: <<https://www.gofundme.com/f/prairie-province-prisoner-support-fund>> [https://perma.cc/3UHU-RSDC] ; Abigail Popple, “Quebec Prisons Failing to Protect Inmates”, *The McGill Daily* (8 June 2020) online <<https://www.mcgilldaily.com/2020/06/quebec-prisons-failing-to-protect-inmates/>> [https://perma.cc/MXN4-EX6J].

¹⁰⁰ “Some prisoners could be released due to COVID-19 concerns in N.L. jails”, *CBC News*, (18 March 2020), online: < <https://www.cbc.ca/news/canada/newfoundland-labrador/bob-buckingham-covid-19-hmp-1.5501247>> at para 15 [perma.cc/2MPL-DMWC]; Jon Milton, “COVID-19 is raging through Quebec prisons”, *Briarpatch* (23 May 2020) online: < <https://briarpatchmagazine.com/articles/view/covid-19-is-raging-through-quebec-prisons>> [https://perma.cc/QH2X-P8EF]; Quebec Provincial Government, News Release, “Questions and answers concerning legal and correctional services during the COVID-19 pandemic” (8 July 2020) online: <<https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/answers-questions-coronavirus-covid19/legal-correctional-services-covid-19-pandemic/#c54102>> [https://perma.cc/8354-4G2D] ; Karen McColl, “Whitehorse jail suspends visits, cuts some programming to reduce risk of COVID-19” (25 March 2020) online: <<https://www.cbc.ca/news/canada/north/wcc-coronavirus-preparedness-1.5509629>> [https://perma.cc/73PB-KA6N].

In most provinces, including Nova Scotia, individuals are removed from income assistance during incarceration and are not eligible to re-apply until after release.¹⁰¹ From the moment they apply, it takes at minimum of two weeks to receive the first payment. This means that, for at least two weeks, these individuals have no income.¹⁰² 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 caught¹⁰³.

Released individuals and support workers both report that, despite the obligation to provide people with one-month worth of medication, many do not receive it.¹⁰⁴ Without a family practitioner and a health care plan, many individuals either cannot get prescriptions or cannot afford to pay for their necessary medications. The consensus amongst community organizations is that the largest cost incurred in providing support for those released is medication. Lack of access to medication is a major reason people return to jail.¹⁰⁵

Three organizations (JHSNS, EFry Mainland, and Coverdale) launched an emergency housing project (“JEC”) during the first wave of the pandemic which safely housed 20 people exiting jail at a time and a total of more than 30 people in hotel rooms.¹⁰⁶ The project was funded through Reaching Home, a federal program.

JEC offered staffing from 9:00 am to 11:00 pm, 7 days a week, including wellness checks on the individuals staying in the hotels. Halifax Public Library staff also offered assistance on-site, at the hotels. JEC offered three meals a day, with other supports provided by the agencies themselves, to the extent that limited funding allowed. Every client was also tethered to a caseworker. These caseworkers dealt with long term housing issues, mental health supports, access to medication, medical appointments, etc. Addiction support was provided by peer mentors, who themselves were formally incarcerated.¹⁰⁷ None of the individuals supported through JEC breached their conditions of release.

JEC was unique in Canada and it followed the emergency housing recommendations provided by international agencies.¹⁰⁸ Unfortunately, this program was significantly underfunded, was only able to support 30 of the over 300 people released between March and

¹⁰¹ Sheila Wildeman, “Timely Access to Income Assistance on Release from Prison/Jail – During and After COVID-19,” [Unpublished] (August 2020) [“*Wildeman*”].

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ 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) [“JEC Consultation”].

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*; “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]

¹⁰⁷ *Ibid.*

¹⁰⁸ Commonwealth Human Rights Initiative, *supra* note 6 at 6.

May, and its 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. EFry received some money from the Department for Status of Women to support released women, but JHS did not receive anything from the province.¹⁰⁹ As of March 4, 2021, a similar program has not been recreated in Nova Scotia or anywhere else in Canada.

III. Best practices during crisis and beyond

Many of the issues associated with prisons that became obvious during the pandemic are rooted in the systemic problems that preceded it.¹¹⁰ Now is an important time to reflect on the public health and human rights concerns prisons raise at all times, learn from the pandemic experience, and commit to structural changes that could eliminate these concerns. What follows is a list of shorter-term (for the duration of the pandemic) and longer-term recommendations, for Nova Scotia and beyond.

i. Prison depopulation: Bail, temporary absences, and short sentences

Considering that the majority of prison systems across the world and in Canada failed to follow the international organizations' recommendations to depopulate to the maximum extent possible, Nova Scotia's success in reducing the prison population by nearly half in two months is significant. These efforts should undoubtedly be emulated across Canada, especially as the country is preparing for further waves of the pandemic.¹¹¹

At the same time, it is important to remember that before the pandemic, 65% of Nova Scotia's jail population¹¹² was comprised of remanded individuals (i.e. awaiting trial). These individuals were subsequently bailed in high numbers during the pandemic. Given that individuals have a constitutional right to bail¹¹³ and that remand should be used only in exceptional and rare situations,¹¹⁴ it is disconcerting that this many people were awaiting trial in custody to begin with. It is also sensible to note that had people's right to bail been properly applied, significantly fewer resources would have been spent on holding emergency bail hearings over a weekend and scrambling to come up with release plans in record time. In addition, these

¹⁰⁹ *Ibid.*

¹¹⁰ Adelina Iftene, "We must decarcerate across the country, then fix the prison system" (20 April 2020), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/april-2020/we-must-decarcerate-across-the-country-then-fix-the-prison-system/>> [<https://perma.cc/5GHZ-A6ZH>].

¹¹¹ Sarah Turnbull, "COVID-19 'peaks and valleys' expected until 2022: new modelling" (14 August 2020), online: <<https://www.ctvnews.ca/politics/covid-19-peaks-and-valleys-expected-until-2022-new-modelling-1.5064623>> [<https://perma.cc/TW9Z-F8BG>].

¹¹² Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2017/2018" (9 May 2019), online: Statistics Canada <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm>> [<https://perma.cc/P3ZA-LWUB>] ["Malakieh"].

¹¹³ *Charter*, *supra* note 65.

¹¹⁴ Nicole Marie Myers, *Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on bail*, *BRIT J CRIMINOL* (2017) 57, 664–683 at 665; *Criminal Code*, RSC 1985, c C-46, s 515.

efforts have not lasted. As of January 17, 2021, the numbers have gone up to 334 of which 75% continue to be on remand.¹¹⁵ While the increase in numbers have not yet led to prisons reaching full capacity, that will likely happen if efforts decarcerate are not recommenced.

High remand rates are a reality across Canada, with seven other jurisdictions (Alberta, Ontario, Manitoba, British Columbia, Yukon, the Northwest Territories, and Nunavut) having more people on remand than sentenced in their jails.¹¹⁶ It is in times of crisis that the value in ensuring that remand is only exceptionally used is glaring, not just from the perspective of the defendant's rights, but also from a public health and public safety perspective. The opportunity to reflect on and invest in bail reform should not be missed.

Another category of prisoners released in high numbers from Nova Scotia jails were individuals serving intermittent or very short sentences through temporary absence certificates. The use of temporary absences, and other measures, should be increased across Canada as an effective and immediate way of depopulating prisons, especially in the face of new pandemic waves.¹¹⁷

It is important to note that most people in Canada serve very-short sentences. In 2017-18, 31% of sentenced individuals released from provincial custody had served one week or less, while 60% had served one month or less across Canada.¹¹⁸ There exists a body of literature to demonstrate that short or intermittent sentences lack utility, while also carrying a host of negative collateral consequences. Very short periods offer no rehabilitation prospects to the individual. It is also very unlikely that the individual is a public safety danger (given that these offences call for such a short sentence and lack severity).¹¹⁹ Yet, any length of time in custody results in loss of employment or other sources of income (such as income assistance), loss of housing, and sometime loss of child custody or access. Additionally, there is the stigma associated with incarceration.¹²⁰ Countries like the UK have begun the process of abolishing

¹¹⁵ <https://globalnews.ca/news/7582002/prison-justice-coronavirus-nova-scotia-jails/>

¹¹⁶ Malakieh, *supra* note 109.

¹¹⁷ On the precise types of release mechanism that can be used, see: Iftene, *Punished for Aging*, *supra* note 56 at 380.

¹¹⁸ Malakieh, *supra* note 109.

¹¹⁹ APS42, "Abolishing short prison sentences" (04 February 2019), online (blog): *University of Kent* <<https://blogs.kent.ac.uk/criminaljusticenotes/2019/02/04/abolishing-short-prison-sentences/#:~:text=Abolishing%20short%20prison%20sentences%20The%20Minster%20for%20Prisons,public%20safety.%20By%20aps42%20%7C%2004%20February%202019>> [<https://perma.cc/NTS8-Y8T6>] ["APS42, *Abolish Short Sentences*"]; Kent Law School, "KLS Criminal Justice Notes" (01 February 2019), online (pdf): *University of Kent* <<https://blogs.kent.ac.uk/criminaljusticenotes/files/2019/02/Criminal-Justice-Notes-February-2019.pdf>> [<https://perma.cc/QYC8-XMPG>] ["KLS, *Criminal Justice Notes*"]; Helen Johnston & Barry Godfrey, "Counterblast: The Perennial problem of Short Prison Sentences" (2013) 52:4, *The Howard J* 433-437 ["Johnston and Godfrey"]

¹²⁰ *Ibid*; The Canadian Bar Association, "Collateral Consequences of Criminal Convictions: Considerations for Lawyers" (February 2017), online (pdf): <https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf> at 14-34 [<https://perma.cc/ZVK8-AY57>]; Law Council of Australia, "The Justice Project Final Report – Part 1: Prisoners and Detainees" (August 2018), online (pdf): <<https://www.lawcouncil.asn.au/files/web->

short prison sentences (i.e. under 6 months) in favour of community sentences, in order “to ease pressure on prisons and enhance public safety.”¹²¹

If all individuals who served less than one month in prison received community sentences instead, the provincial prison population in Canada at the beginning of the pandemic would have been half the size. If the prisoners serving less than six months had received community sentences, that percentage would have been even lower. It would have reduced the resources expended (time and money) to issue those temporary absences. Additionally, for the provinces who did not depopulate to the same extent, it would have increased the probability of avoiding the outbreaks that occurred.

It is time for Canada to also consider the abolition of short and intermittent sentences. The pandemic has made it clear that, in addition to the previously established futility of these sentences, they also constitute a public health hazard that may become catastrophic during a pandemic.

ii. Institutional protocols and directives

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 and include “*Coronavirus: preventing harm and human rights violations in criminal justice systems*” (International Penal Reform, July 2020),¹²² “*Interim Guidance, COVID-19: Focus on persons deprived of their liberty*” (OHCHR and WHO, March 2020),¹²³ “*Operational Toolbox: COVID-19 Preparedness and responses in places of detention*” (International Red Cross, 2020);¹²⁴ “*Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention*” (WHO, 2020);¹²⁵ “*Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*” (WHO, March 2020).¹²⁶

The DOJ and NSHA’s appointment of Dr. Lisa Barrett as the Authorized Prescriber for Corrections is a positive step when compared to other jurisdictions that delayed working with public health experts to prevent prison outbreaks. However, it is unclear which protocols,

pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20%28Part%201%29.pdf> [<https://perma.cc/58YJ-FVS3>].

¹²¹ APS42, *Abolish Short Sentences*, *supra* note 115; KLS, *Criminal Justice Notes*, *supra* note 115.

¹²² Penal Reform International 2, *supra* note 7.

¹²³ OHCHR & WHO, *supra* note 4.

¹²⁴ UN, *Operational Toolbox*, *supra* note 10.

¹²⁵ WHO, Regional Office for Europe, *Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention* (accessed 20 July 2020), Online: *Euro WHO*

<https://www.euro.who.int/__data/assets/pdf_file/0008/436904/prisons-FAQ-COVID-2019.pdf>

[<https://perma.cc/CD5C-URJW>].

¹²⁶ WHO, *Preparedness, Prevention and Control*, *supra* note 10.

directives, and measures she consulted on, except for the one NSHA protocol and the assessment chart released to the public.

Correctional Services in various jurisdictions, including Nova Scotia, should work alongside their respective health departments and independent experts (like Dr. Barrett) to create adequate institutional procedures for implementing the broader-level protocols discussed above. These institutional procedures should detail how each protocol will be implemented (including issues such as staff-prisoner interactions, the provision of PPE to staff and prisoners, food handling, delegating the responsibility of cleaning objects in the common space areas, etc.), the instructions staff must receive, as well as an outline for the consequences of staff non-compliance. The implementation of all procedures and protocols should be overseen by independent public health experts.

iii. Transparency

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 relating to the application of the existing protocols, as well as testing and other measures taken. A directive should be issued detailing the public information process for the duration of the pandemic.

In the short term, Correctional Services should work alongside the Nova Scotia Human Rights Commission, public health agencies, and the existing civil societies (such as ECPJS, EFry, Coverdale, and JHSNS). These consultations will help ensure some form of consistent and independent oversight of measures adopted during the pandemic, as well as how human rights are being enforced. An agreement between these parties providing the details of the oversight mechanisms during the pandemic, as well as the reports of the oversight groups, should be made public. This may help mitigate some of the concerns regarding access and independence for the organizations that act as monitors.

In the long term, every correctional system in the country should have an independent monitoring agency. It can be incorporated through an existing agency (like a human rights commission), or it can be separately created by statute. While it is beyond the scope of this article to expand on these issues, an important solution would be the adoption of the Optional Protocol to the Convention Against Torture by Canada.¹²⁷ This would create independent national oversight mechanisms that would be responsible for all centres of detention in the country.¹²⁸

¹²⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, 23 Aug 1985, Treaty Series, vol 1465, p 85, art 2 (entered into force 26 June 1987, in accordance with article 27 (1))

¹²⁸ Iftene, *Punished for Aging*, *supra* note 56 at 139-143.

iv. Human rights

Enforcement of human rights in prisons is not optional. During the pandemic, all protocols, policies, and directives should be checked against national and international human rights requirements. When a measure derogates from this norm, it needs to be acknowledged and a justification must be provided. There must also be a strict timeframe set for how long the measure can remain in place. In particular, all Correctional Services should have isolation protocols in place during the pandemic (including lockdowns, medical isolation, quarantine, etc.). There must also be measures in place to alleviate its negative consequences, with preference for alternatives to the use of isolation.

v. Income assistance for released individuals

As noted by IPR, “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.”¹²⁹

In her review of the income assistance process for released individuals in Nova Scotia, Sheila Wildeman provided a set of excellent and practical recommendations.¹³⁰ In the short term, the Minister of Community Services in Nova Scotia (or the corresponding minister in a different province) should issue a directive to caseworkers pursuant to her authority under the *Employment Support and Income Assistance Act*,¹³¹ mandating emergency assistance for persons released from provincial jails in the face of a second wave of COVID-19.

In the long term, the application process for income assistance for those incarcerated should be restructured. As part of their preparation for release, each individual in need should be helped by a caseworker to apply for income assistance while they are still in prison, so that its support becomes available to them at the time of the release. Since there is a residence requirement associated with an application for income assistance, it is crucial that housing is also part of their release plans, as discussed below.

¹²⁹ Penal Reform International 2, *supra* note 7 at 36.

¹³⁰ Wildeman, *supra* note 98.

¹³¹ *Employment Support and Income Assistance Act*, SNS 2000, c 27.

vi. Housing

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 in advance, and solutions resourced, particularly around housing/accommodation, transport, and medical needs. These plans should be prepared by collaboration between the Correctional Services, health departments, and other relevant departments.

In the short term, during the current and future waves of the pandemic, the JEC model should be used by governments to consult with civil societies for the creation and funding of accommodations for released individuals. This can be done in hotels or residences that are not being used due to the pandemic.¹³²

In the long term, a housing strategy for newly released and other criminalized or at-risk individuals should be developed to prevent future housing crises such as this. For instance, 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, this group should be added.¹³³

The *Housing Nova Scotia Act*,¹³⁴ 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.

Housing Nova Scotia should be mandated by the Department of Municipal Affairs and Housing to create a program, in collaboration with the municipalities, to provide financial housing support for those newly released.

All policy and financial initiatives for long-term housing supports involving newly released individuals should be done in collaboration with the DOJ, community organizations (such as EFry, and JHSNS), the councils for the Status of Women, and Aboriginal Affairs departments (and the African Nova Scotian Affairs Department for Nova Scotia). This will ensure gender and culturally appropriate housing and support planning, implementation, as well as wrap-around social and reintegrative services. Comparable measures should be considered across provinces.

¹³² This recommendation has also been made by international agencies: Commonwealth Human Rights Initiative, *supra* note 6 at 6.

¹³³ “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>].

¹³⁴ *Housing Nova Scotia Act*, RSNS 1989, c 213, s 7 (d).

IV. Conclusion

Prisons are places that, at the best of times, raise public health and human rights concerns. The pandemic has significantly tested both the willingness and the ability of governments to protect those in custody, while still upholding their rights. Most jurisdictions, in Canada and beyond, have failed this test and there have been consequences not only for those incarcerated but also for their communities. In addition, the pandemic has revealed systemic issues that plague the criminal justice system, that can no longer be ignored. This includes a significant inability of the system to learn from the past.

During the TB and HIV/AIDS prison epidemics, foreign scholars have conducted robust research on the fails of the prison systems and provided solutions for change.¹³⁵ Some of the solutions to these health crises squarely centered around the need to incarcerate less people.¹³⁶ Some of that work linked prison health policy to public health crises that disproportionately impacted the poor and racialized groups. Not only that those lessons have not been learned but we currently do not even have disaggregated race data on infections in prisons across Canada. The only race data available is federal and shows that nearly half of those infected in CSC custody were Indigenous.¹³⁷ Given the significant overrepresentation of Indigenous people in prison this is hardly a surprise, but it reinforces the disproportionated impact that the gross negligence governments display towards the lives and well-being of those in custody has on already marginalized communities.¹³⁸

This inability to learn has been noticeable even in the context of the current pandemic. Despite the NS government being provided with a detailed report on the issues arising out of their responses to the first wave¹³⁹ and despite the significant pressure from various NGOs, the number of people in custody has gone back up after the first wave, transparency and oversight have not increased, and funding for projects like JEC has not been made available. Nova Scotia has thus far been lucky in that there has not been an outbreak in its prisons,¹⁴⁰ but the likely

¹³⁵ See e.g. Theodore M. Hammett, "HIV/AIDS and Other Infectious Diseases Among Correctional Inmates: Transmission, Burden and an Appropriate Response," (2006) 96(6) *Am J Public Health* 97; Janet C Mohle-Boetani et al, "Tuberculosis Outbreak in a Housing Unit for Human Immunodeficiency Virus – Infected Patients in a Correctional Facility: Transmission Risk Factors and Effective Outbreak Control," (2002) 34:5 *Clinical Infectious Diseases* 668; J. O'Grady et al, "Tuberculosis in prisons: anatomy of global neglect," (2011) 38 *European Respiratory Journal* 752.

¹³⁶ See e.g. Kate Dolan, Andrea L. Wirtz, Babak Moazen et al, "Global burden of HIV, viral Hepatitis, and tuberculosis in prisoners and detainees," (2016) 338: 10049 *The Lancet* 1089.

¹³⁷ See e.g. Natasha H. Williams, "Prison Health and the Health of the Public: Ties That Bind," (2007) 13:2 *Journal of Correctional Health Care* 80.

¹³⁸ On this see Adelina Iftene, "COVID-19 in Canadian Prisons: Policies, Practices and Concerns," in Colleen M. Flood, Vanessa MacDonell, Jane Philpott, Sophie Theriault, and Sridhar Venkatapuram, *Vulnerable: The Law, Policy and Ethics of COVID-19*, (Ottawa: university of Ottawa Press: 2020), at 377-379.

¹³⁹ Adelina Iftene, *COVID-19 and Provincially Incarcerated Individuals. A Policy Report* (2020), available: <https://www.halifaxexaminer.ca/wp-content/uploads/2020/09/COVID-19-Provincially-Incarcerated-Individuals-A-Policy-Report.pdf>.

¹⁴⁰ The number of infections in the province are overall much lower than in the rest of the country, which may help explain why there have not been any outbreaks in Nova Scotia prisons. See Government of Canada, "Coronavirus disease 2019 (COVID-19); Epidemiological Update," March 3, 2021, online: <https://health->

comparable unwillingness to learn, to improve practices and to decarcerate has contributed to the skyrocketing rates of infection during the second wave in federal prisons, as well as in some of the other provinces.¹⁴¹

This investigation into Nova Scotia's response to the pandemic highlights the fact that even the jurisdictions that did not encounter prison outbreaks still faced significant limitations in the protection they offered to those incarcerated. The case study of Nova Scotia provides some examples of strong responses that could be replicated and should continue post-pandemic. These responses illustrate the fact that measures long dismissed as impossible (such as prison depopulation, reduced remand use, meaningful collaborations with civil societies) are in fact feasible. At the same time, the weaknesses identified in the approaches taken in Nova Scotia are rooted in systemic issues such as the lack of transparency and accountability of Correctional Services, a culture of disregard for human rights, overreliance on various forms of segregation, overcrowding, and poor supports for release.

The pandemic provides an opportunity to engage in sentencing and bail reforms, to increase the use of non-custodial sentences, as well as to re-think the approach Canada has taken in rehabilitation and reintegration. Doing so will help redress some of the significant shortcomings of the justice system that reflect on both the public health of communities and the human rights of criminalized individuals.

infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html?stat=num&measure=deaths_last14&map=pt#a2

¹⁴¹ Prison Pandemic Partnership, "Reported COVID-19 Cases Linked to Carceral Institutions in Canada Before and After 1 December 2020," January 8, 2021, online: <https://ccla.org/ccla-covid-prisons/>.

V. Appendix

| Timeline of Measures Taken in Nova Scotia | |
|--|-------------|
| Event | Date |
| A subcommittee for COVID-19 planning and response in correctional facilities convenes for first time and subsequently meets daily | 12-Mar |
| The Nova Scotia Supreme Court suspends all upcoming jury trials for sixty days | 13-Mar |
| Correctional facilities close to all volunteers | 14-Mar |
| Family and friend visits to inmates become non-contact | 14-Mar |
| Inmates granted two free phone calls a week | 14-Mar |
| Correctional facilities close to all visitors | 15-Mar |
| First presumptive case of covid-19 in Nova Scotia | 15-Mar |
| Urgent open letter re health, safety, and human rights of people in prison during COVID-19 crisis | 15-Mar |
| Open letter from advocacy groups on the urgency of reducing incarceration during COVID-19 pandemic | 16-Mar |
| 41 people serving intermittent sentences in the province to be released on temporary absence | 18-Mar |
| The Nova Scotia Supreme Court adopts an essential services model | 19-Mar |
| Chief Judge Pamela Williams of the Provincial Court held video bail reviews | 21-Mar |
| Nova Scotia declares a provincial state of emergency | 22-Mar |
| Approximately 20 people are released from jails on bail by way of consent release | 24-Mar |
| The Nova Scotia Supreme Courts begins accepting filings electronically | 26-Mar |
| The Nova Scotia Court of Appeal adjourned all hearings for May & June | 27-Mar |
| First case of community spread is identified in Nova Scotia | 30-Mar |
| To this point no one in any of the province's correctional facilities, neither the people in jail nor those working there, had tested positive for COVID-19. | 01-Apr |
| Nova Scotia's Deputy Minister responds to the East Coast Prison Society's calls to action | 08-Apr |
| Advocates call for the decarceration of women and trans/nonbinary parents. | 11-Apr |

| | |
|---|--------|
| Chief Judge Pamela Williams of the Provincial Court held video bail reviews | 13-Apr |
| Nova Scotia Supreme Court decides that "the presence of virus alone is not sufficient to warrant emergency proceedings, the party must demonstrate an actual emergency" | 15-Apr |
| The Provincial Court to hold all pre-trial and resolutions via telephone conferences | 15-Apr |
| A prisoner at Burnside tests positive for COVID-19 | 20-Apr |
| Jail population reduced from 452 people in custody before mid-March down to 251 | 21-Apr |
| The Nova Scotia Supreme Court now hearing non-urgent matters | 21-Apr |
| 180 people have been released from custody through bail agreements or through temporary absences | 22-Apr |
| Crown is now considering public health on a case-by-case basis for bail applications | 22-Apr |
| By this date 81 individuals both intermittent and continuous prisoners were released on temporary absence certificates | 21-May |
| By this date there were a total of 322 release orders issued for individuals with remand status. | 31-May |
| JEC (Emergency Housing Project) Funding "Runs Out" | 31-Jun |