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## Behind Closed Walls

*“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.” – Nelson Mandela.*

I acknowledge the Traditional Owners of the land on which I wrote this article. I would also like to pay my respects to Elders past and present.

Aboriginal and Torres Strait Islander peoples should be aware that this article contains names of people who have died.

### Introduction

Against the background of COVID-19 as cases began to grow in earnest in Australia through March 2020, voices began advocating for the release of prisoners who posed no harm to society to avoid unnecessary deaths and for the legislatures of Australia to exercise their duty of care. Increasingly, the potential for more Indigenous deaths in custody because of COVID-19 was voiced as a concern.

On May 25<sup>th</sup>, 2020, George Floyd was killed by police in the US, captured on phone cameras and broadcast across multiple platforms around the world. His death serving as a catalyst for Black Lives Matter protests worldwide, despite the risks posed by coronavirus, by which time there were over 5 million confirmed cases and almost 350,000 confirmed deaths<sup>1</sup>. In Australia, the images, and last words “I can’t breathe” were reminiscent of David Dungay Jr who died in Long Bay prison, 2015 under similar conditions<sup>2</sup>.

The story of Australia’s prisons is largely a story of modern-day racism in a society that is in full denial of its history, and of its present-day attitudes and behaviours. Unfortunately, as a nation, we do not really want to know or acknowledge the painful truths. The governments of Australia know this, they represent us after all. They hide and misrepresent the facts to assuage our fragility so that we do not have to be deal with our guilt. Our refrain is that we are not racists and should not be made to feel guilty for what has happened in the past. Indigenous people and how they are treated by our society are hidden behind a “Somebody Else’s Problem (SEP) field”, to quote Douglas Adams.

However, once you begin peeling back the curtain, the uncomfortable truth is there in plain sight, in the figures published by the various government departments, by inquiry after inquiry available for public reading, by first hand testimony, by comparison tables against other countries, it paints a damning picture. And yet, even with the wealth of evidence already available, the governments do

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<sup>1</sup> WHO COVID-19 dashboard (<https://covid19.who.int/>)

<sup>2</sup> Australia’s death in custody mirror (<https://theconversation.com/i-cant-breathe-australia-must-look-in-the-mirror-to-see-our-own-deaths-in-custody-139848>)

their best to limit what data is made available to the public, either through departmental incompetence and lack of capability or through deliberate obfuscation to avoid accountability.

Hopefully, our international obligations to hold independent reviews of all forms of detention will help address some of the more egregious behaviours that happen behind these closed walls. However, the slow pace of preparation by the various states does not bode well.

Unfortunately, COVID-19 is not going to wait until the end of the year and the results of any independent inspection. The recent BLM protests have moved the dial of acceptance that racism exists more than any other event in recent times. It is time to hold authority to account and for all of us to accept the truth of our society in this post truth world.

As COVID-19 poses greater risks to adults than juveniles, this article only looks at the adult prison system. However, as a society, our treatment of Indigenous juveniles based on incarceration rates<sup>3</sup> alone is a horrific reflection of ourselves. Many of the concerns covered in this article are just as applicable for other places of detention such as immigration detention centres<sup>4</sup>, psychiatric hospitals<sup>5</sup>, and even nursing homes<sup>6</sup> as shown with the recent COVID-19 outbreaks in nursing homes in Victoria and New South Wales<sup>7</sup>.

## The Public Data Policy – Reality vs Intent

On 7<sup>th</sup> December 2015, Malcolm Turnbull released the Australian Government Public Data Policy Statement<sup>8</sup> to make government data freely available. This resulted in a number of portals being made available from which machine-readable geocoded data would be able to be sourced, such as data.gov.au, dta.gov.au and pmc.gov.au, along with a number of Australian states following suit with their own data portals.

Four years on, if you were to do a search for data on prisons across these data portals, there is a current list of Queensland adult prisons with geolocations, but no capacity numbers and an eleven year old list of Victorian prisons with old capacity numbers but no geolocations, and a 2016 dataset of detention and correctional facilities<sup>9</sup>, and that's it. The Australian Bureau of Statistics (ABS) have a 2019 prisoner population census per adult prison<sup>10</sup>, a March 2020 aggregate dataset of the

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<sup>3</sup> Youth detention population in Australia 2019 (<https://www.aihw.gov.au/reports/juv/128/youth-detention-population-in-australia-2018/contents/table-of-contents>)

<sup>4</sup> Australia's treatment of asylum seekers violates the Convention Against Torture 2015 (<https://www.hrlc.org.au/news/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture>)

<sup>5</sup> Sexual assault rife in psychiatric hospitals 2013 (<https://www.scribd.com/document/141105428/Zero-Tolerance-For-Sexual-Assault-A-Safe-Admission-For-Women>)

<sup>6</sup> Royal Commission into Aged Care Quality and Safety 2020 (<https://agedcare.royalcommission.gov.au/Pages/default.aspx>)

<sup>7</sup> COVID-19 in VIC and NSW nursing homes (<https://www.abc.net.au/news/2020-08-02/melbourne-coronavirus-aged-care-tough-questions/12511468>)

<sup>8</sup> Australian Government Public Data Policy Statement ([https://www.pmc.gov.au/sites/default/files/publications/aust\\_govt\\_public\\_data\\_policy\\_statement\\_1.pdf](https://www.pmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf))

<sup>9</sup> National Detention and Correctional Facilities 2016 (<https://data.gov.au/dataset/ds-ga-cc365600-294b-597d-e044-00144fdd4fa6/details?q=correctional%20facilities>)

<sup>10</sup> ABS Prisoners of Australia, 2019 (<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>)

prisoner population<sup>11</sup>, and 2016 census data on Aboriginal and Torres Strait Islander population<sup>12</sup>, while the Australian Institute of Health and Welfare (AIHW) have a 2018 data set on Australia's prisoners based on a very small population sample size which excludes NSW prisoners<sup>13</sup>. The data available on prisons from government agencies is piecemeal, dated, and incomplete or missing altogether, among other issues with the data.

The U.S Secretary of State Mike Pompeo, in discussing China's response to the coronavirus stated "China behaved like authoritarian regimes do, attempted to conceal and hide and confuse"<sup>14</sup>, missing the irony of the current behaviour of conservatist populist governments around the world including his own with regard to this very behaviour. This statement also resonates in describing the behaviours we see within our own Australian governments. Democracies require transparency and accountability to prosper, tyranny and abuse of power flourish when hidden from the public gaze.

## OPCAT and the State of our State Adult Prisons

Abuse of power is most prone to occur when there is already an imbalance of power between parties. On becoming a prisoner, many of your rights are forfeited and you are at the mercy of the institution that holds you, the staff that holds the keys to anything you can do, and subject to threats of physical violence from other prisoners. This type of environment breeds abuses of power at multiple levels.

In an attempt to address the worst excesses of this abuse of power in prison systems around the world the United Nations General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1984. Australia became a signatory to the CAT in 1985 and ratified it in 1989. The United Nations treaty: the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was ratified by Australia in 2017.

OPCAT aims to prevent abuse of people in detention where people are deprived of liberty, such as prisons, police holding cells, psychiatric hospitals, etc through opening these places up to regular independent inspections. The Australian federal government will coordinate inspection bodies with the different states and territories and will be responsible for its own independent inspection body to inspect federal institutions such as military prisons. Each state and territory will be responsible for creating their own independent inspection bodies known as National Preventive Mechanisms (NPMs) and their respective places of detention will also need to be open to inspections from a UN committee called the sub-committee on the Prevention of Torture. Australia has committed to having these NPM inspection bodies conducting regular inspections by December 2020.

According to the OPCAT Readiness Report from September 2019<sup>15</sup>, only three states and one territory were currently in a position to implement an NPM: Western Australia, New South Wales,

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<sup>11</sup> ABS Corrective Services, March 2020

(<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4512.0Main+Features1March%20Quarter%202020>)

<sup>12</sup> ABS Estimates of Aboriginal and Torres Strait Islander Australians, June 2016

(<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3238.0.55.001June%202016?OpenDocument>)

<sup>13</sup> AIHW The health of Australia's prisoners 2018 (<https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/data>)

<sup>14</sup> Mike Pompeo on coronavirus leaking from Wuhan lab (<https://abcnews.go.com/Politics/pompeo-enormous-evidence-unproven-theory-coronavirus-lab/story?id=70472857>)

<sup>15</sup> Australian Ombudsman OPCAT Readiness Report September 2019

([https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf))

Australian Capital Territory, and Tasmania. Queensland, Victoria, South Australia, and Northern Territory had no pre-existing independent inspection capabilities.

However, even with those states best prepared for implementing an NPM, there were issues. Western Australia is regarded as having the reference model for other states to use with The Office of the Inspector of Custodial Services, although it is only required to inspect a place of detention every three years<sup>16</sup> – much can happen over three years. Tasmania, through its Office of the Custodial Inspector Tasmania, also is required by state legislation to undertake inspections no greater than every three years. However, they are under-resourced and do not have the means to meet this legislative target<sup>17</sup>. New South Wales only has a legislative requirement to inspect a place of detention every five years.<sup>18</sup> The Australian Capital Territory saw the first full year of operation in 2018-19 of the Office of Inspector of Correctional Services and is only responsible for inspecting a limited number of detention facilities within the ACT and does not appear to have a maximum period between which to conduct inspections.<sup>19</sup>

The Victorian ombudsman has conducted a number of OPCAT compliant inspections<sup>20</sup> to understand the current state of compliance of Victorian prisons and to determine what resources would be required to implement an NPM for Victoria. Queensland has the Office of the Chief Inspector of Correctional Services, but the last inspection report was in 2013<sup>21</sup>. South Australia has complaints go to the State Ombudsman and can perform investigations based on complaints received<sup>22</sup> but does not have any independent inspections body, and the Northern Territory does not have an inspections body, with its last review being in 2016<sup>23</sup>.

When looking through what reviews have been conducted across the different states and territories, a consistent theme emerges of the Australian adult prison system:

- Overcrowding
- Poorly maintained facilities, in some cases rodent infested and without appropriate A/C
- Disproportionate representation of Aboriginal and Torres Strait Islanders among the prison population

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<sup>16</sup> Western Australia The Office of the Inspector of Custodial Services – Inspections (<https://www.oics.wa.gov.au/about-oics/what-we-do/>)

<sup>17</sup> Office of the Custodial Inspector Tasmania – Annual Report 2018-19 ([https://www.custodialinspector.tas.gov.au/\\_data/assets/pdf\\_file/0004/548689/Custodial-Inspector-Annual-Report-2018-19.pdf](https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0004/548689/Custodial-Inspector-Annual-Report-2018-19.pdf))

<sup>18</sup> New South Wales Inspector of Custodial Services – What we do (<http://www.custodialinspector.justice.nsw.gov.au/Pages/What-we-do.aspx>)

<sup>19</sup> Australian Capital Territory Office of Inspector of Correctional Services 2016-19 Annual Report (<https://www.ics.act.gov.au/reports-and-publications/annual-reports/annual-reports/2018-19-annual-report>)

<sup>20</sup> Victorian Ombudsman OPCAT Investigation September 2019 (<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/opcat-in-victoria-a-thematic-investigation-of-practices-related-solitary-confinement-of-children-and-young-people/>)

<sup>21</sup> Queensland Office of the Chief Inspector prison reports (<https://corrections.qld.gov.au/documents/reviews-and-reports/healthy-prison-report/>)

<sup>22</sup> South Australia Ombudsman Investigation Reports (<https://www.ombudsman.sa.gov.au/publications/investigation-reports/>)

<sup>23</sup> A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services July 2016 ([https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0010/384454/NTDCS-Review-Final-Report-PDF-Redacted-Final.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0010/384454/NTDCS-Review-Final-Report-PDF-Redacted-Final.pdf))

- Punitive use of control measures such as overuse of strip searches, solitary confinement and removal of privileges including against victims of internal prison assaults, not just perpetrators, that often breached International conventions on treatment of prisoners
- Staff shortages resulting in frequent lockdowns
- Limited training of prison officers in the appropriate use of control measures
- High rates of recidivism
- Higher rates of health-related comorbidities and mental illness among prisoners than in the general population
- Each state and territory have a patchwork of departments and processes for dealing with complaints and undertaking inspections, with unclear boundaries of responsibility.
- There appears to be limited powers of the various departments that can undertake inspections to have any findings addressed by the place of detention that has been inspected

The Human Rights Commission also calls out additional human rights problems that are faced by prisoners in Australia<sup>24</sup> including the limitations of what a federal government can do when most places of detention in Australia are the responsibility of state and territory governments, requiring complementary state and territory human rights legislation.

With a lack of oversight of prisons, it has fallen to relatives and prison advocates<sup>25</sup> to call out abuses of care to individual prisoners. But these complaints seldom result in change and do not expose systemic issues. Sometimes, it is investigative journalism such as what we saw with Don Dale<sup>26</sup> that brings to our attention the conditions in which prisoners are held and triggers a royal commission<sup>27</sup>. However, it is usually only during coronial inquests that are triggered by unfortunate deaths such as for Wayne Fella Morrison<sup>28</sup> that we get a glimpse of what is happening behind these walls. But even after the spotlight temporarily falls on these institutions, shining a light on systemic unconscionable behaviours, there is little evidence that any changes occur as the light fades and news cycles move on.

## Prison Privatisation and what it tells us about Duty of Care

With the privatisation of some prisons, it becomes even more vague on how much duty of care a state owes prisoners incarcerated in these private prisons, or whether that responsibility is deferred to the private operator running the prison. When the emphasis is on efficiency and costs savings, it is not in the private operator's interests to be transparent in how they achieve these measures. An audit from the Victorian Auditor General of 2 out of 3 private prisons in Victoria found that even though they delivered cost savings of up to 20%, they did not evaluate the effectiveness of their safety measures, failed to investigate the causes of incidents and had incident rates higher than the average of other comparable Victorian prisons, and they had a lack of transparency and public

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<sup>24</sup> Human Rights and Prisoners

([https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA\\_prisoners.pdf](https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_prisoners.pdf))

<sup>25</sup> List of prison advocacy and support groups in Australia

(<https://www.freewebs.com/australianprisonfoundation/organisationsforprisoners.htm>)

<sup>26</sup> ABC's Four Corners investigative report into Don Dale (<https://www.abc.net.au/4corners/australias-shame-promo/7649462>)

<sup>27</sup> Royal Commission announcement into NT juvenile detention (<https://www.abc.net.au/news/2016-07-26/turnbull-calls-for-royal-commission-into-don-dale/7660164>)

<sup>28</sup> Supreme Court case to have deputy coroner removed from inquest into the death of Wayne Fella Morrison (<https://www.abc.net.au/news/2020-04-22/deputy-coroner-to-remain-on-wayne-fella-morrison-inquest/12172176>)

reporting<sup>29</sup>. As these same private operators also run private prisons in other Australian jurisdictions, the same issues are likely to apply to some extent to those as well, although the report does highlight that some states have better reporting and inspection bodies than Victoria does.

You get the behaviour that you incentivise for, in this case cost efficiencies at the expense of the welfare of the prisoners. Custodial agencies have a duty of care to protect prisoners against risks that are reasonably foreseeable and to ensure a standard of care that a reasonable person would regard as reasonable<sup>30</sup> as laid down in the National Report to the Royal Commission into Aboriginal Deaths in Custody, 1991<sup>31</sup>. Despite this, state legislatures such as NSW attempt to legislate this duty of care away<sup>32</sup> or abdicate this duty of care by placing the responsibility in the hands of private operators. Rather than address issues that might lead to a state having to address any liability, their inclination is to insulate themselves from being held accountable for any liability, making recourse of prisoners who suffer from a standard of care that falls short of reasonable, all but impossible. There is little evidence that states accept their duty of care to a reasonable level of prisoners in their custody.

Sadly, the way that the states and territories treat our prisoners is a sad reflection on how our society more broadly views prisoners<sup>33</sup>.

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<sup>29</sup> Victorian audit of private prisons in Victoria 2018 (<https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf>)

<sup>30</sup> RCIADIC Duty of Care (<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/70.html>)

<sup>31</sup> RCIADIC (<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>)

<sup>32</sup> The duty of care to prisoners (<http://classic.austlii.edu.au/au/journals/PrecedentAULA/2007/64.pdf>)

<sup>33</sup> Imprisonment, what do the public really think (<https://theconversation.com/imprisonment-and-its-alternatives-what-do-the-public-really-think-40375>)

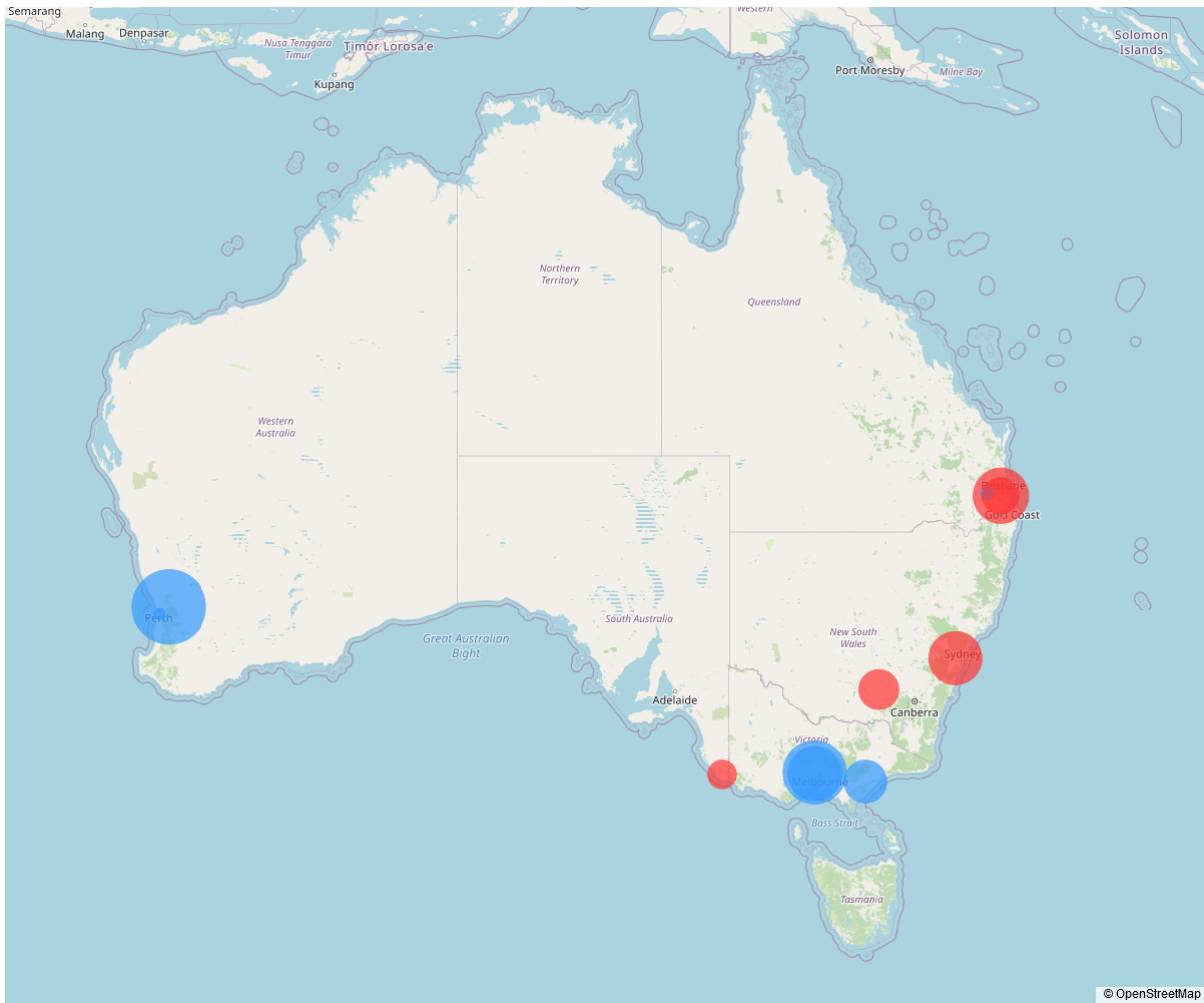


Figure 1 Privately Operated Prisons in Australia – circle size shows relative size of prisons, red circles are overcrowded prisons

## Prison Response to COVID-19, Paying Lip Service

Then along came the novel coronavirus. All state governments moved swiftly to shutdown access to prisons, stopping visitation rights of relatives and prison advocates and posting on their web portals what measures they are undertaking to ensure that prisoners are kept safe during this time of pandemic. In doing so, they have effectively removed any limited oversight of what happens in these institutions and only added to the tensions in prisons<sup>34</sup>. Even if this is a temporary measure, it still does not bode well for the welfare of prisoners. Various jurisdictions and prisons have stated that they are implementing or will implement video conferencing capability for relatives to be able to speak to prisoners, but how much a prisoner may want to divulge of their treatment through this medium with the prospect of their call being monitored, does little to address transparency issues. The access to phone and video calls by prisoners, even to their legal representatives may be constrained as well due to the existing telephony capacity in prisons if Corrections Victoria is anything to go by<sup>35</sup>.

<sup>34</sup> Correctional Centre ‘volatile’ as drug supply dries up (<https://www.abc.net.au/news/2020-05-02/drug-supply-dries-up-in-woodford-correctional-centre-coronavirus/12206488>)

<sup>35</sup> Corrections Victoria phone and video calls to prisoners (<https://www.corrections.vic.gov.au/prisons/professional-phone-and-video-calls-to-prisoners>)



As an additional indication of the lip service that these health measures are as opposed to anything of substance being implemented to really help protect prisoners from COVID-19 infections, the Supreme Court of Victoria at the beginning of May found that Corrections Victoria were failing in their duty of care in implementing the coronavirus guidelines and that circumstances were unhygienic and they had yet to create a COVID-19 action plan<sup>36</sup>. While it is fine in principle for the National Cabinet to agree to guidelines on how to manage COVID-19 in Australia's prisons in line with the 'Communicable Diseases Network Australia National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correction and Detention Facilities in Australia'<sup>37</sup>, it is still up to the individual states and territories to implement. And without adequate oversight and accountability, they have limited incentive to do so. Assurances from the likes of the Minister for Health, Greg Hunt that prison staff are well trained and equipped to handle a COVID-19 outbreak<sup>38</sup> falls short when all of the limited evidence available would tend to indicate that the reality is far different.

Limiting access to visitors may reduce the risk of a COVID-19 infection, but there is still a constant flow of new prisoners into places of detention and staff are still moving between the community and prisons on a daily basis so the degree by which limiting visitors safeguards prisons during the pandemic is questionable.

Once a COVID-19 infection takes off in a prison, it will be extremely hard to contain. The more crowded the prison is, and the less hygienic, the faster it will spread. As such, there has been any number of calls for the government(s) to release prisoners<sup>39,40</sup>. While New South Wales has passed legislation allowing the release of some prisoners, there is no evidence to indicate that any prisoners have been released under this legislation.

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<sup>36</sup> Victorian Government breached duty of care (<https://croakey.org/supreme-court-rules-victorian-government-breached-duty-of-care-to-person-in-prison-in-their-response-to-covid-19-pandemic/>)

<sup>37</sup> Communicable Diseases Network Australia National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correction and Detention Facilities in Australia (<https://www.health.gov.au/resources/publications/cdna-guidelines-for-the-prevention-control-and-public-health-management-of-covid-19-outbreaks-in-correctional-and-detention-facilities-in-australia>)

<sup>38</sup> Health Minister Greg Hunt response to what the government is doing to protect prisoners during the pandemic (<https://www.youtube.com/watch?v=tyu-ZP1Znuk&feature=youtu.be>)

<sup>39</sup> UNODC, WHO, UNAIDS, OHCHR statement on prisons and other closed settings May 13, 2020 (<https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>)

<sup>40</sup> Open letter calling for release of prisoners (<https://www.sbs.com.au/news/hundreds-of-experts-sign-open-letter-calling-for-release-of-prisoners-to-avoid-coronavirus-deaths>)



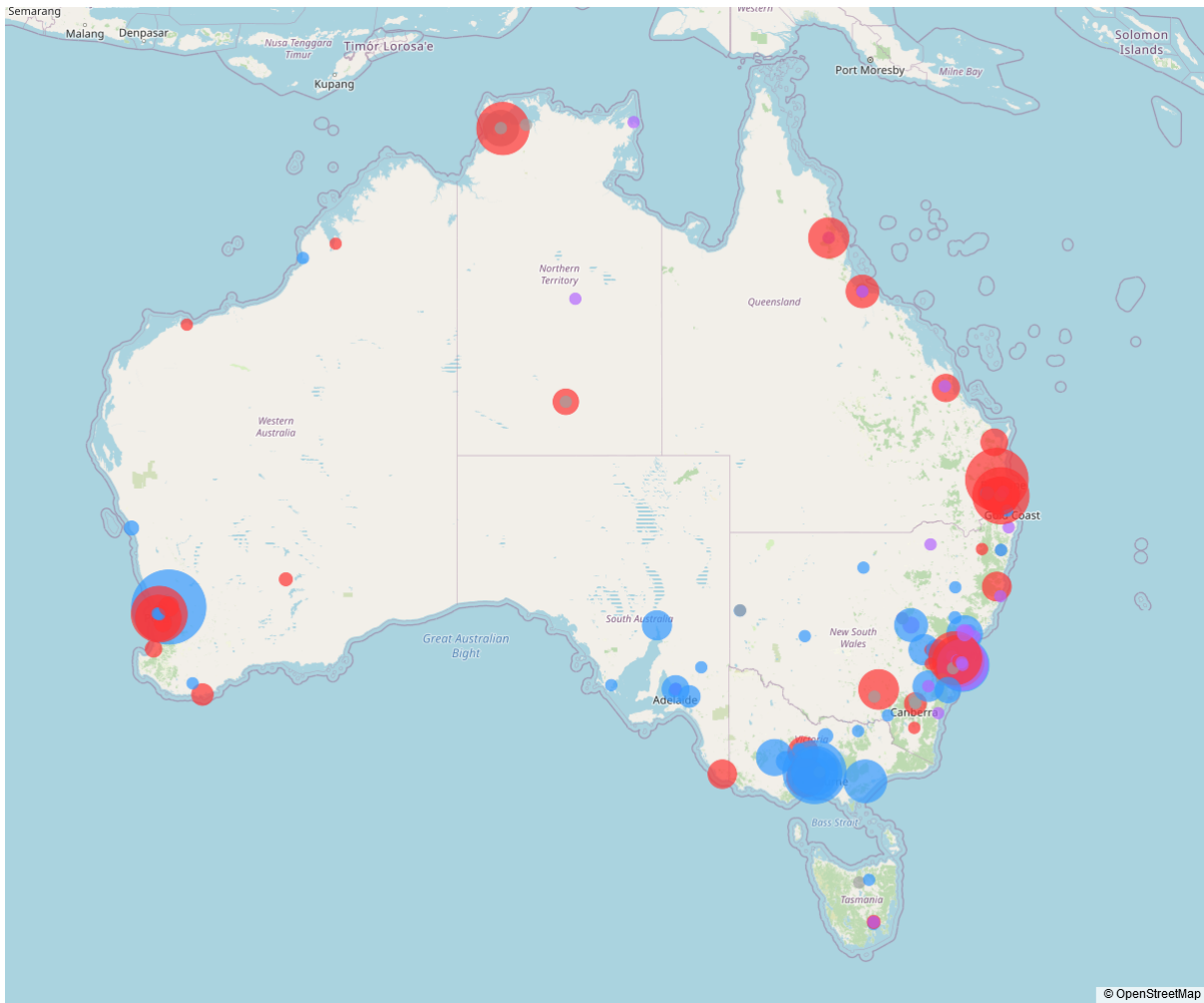


Figure 2 Australian Prisons— circle size shows relative size of prisons, red circles are overcrowded prisons

Combining Wikipedia<sup>41</sup> and ABS<sup>42</sup> data, the above diagram shows the prisons around Australia and their relative sizes. Those that are red are overcrowded prisons. However, as this source information that is dated and partially crowd sourced rather than from an official current data source, it does not provide any indication of how the state and territory governments are addressing the issue of overcrowding during this pandemic, if they have done anything at all.

Both New South Wales<sup>43</sup> and Victoria<sup>44</sup> are building new prisons, but that is not the way out of this high-risk scenario either. Both Queensland<sup>45</sup> and New South Wales<sup>46</sup> have reported cases of staff testing positive to COVID-19. Queensland's response has been to invoke lockdowns of their

<sup>41</sup> Wikipedia List of Prisons in Australia ([https://en.wikipedia.org/wiki/List\\_of\\_prisons\\_in\\_Australia](https://en.wikipedia.org/wiki/List_of_prisons_in_Australia))

<sup>42</sup> ABS Prisoners in Australia 2019 (<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>)

<sup>43</sup> Clarence Valley new prison (<https://www.abc.net.au/news/2020-05-25/australias-largest-jail-to-start-taking-inmates-in-july/12277570>)

<sup>44</sup> Chisholm Road new prison (<https://www.corrections.vic.gov.au/prisons/expanding-victorias-prison-system>)

<sup>45</sup> Program officer tests positive in Wolsten Correctional Centre (QLD) (<https://www.brisbanetimes.com.au/national/queensland/more-than-20-inmates-quarantined-in-maximum-security-brisbane-prison-20200423-p54mp7.html>)

<sup>46</sup> Staff member tests positive at Long Bay Hospital ([https://www.health.nsw.gov.au/news/Pages/20200329\\_01.aspx](https://www.health.nsw.gov.au/news/Pages/20200329_01.aspx))

prisons<sup>47</sup>. Overseas, we are seeing prisons become epicentres for COVID-19 infections, and prison staff are as much at risk as the prisoners<sup>48</sup>. This in turn poses a risk to the family of the prison staff and in turn to the broader communities.

## R<sub>0</sub> in Prisons

The number of people who on average become infected from one infected person with regard to the spread of an infection is referred to as the Basic Reproduction Number (R<sub>0</sub>) which provides an indication of how infectious the disease is. When it is great than 1, then the disease spreads at an ever-faster rate. When it is less than 1, then the disease prevalence is declining and will eventually die out. The value of R<sub>0</sub> can be modified through measures such as distancing, hygiene and if available, vaccinations. The basic R<sub>0</sub> of coronavirus is estimated to be 3.28 and the median is 2.79<sup>49</sup>. In Australia, we have been able to get the R<sub>0</sub> to less than 1. As a loose proxy to R<sub>0</sub> the 'growth factor' can provide an indication of the trend in infections, where the number of new cases is divided by the previous day's cases. This has for the most part been staying below 1 for the month of August<sup>50</sup> following the July outbreak in Victoria.

From what we are seeing in prisons in the US would indicate that in a closed setting of a prison, the R<sub>0</sub> is somewhere between 5 to 10<sup>51</sup>. Like Australian prisons, the US prisons are overcrowded and lack adequate sanitation. But another factor is that the prisons have a significantly high percentage of asymptomatic cases<sup>52</sup>. A couple of reasons for the high percentage of asymptomatic cases could be that the average age of the prison population is younger than the general population and that COVID-19 is infectious for a period of time before symptoms manifest, so it could also partially be in the timing of the testing. While the incubation period ranges from 1 to 14 days with a median incubation period between 5 to 6 days, there are reports that suggest that in some cases the incubation period can be up to 24 days<sup>53</sup>. Even if new prisoners are in isolation for 14 days, and prison staff maintain proper barrier care with full PPE (which there is no indication that they are), there is still the risk that the prisoner may be infectious following the 14-day quarantine and the regular testing of temperature is not a failsafe mechanism by which to detect asymptomatic infections in either prisoners or staff.

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<sup>47</sup> Queensland prison lockdown and prison rioting amid staff shortages (<https://www.abc.net.au/news/2020-09-01/fire-arthur-gorrie-correctional-centre-coronavirus-lockdown-riot/12615726>)

<sup>48</sup> The Marshall Project – monitoring COVID-19 outbreaks in US prisons where the data has been made available (<https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>)

<sup>49</sup> Coronavirus information for clinicians (<https://www.health.gov.au/sites/default/files/documents/2020/03/coronavirus-covid-19-information-for-clinicians.pdf>)

<sup>50</sup> Australia's COVID-19 'growth factor' (<https://www.abc.net.au/news/2020-04-10/coronavirus-data-australia-growth-factor-covid-19/12132478?nw=0>)

<sup>51</sup> Stopping covid-19 behind bars was an achievable moral imperative. We failed. (<https://www.washingtonpost.com/opinions/2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/>)

<sup>52</sup> In four US prisons 96% test positive without symptoms (<https://www.reuters.com/article/us-health-coronavirus-prisons-testing-in-idUSKCN2270RX>)

<sup>53</sup> Coronavirus information for clinicians (<https://www.health.gov.au/sites/default/files/documents/2020/03/coronavirus-covid-19-information-for-clinicians.pdf>)

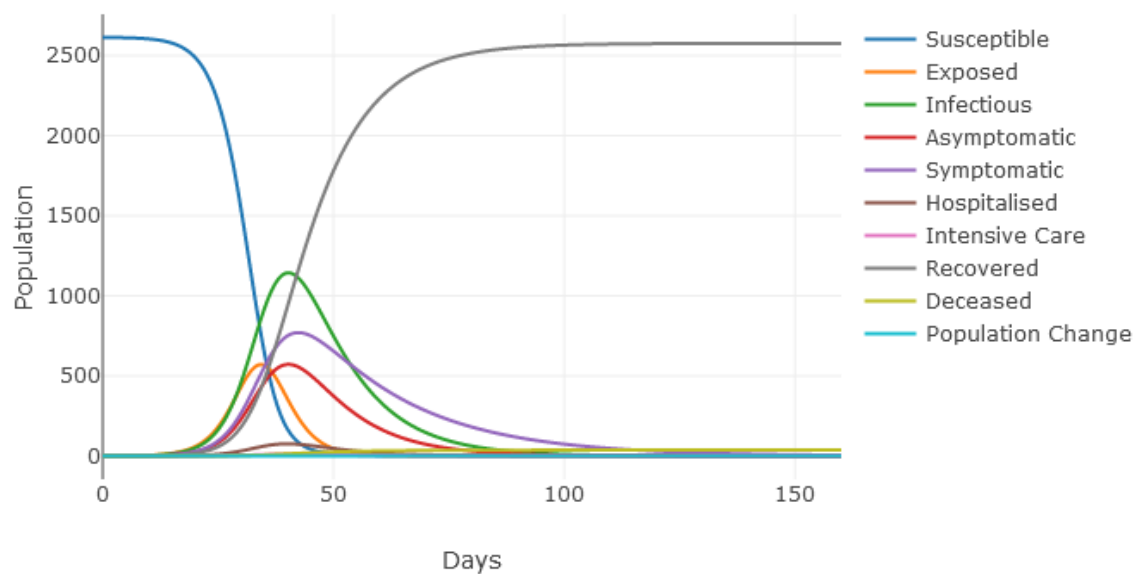


Figure 3 SEIR Infection Model – Population approximately 1,500 prisoners and 1,000 staff,  $R_0$  7.5

A prison such as Acacia Prison in Western Australia with over 1,500 prisoners would take less than a couple of months for COVID-19 to spread through the entire prison population including both staff and prisoners if we model it like the events that have occurred in the US. As it can take between 2 – 3 weeks before an outbreak is detected, it would already be well advanced through the prison and hard to contain by the time the first infections are detected. During this time, prisoners will be completing their sentences and being released, potentially infected by the time that they leave, to infect the families and communities that they are returning to, while staff will be moving between the prison, family and community, infecting others before they are aware that they have an infection themselves.

This is a worst-case type model, and subject to the measures that are implemented, an outbreak in a prison may play out differently. But projections such as these are useful to inform what would likely happen if nothing is done.

## The Minority Risk

An additional complication of the prison population are the comorbidities of the prisoners and age of the prison staff. As the rate of these risk factors are higher in prisons than in the general population, prisons run the risk of having higher mortality rates from COVID-19 than what has been seen in the general population.

People with disabilities represent 50% of the prison population compared to 18% of the general population<sup>54</sup>. Many of these prisoners that have disabilities have some psychosocial disability such as a mental health condition or a cognitive disability and have limited ability to call attention to the way that they are abused and neglected in the prison system and may also struggle to understand changes to routine that COVID-19 measures have wrought.

<sup>54</sup> Human Rights Watch. Australia: Prisoners with Disabilities Neglected, Abused (<https://www.hrw.org/news/2018/02/06/australia-prisoners-disabilities-neglected-abused>)

Indigenous people the world over are being disproportionately impacted by COVID-19. In Australia, the Aboriginal and Torres Strait Islander people were particularly hard hit from the Spanish Flu of 1919, with one of the most significant outbreaks of the pandemic in the world occurring in Cherbourg, Queensland<sup>55</sup>. Consequently, Indigenous communities across Australia were put into lockdown<sup>56</sup>. The Indigenous Peoples of Brazil are dying at twice the rate of the rest of the Brazilian population<sup>57</sup>. In the US, Native Americans are dying at almost three times the rate of the rest of the population in their state<sup>58</sup>.

It is not just Indigenous First Nations people whose populations are more impacted than the general population. Black, Asian, and Minority Ethnic (BAME) populations are also disproportionately impacted<sup>59</sup>. And this is regardless of country, whether in the US, UK, or Norway. COVID-19 is the gift of the rich jet setters to the poor and disenfranchised of the world. The poor cannot self-isolate, are more likely to be working face to face jobs, have poorer diets, poorer health, less access to health services, and more comorbidities.

As the prison population's Indigenous representation is significant, the potential impact to the broader Indigenous community through a prison outbreak of COVID-19 and the corresponding deaths will be felt much more, even if the raw numbers of Indigenous deaths end up being less than non-Indigenous deaths.

The cause of this high Indigenous incarceration rate has been discussed in many other places, but at its heart lies a systemic cultural institutional racism that we collectively attempt to deny, as much as it takes up the road in front of us. It starts with the Karen's<sup>60</sup> of the world and carries on right through the entire judiciary<sup>62</sup>, health<sup>63</sup>, and education systems, compounded by the lack of employment opportunities<sup>64</sup> and the people we vote for<sup>66</sup>. The law is not executed impartially, it is

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<sup>55</sup> Likely mass graves uncovered in Queensland town of Cherbourg decimated by Spanish influenza (<https://www.abc.net.au/news/2019-12-07/hunt-for-mass-graves-in-queensland-community-hit-by-spanish-flu/11770652>)

<sup>56</sup> Cherbourg, devastated by Spanish flu, among Indigenous communities in COVID-19 lockdown (<https://www.abc.net.au/news/2020-04-01/indigenous-communities-lockdown-during-coronavirus/12107254>)

<sup>57</sup> Report: Brazil's indigenous people are dying at an alarming rate from COVID-19 (<https://edition.cnn.com/2020/05/23/world/coronavirus-indigenous-death-apib-intl/index.html>)

<sup>58</sup> Native Americans being left out of US coronavirus data and labelled 'other' (<https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data>)

<sup>59</sup> Coronavirus: BAME deaths urgently need to be understood, including any potential genetic component (<https://theconversation.com/coronavirus-bame-deaths-urgently-need-to-be-understood-including-any-potential-genetic-component-138400>)

<sup>60</sup> Too strong for you Karen (<https://www.sbs.com.au/news/mildura-woman-attempts-to-tear-down-aboriginal-flag-in-viral-video>)

<sup>61</sup> Woman calls police (<https://www.abc.net.au/news/2020-05-27/woman-loses-job-after-dog-leash-confrontation-central-park/12289656>)

<sup>62</sup> Death in Custody (<https://www.theguardian.com/australia-news/2020/jun/11/deaths-inside-how-we-track-indigenous-deaths-in-custody-and-why-we-do-it>)

<sup>63</sup> Naomi Williams (<https://www.abc.net.au/news/2019-07-29/naomi-williams-tumut-sepsis-death-inquest-findings/11355244>)

<sup>64</sup> AIHW Indigenous Australians (<https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>)

<sup>65</sup> Indigenous Policing and Arrests (<https://aic.gov.au/publications/rpp/rpp107/data-policing-and-arrests>)

<sup>66</sup> PM Scott Morrison denies Australian history of slavery (<https://www.theguardian.com/australia-news/2020/jun/12/scott-morrison-sorry-for-no-slavery-in-australia-claim-and-acknowledges-hideous-practices>)

executed with half a blind eye to the dominant power, and with a thumb pressing down on the scales of justice to the disadvantage of those not in the right social or racial class.

With many state borders and Indigenous communities across Australia in lockdown, this imposes a challenge for many Indigenous prisoners early release with no place to go. With existing high rates of recidivism, without additional supports, releasing prisoners early may just lead to them returning to prison sooner rather than later. The states and territories need to step up to their duty of care, not just to consider the impacts of keeping them in prison, but also in providing additional supports to facilitate the early release of those that merit it.

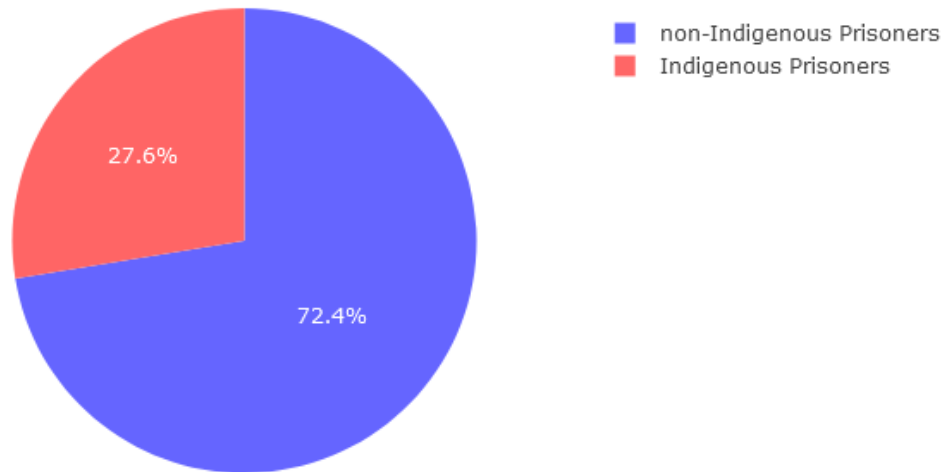


Figure 4 Prisoner Indigeneity Ratio

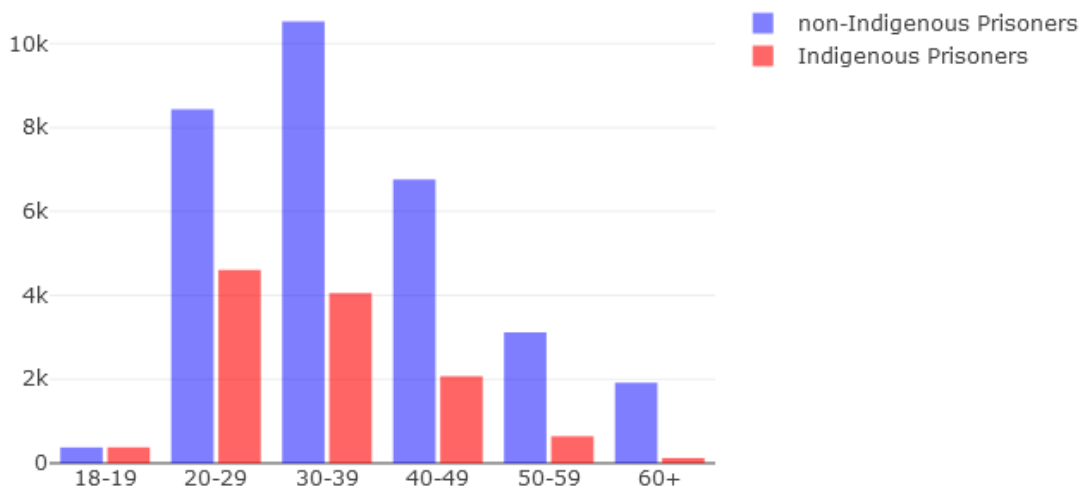


Figure 5 Prisoners by Age

While non-Indigenous prisoners outnumber Indigenous prisoners, the Indigenous population only accounts for 3% of the Australian population. Yet Indigenous people are disproportionately incarcerated<sup>67</sup>.

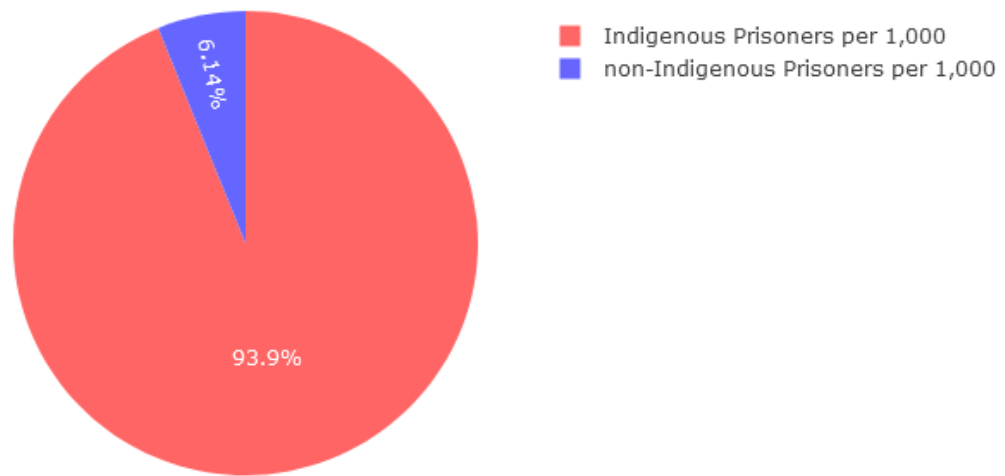


Figure 6 Prisoner per 1,000 Indigeneity Ratio

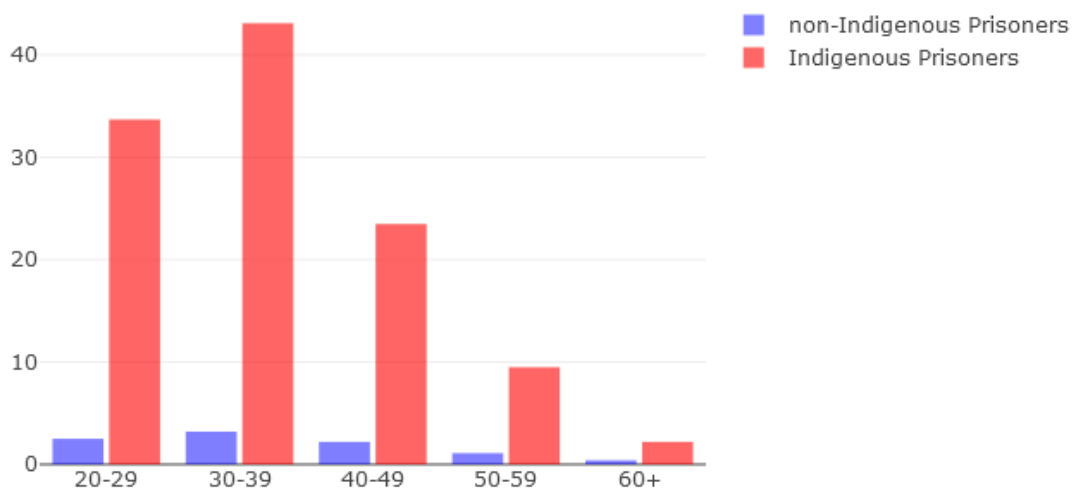


Figure 7 Prisoners per 1,000 of Population

<sup>67</sup> ABS 2019 (<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>)

Almost 5% of the adult male Indigenous population is in custody<sup>6869</sup>. Even if Indigenous deaths in custody were to be at the same or lower rate than non-Indigenous prisoners, it is still too high. If Indigenous people were in custody at the same rate as everyone else and only accounted for 3% of the prison population, statistically there should have been less than one Indigenous death in custody since the royal commission. The 437<sup>70</sup> deaths in custody and counting since 1991 are 437 too many. If COVID-19 hits the prisons, every additional Indigenous death will be one too many.

One of the reasons for COVID-19 having a greater impact on First Nations and BAME populations are the higher rate of chronic illnesses in these populations that are known to contribute to worse outcomes with COVID-19.

Chronic Illnesses in Prison Population by Indigeneity

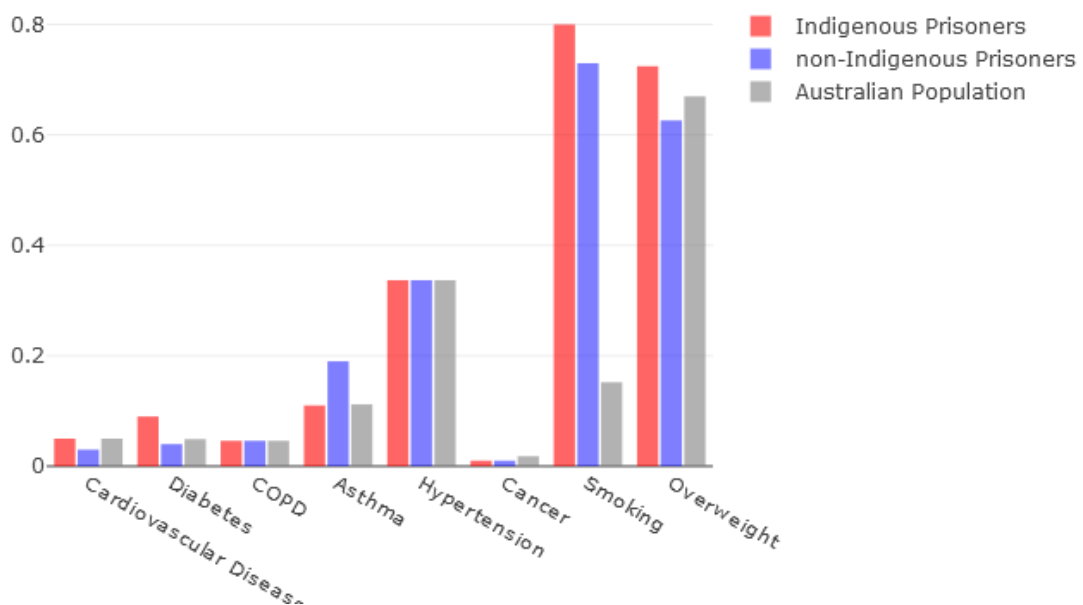


Figure 8 Percentage of Prisoner Population with Chronic Illnesses by Indigeneity

Unfortunately, there is no information available on the prevalence of COPD or hypertension in the Australian prison population, in common with the paucity of data available on most things related to prisons. As such, the above diagram shows the general Australian population rates of these comorbidities.

The prison population is also predominantly male. Males have a higher morbidity with COVID-19 than females, so an outbreak of COVID-19 in a prison is even more likely to have a higher death rate than in the general population.

<sup>68</sup> ABS March 2020

(<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4512.0Main+Features1March%20Quarter%202020>)

<sup>69</sup> Australian Indigenous incarceration rates compared to US

(<https://www.theguardian.com/business/grogonomics/2020/jun/07/no-australia-is-not-the-us-our-shocking-racial-injustice-is-all-our-own>)

<sup>70</sup> 437 deaths in custody (<https://www.theguardian.com/australia-news/2020/jun/09/black-lives-matter-protesters-referred-to-our-count-of-432-aboriginal-deaths-in-custody-its-now-437>)



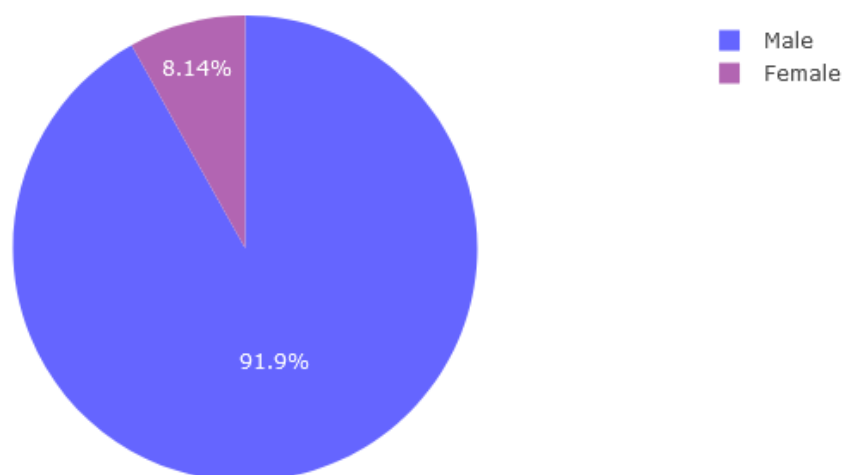


Figure 9 Prisoner Sex Ratio

It is also telling that ABS prisoner stats only provides gender binary numbers.

## Prisons – Infection Vector for the Broader Community

In addition to the risk factors inherent in the prisoner population itself, the staff is 59% male with an average age of 45 years and 38% are over the age of 50 with 15% of staff casual workers<sup>71</sup>.

As staff fall sick, the default behaviour in prisons when understaffed is to lockdown the prisons<sup>72</sup>. The ability to manage an illness of this magnitude in a prison environment when dealing with significant sick leave among the staff is likely to lead to detrimental outcomes for both prisoners and staff as seen with Brisbane’s Arthur Gorrie Correctional Centre<sup>73</sup>.

Much has been said elsewhere of the need to address any number of egregious cultural practices in prisons and to prepare better for COVID-19. While the state authorities and federal government go through the motions to assuage the public that they are doing the right thing by the prisoner population, anecdotal evidence from prisoners and review findings from a Supreme Court shows that no real preparation has occurred. If a prison does become the epicentre of a COVID-19 outbreak, it is not just the prisoners and staff who will feel the effects, it runs the risk of affecting all of us as that outbreak seeds the rest of the population. We only need to cast our eyes overseas to see how devastating an infection in a place of detention can be.

<sup>71</sup> Corrections Key Findings 2018 (<http://www.australianindustrystandards.org.au/wp-content/uploads/2018/02/Corrections-Key-Findings-Paper2018V6Web.pdf>)

<sup>72</sup> Victorian Ombudsman OPCAT Investigation September 2019 (<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/opcat-in-victoria-a-thematic-investigation-of-practices-related-solitary-confinement-of-children-and-young-people/>)

<sup>73</sup> Arthur Gorrie Correctional Centre riots (<https://www.abc.net.au/news/2020-09-01/fire-arthur-gorrie-correctional-centre-coronavirus-lockdown-riot/12615726>)

## Conclusion

Places of detention should be regularly reporting on their compliance to performance and safety metrics and providing near real-time incident and population metrics to the public. They should be subject to regular independent inspections as per Australia's OPCAT obligations and held accountable to the findings of these inspections.

Until then, these institutions will continue to freely perpetuate cruel, inhuman and degrading treatment on some of our most vulnerable members of society. It is imperative that we lift the veil of secrecy behind which our places of detention hide, and while keeping in mind a person's right to privacy, make available in the public domain as much information as possible, holding places of detention, staff, and operators accountable for their actions.

Hopefully, we will begin to see changes once the NPMs are created by December 2020. At this stage, it is unclear if all states will make this date, so it is important that this is pushed forward with the various states to ensure that it does happen. This is just one small, but significant step forward. Opening the data, including the findings of all NPM reviews and the accountability and actioning of the review findings is also a fundamental requirement to be able to make progress.

Healthy democracies are built on transparency and accountability. To this end, our governments should be opening up their data in a timely manner to facilitate data democratisation<sup>74</sup> and in turn making institutions accountable. Until we achieve this, we all become unwitting accomplices in the ongoing transgressions visited on the most vulnerable in our society, making a mockery of the view that Australia is the land of the 'fair go'<sup>75</sup>.

But in that too, we must be open to what the data tells us and be open to change. We all benefit when we can accommodate diversity and treat others with respect. And even if we come at this from a purely self-interested perspective, emptying prisons of people who pose no harm to society significantly reduces the risk of community transmission of COVID-19 to ourselves, and having Indigenous people contributing to society rather than incarcerated by society at taxpayer expense, is a win-win for everybody.

Maybe now is the time that our society is willing to accept greater responsibility for our behaviours, past and present, and maybe it is a moment when real change can begin to happen, and we start to become more honest with ourselves in the way we treat the lowest among us.

However, if this change does not translate into real outcomes soon, COVID-19 will be yet another indelible stain on this country's soul, as COVID-19 feasts off political inaction<sup>76</sup>. Once it takes hold in our prisons, it will spread like wildfire through the prison population, disproportionately impacting the Indigenous peoples of Australia over whom we have punitively imposed our custodial duty of care.

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<sup>74</sup> Explanation of the term data democratisation of government public data

(<https://www.cio.com/article/3088653/the-democratization-of-public-data-and-analytics-tools.html>)

<sup>75</sup> An Australian 'fair go' (<https://theconversation.com/in-australia-land-of-the-fair-go-not-everyone-gets-an-equal-slice-of-the-pie-70480>)

<sup>76</sup> The WHO at the time of declaring COVID-19 a pandemic March 11, 2020, expressing their concern of the "alarming levels of inaction" (<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>)

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# #JusticeCOVID

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