

SECOND NATIONAL OPEN LETTER TO AUSTRALIAN GOVERNMENTS ON COVID-19 AND PRISONS AND YOUTH DETENTION CENTRES

We the undersigned are again seeking your immediate action to reduce the risk of transmission of COVID-19 in the Australian criminal justice system, especially prisons and youth detention centres. This requires **INFORMATION, INDEPENDENT MONITORING AND RELEASE**.

This national open letter has been produced in consultation with and with contributions from a range of national stakeholders, including the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and Keeping Women Out of Prison Coalition (KWOOP). The ANNEXURE to this letter summarises the human rights and community protection issues arising from the COVID-19 pandemic in relation to people in Australian prisons and youth detention centres (YDC).

This national letter makes FIVE calls to decision-makers in criminal and penal justice:

1. Programs of testing, diagnosis and public health measures (including the provision of personal protective equipment) to be immediately implemented in all prisons and YDC.
2. Hospitalisation/urgent medical treatment of any person in prison or YDC (or police custody) who has COVID-19 symptoms. Families and ATSILS/Custody Notification Service (CNS) to be immediately notified of the symptoms, hospitalisation and treatment.
3. Ongoing and publicly available information on the COVID-19 testing, diagnosis and public health measures in prisons and YDC (without compromising private health information). This should particularly be made available to people in prison, their families, lawyers and the courts (to enable informed bail and sentencing decisions).
4. Independent monitoring by health and criminal justice experts of COVID-19 responses across prisons and YDC.
5. The current information is that there is a risk to life and health in prisons and YDC, which in turn creates risks for the wider community. This requires every State and Territory to legislate for immediate release, where it is safe to do so. Priorities for release should be:
 - a. Aboriginal and Torres Strait Islander people – consistently identified as one of the most vulnerable groups.
 - b. The vulnerable, including the elderly; peoples who are victims of domestic violence, coercive control and human trafficking; and those with additional health issues such as immunosuppression, respiratory illness and hypertension, addiction and/or mental health.
 - c. Women.
 - d. Children.
 - e. Those serving sentences of less than 6 months or with 6 months or less remaining.
 - f. Unsentenced people in prison.

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Grata Fund
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 Fitzroy Legal Service
 Sisters Inside
 Australian Lawyers for Human Rights
 National Justice Project
 Winnunga Nimmityjah Aboriginal Health and Community Services Ltd
 Caxton Legal Centre Inc
 SHINE for Kids
 Keeping Women Out of Prison Coalition
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ANNEXURE TO SECOND OPEN LETTER CALLING FOR PRISONER INFORMATION, MONITORING AND RELEASE

On 25 March 2020, the [UN High Commissioner for Human Rights, Michelle Bachelet](#), called on [governments](#) to take urgent action to protect the health and safety of people in detention and other closed facilities, as part of overall efforts to contain the COVID-19 pandemic.

Principle 9 of the [United Nations Basic Principles for the Treatment of Prisoners](#) makes it clear that “[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation”.

According to the 2020 Productivity Commission [Report on Government Services](#), the current average daily prison population is 43,115. At 384.2 per 100,000 of the population, Australia’s incarceration rate is [well above the OECD average](#) and [growing](#). Aboriginal and Torres Strait Islander peoples make up just 2 percent of the population, but they represent 28 percent of the full-time adult prison population. In YDC, the [figures are much higher](#). The [Public Health Association of Australia](#) states that:

Prisoners have poorer health than the general community, with particularly high levels of mental health issues, alcohol and other drug misuse, and chronic conditions. They are a vulnerable population with histories of unemployment, homelessness, low levels of education and trauma.

PROPORTIONATE RESPONSES TO COVID19

Australia is a party to the seven core international human rights treaties and, as such, has voluntarily accepted binding legal obligations under international law to protect the rights expressed therein, including:

- an inherent right to life;
- a right to the highest attainable standard of physical and mental health;
- an obligation to ensure that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and
- a right to liberty of movement, albeit subject to necessary and proportionate restrictions in relation to public health. Those restrictions are currently the subject of a range of Commonwealth and State/Territory emergency and extraordinary powers.

There is a clear need to mitigate risk to public health from COVID-19. People in prison and the wider community will be affected if prisons and YDC become clusters of infection. There also needs to be accurate public health **information** on responses (testing, diagnosis and public health measures) in place for people in prisons and YDC. Axiomatically, this requires **monitoring systems**. For **courts dealing** with bail hearings or those awaiting sentence, evidence of these responses is relevant for judicial consideration and for administrative decisions on releasing people from prison.

Risks can be reduced by police limiting the number of people who are arrested and then detained, and by prosecutors using their discretion to limit the number of people who are prosecuted and reduce requests for pretrial detention. With a special focus on populations who are vulnerable, prosecutors should also institute a review-and-release protocol in cases where bail was sought. This does not mean there should be a blanket restriction on all court activity, as this will needlessly prolong people's cases and exacerbate the stigma and harm associated with having an open case. Procedures in prisons and YDC must include, at a minimum: screening and testing of people for COVID-19, based on the most up-to-date information available; and access to medical care and facilities to self-isolate and exercise social distancing. This should not result in prolonged, wide-spread lock-downs.

This should come with a heightened focus on identifying vulnerable populations who can be immediately released. Parole Boards should expedite and expand release opportunities for incarcerated people, reducing the populations in prisons as is recommended by health experts. Such measures play a powerful role in stopping the spread of COVID-19 and limiting the harm it inflicts on communities. Decreasing the numbers of incarcerated populations creates a culture in which transparency, safety, and the health of all people are the paramount concerns.

WORLD HEALTH ORGANISATION GUIDANCE ON HEALTH IN PRISONS AND YDC

On 15 March 2020, the World Health Organisation (WHO) published [interim guidance on preparedness, prevention and control of COVID-19 in prisons, YDC and other places of detention](#). It includes the following introduction:

People deprived of their liberty, such as people in prisons and youth detention centres and other places of detention are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time. Moreover, experience shows that prisons and youth detention centres, jails and similar settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons and youth detention centres. Prison health is therefore widely considered as public health. The response to COVID-19 in prisons and youth detention centres and other places of detention is particularly challenging, requiring a whole-of-government and whole-of-society approach.

The rationale for a whole-of-government and whole-of-society approach is set out and includes the following:

People deprived of their liberty, such as people in prisons and youth detention centres, are likely to be more vulnerable to various diseases and conditions. The very fact of being deprived of liberty generally implies that people in prisons and youth detention centres and other places of detention live in close proximity with one another, which is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19. In addition to demographic characteristics, people in prisons and youth detention centres typically have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.

COVID19 is not an excuse for reducing any human rights protections; the WHO guidance stipulates that the COVID-19 outbreak “must not be used as a justification for undermining

adherence to all fundamental safeguards incorporated in the United Nations Standard Minimum Rules for the Treatment of Prisoners”, including the prohibition on torture and any cruel, inhuman or degrading treatment or punishment, obligations relating to restrictions on solitary confinement, and appropriate provision of health-care.

Further, the COVID-19 outbreak must not be used as a justification for objecting to external inspection of prisons and other places of detention by independent international or national bodies.

Basic measures required within prisons and YDC include the following:

1. Provision of accurate and up-to-date information about COVID-19 and the health risks with transparency about any measures taken.
2. Access to legal and welfare support via free telephone calls, with support to legal and welfare services to triage and refer the calls.
3. As much as possible, single accommodation should be provided, at the very least for anyone who may be more at risk of contracting the virus (e.g. due to age or condition of health).
4. Newly-admitted prisoners should be immediately screened for fever and lower respiratory tract symptoms and if they exhibit such symptoms, they should be immediately isolated.
5. Anyone exhibiting COVID-19 symptoms should be isolated and provided with appropriate medical care. When putting someone in isolation, a full and proper explanation as to why this is occurring is needed. Offers to contact a third party should be made.
6. There is an increased need for emotional and psychological support for anyone who is in isolation since people in prison experience this very differently to members in the general community.
7. Those who are in isolation need to be assured that they will have access to some form of contact with families and friends.
8. Isolation should only occur if it is medically necessary and care is needed so that people in isolation are not stigmatised or marginalised by others in the prison.
9. Even if someone is in isolation, they should be provided with social contact via video link or other form of telecommunications.
10. There should be no torture or cruel, inhuman, or degrading treatment of anyone in the prison during the COVID-19 crisis.
11. All prison and YDC staff need to be provided with appropriate COVID19 training and resourced to ensure testing, diagnosis and public health measures are maintained.
12. Prisons must still allow external independent inspectors / monitors to access the prison either remotely through virtual tour (such as facilitated by mobile devices) or in person, depending on safety issues.
13. Prison staff need to work together with health care professionals more than ever.
14. A suitable register of people coming in and out of prison needs to be maintained with notification of infection procedures.
15. Air flow in enclosed spaces needs to be safe.
16. Food should be distributed in rooms or cells rather than in common canteen areas. This should also apply to other items distributed to people in prison (such as medicines).
17. Prisons and YDC need to manage the number of people who are congregated in any area (inside or outside) so as to limit numbers.
18. People in prison should be given an adequate supply of soap and water and regularly changed personal towels.
19. Aboriginal and Torres Strait Islander people in prison, in particular, need arrangements for family and cultural contact.

WHO GUIDANCE ON INFORMATION

The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has found that prolonged medical isolation creates feelings of anger, fear, self-blame, depression and suicide. Such feelings are [amplified in prisons and YDC](#). In situations of deprivation of liberty, private and family life is already subject to restriction. Prison authorities must assist people in prison and YDC to maintain contact with family.

The information from corrections agencies does not appear to be consistent across Australia's States and Territories or with the WHO guidance. Whilst there may be local variations, these need to be justified and the reasons for such decisions visible for governments to assess the continuing risk in each prison and for courts to assess whether it is safe to remand or sentence an individual.

The [WHO guidance for risk communication](#) is as follows:

In an event such as the COVID-19 outbreak, it is crucial that there is good coordination between the teams at national and subnational levels involved in risk communication. Close contacts must be established to ensure rapid clearance of timely and transparent communication messaging and materials in such crisis situations. Key messages for people in prison and other places of detention, custodial staff, health-care providers and visitors must be coordinated and consistent.

To address language barriers, translation or visual material may be needed. Information resources for custodial and health-care staff, visitors, vendors and detained persons, such as short information sheets, flyers, posters, internal videos and any other means of communication, should be developed and placed in prison common areas and in areas designated for legal visits and family visits.

Consideration should be given to how messages about risk can be delivered quickly. This should include:

- (1) access to custody notification service, without exemption or delay – COVID-19 powers should not be used as an excuse to deny access to information;
- (2) an overall assessment of the local risk (community risk and risk within the prison);
- (3) advice on preventive measures, especially hand hygiene practices and respiratory etiquette;
- (4) advice on what measures to adopt if symptoms develop;
- (5) information about disease signs and symptoms, including warning signs of severe disease that require immediate medical attention;
- (6) advice on self-monitoring for symptoms and signs for those travelling from or living in affected areas, including checking their temperature;
- (7) advice about how to access local health-care if necessary, including how to do so without creating a risk to health-care workers;
- (8) information that wearing a face mask is recommended for people who have respiratory symptoms (e.g. a cough), but it is not recommended for healthy people. WHO's advice for the public about COVID-19, including information about the myths that surround it, should also be consulted.

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (OPCAT) STYLE MONITORING OF PRISONS AND YDC

In Australia, there appears to have been a lack of preparedness within the prison estate to deal with the current crises. Several jurisdictions, including the Northern Territory are only just providing written guidance, and monitoring systems that are universally accepted under OPCAT have not been implemented. Nonetheless, there are some apparent efforts on foot, including legislation from the NSW Parliament on 24 March 2020, allowing for early releases for vulnerable populations.

Continued independent monitoring of the operation of prisons and YDC, and their response to COVID-19, is essential. The Australian Government ratified OPCAT in December 2017, and opted to seek an extension of three years to allow it to implement the Treaty across Federal, State and Territory jurisdictions. The key obligation that arises from ratifying OPCAT is the establishment of a system of regular preventive visits by independent bodies, known as National Preventive Mechanisms (NPMs). Article 3 of OPCAT states that “Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment”. The Commonwealth Ombudsman has been nominated as the NPM Coordinator responsible for facilitating and coordinating the Commonwealth, State and Territory NPMs, a role which will include [collecting information and facilitating information sharing and preparing reports](#). The Ombudsman has also been designated as the NPM for inspecting places of detention under the control of the Commonwealth, which are primarily immigration detention facilities. Prisons and YDC fall within the authority of States and Territories. Only Western Australia has currently nominated a State NPM, but all States and Territories have existing monitoring bodies, such as the Ombudsman office, Commission for Children and Young People, and Prisons Inspectorate. Monitoring of the COVID-19 testing, diagnosis and public health measures is therefore entirely possible within existing mechanisms in Australia and can be applied in an OPCAT style.

The present circumstances have affected monitoring activities. Mindful of the do-no-harm principle, the [UN Subcommittee on Prevention of Torture](#) (SPT) and some international NPMs have suspended visits in their jurisdictions, while other NPMs have decided [to monitor quarantine facilities](#). These bodies have a mandate to monitor what is happening wherever people are deprived of their liberty, and are thus in a privileged position to identify warning signs and prevent abuse. Australian monitoring bodies must continue to carry out these tasks. In emergency situations, such bodies have a key role to play in assessing and recommending measures to prevent and contain the virus while respecting human rights and dignity. Even under such pressure as the current COVID-19 pandemic, authorities cannot let fear of contagion jeopardise the human rights of those deprived of liberty.

In the absence of effective information or monitoring or where information and monitoring shows that there is a risk to public health in and from prisons and YDC, authorities must revert to non-custodial alternatives to prevent further contamination.

Basic monitoring questions which could be answered immediately by prisons and YDC include:

1. Publishing a copy of any existing COVID-19 safety plan for each prison and YDC and any existing policies and procedures directed at preventing/reducing the spread, control and management of COVID-19 or other communicable diseases in prisons and YDC.
2. Publishing the details of measures being taken to allow for self-isolation, social distancing and access to fresh air.
3. Providing effective sanitiser to each person in prison/YDC.

4. Identifying how many people in prisons are over 60 or otherwise vulnerable to severe health impacts and increased risk of death from COVID-19, including those who have other vulnerabilities, such as a history of being a victim of domestic violence or trafficking, addiction and/or mental health issues.
5. Publishing details of the health and medical care, treatment and facilities, particularly hospital facilities, available, including in regional prisons (transport, beds, ventilators etc).
6. Facilitating personal visits and communication with family, lawyers and cultural or religious connections, and ensuring isolated people in prison can contact others in the prison, advocates, the Ombudsman, medical services, family and friends.
7. Publishing the alternatives that will be available to replace in-person reporting on parole, community corrections and other orders, given that travel and face-to-face contact is generally not possible under current public health guidelines.

PARTICULAR GROUPS

Vulnerability to COVID-19 generally

According to the Center for Disease Control and WHO, older adults and people of any age with serious chronic medical conditions – such as heart disease, lung disease, diabetes or conditions which are the consequences of addiction or who are otherwise immuno-compromised – are at higher risk for contracting and suffering serious harm from COVID-19. Public health experts clearly state that preventing the harm from COVID-19 can become immensely more difficult for people involved in the criminal justice system. Being arrested and detained, incarcerated, or forced to appear in public spaces or having mobility limited even while home, can drastically limit a person’s ability to exercise any precautions or to seek medical help.

Many prisons and YDC exceed design capacity and suffer from a stream of changing communities from those serving short sentences, contributing to the public health risks.

Prescribed physical separation is impossible in the prison’s crowded conditions and isolation can have a significant effect on mental health.

This is also an opportunity to implement new health policies, such as moving addiction policy to treatment in the community.

Special consideration needs to be given to Aboriginal and Torres Strait Islander people in prison

The ongoing impacts of colonisation, land dispossession and family separation mean that Aboriginal and Torres Strait Islander people are already experiencing the worst impacts of inequitable health. The Commonwealth’s Chief Medical Officer has identified Aboriginal and Torres Strait Islander people as more vulnerable to contracting COVID-19. This is due to “[a higher risk from morbidity and mortality during a pandemic and for more rapid spread of disease, particularly within discrete communities](#)”.

Aboriginal and Torres Strait Islander people make up 28% of the imprisoned adult population, but only 2% of the national population. This over-representation is far higher for Aboriginal and Torres Strait Islander women and children. This is due to a range of systemic factors including [over-policing, discrimination, lack of access to legal services, socio-economic factors such as housing, child removal, mental health, family violence](#). Many Aboriginal and Torres Strait Islander people in prison have a disability, [with 73% of imprisoned men and 86% of imprisoned women reporting at least one diagnosed psychosocial disability, like mental illness](#).

It is clear that Aboriginal and Torres Strait Islander people in prison will be more vulnerable to contracting and dying from COVID-19. Aboriginal and Torres Strait Islander people are already far more likely to die in custody than non-Aboriginal and Torres Strait Islander people: [there have been over 424 Aboriginal deaths in custody since the Royal Commission into Aboriginal Deaths in Custody](#). Lack of adequate medical care is a factor in far too many of these deaths. NATSILS has heard disturbing reports of access to life-saving Custody Notification Services being denied during the COVID-19 pandemic. It is absolutely critical that all governments take action to prevent COVID-19 related Aboriginal and Torres Strait Islander deaths in custody. Cultural protocols and consultation should be undertaken with, and support provided to, Aboriginal and Torres Strait Islander communities before early return of community members occurs.

Children

While children appear to be spared the worst symptoms of COVID-19 (though **not** those with pre-existing vulnerabilities like those in the youth detention population), the prevailing wisdom is that they are efficient transmitters of the virus, that is, [super spreaders](#). This is in part due to the increased difficulty in ensuring children and young people comply with behavioural changes such as self-distancing measures or handwashing. The cohort of young people in detention who are more likely to have mental illness, cognitive impairment, FASD and other behavioural difficulties are likely to find it [harder than most to comply with these directives](#). This, combined with enclosed, inadequately sanitised, and overcrowded conditions make many YDC high risk environments for the transmission of COVID-19 amongst detainees and staff, and therefore the broader community

Global uncertainty and anxiety about COVID-19 affects all members of our community, but children in detention separated from their families and support networks are at particular risk of mental harm. Children and young people in detention already experience [extremely high rates of co-morbid health problems and mental disorders](#) and [Aboriginal and Torres Strait Islander young people are at even higher risk of self-injury and suicide](#). Similarly, we expect extremely negative impacts on the mental health and wellbeing of the families of these young people if they are unable to reunited during these difficult times.

Immediate efforts should be made to release these children and young people wherever possible. If these children and young people are not released, there is a very real risk that they will be subjected to conditions of separation, isolation and restriction within YDC if COVID-19 enters the youth detention system, in a belated bid to contain the virus. This poses extreme risk to the mental health and wellbeing of these children. The above signatories are concerned that efforts to control COVID19 including separating detainees, putting detainees in isolation and limiting social interaction and visits will have potentially long- lasting negative impacts on the mental health and wellbeing of these young people.

Emergency measures specific to children include:

- Granting temporary leave to young people who have suitable family or alternative accommodation.
- Prioritising bail for children and young people who are on remand.
- Expediting youth parole board hearings to release children and young people to suitable family or alternative accommodation.
- Enacting legislative changes necessary to release sentenced children and young people early.
- Enacting necessary legislative changes to state and territory bail acts to reduce the number of children on remand due to breaches that do not constitute new offending.
- Making specific provision to move Aboriginal and Torres Strait Islander children out of YDC and on country.

Women

The compassionate and sensible legislation from the NSW Parliament on March 24, 2020 allowing for early releases for vulnerable populations inside our prisons and youth detention centres and those who are nearing the end of their sentences is welcome. Reducing the numbers of people in prison is a critical public health strategy, and will assist in reducing the enormous risk of transmission inherent in custodial environments.

One of the key issues highlighted in [research undertaken by the KWOOP](#), is the large numbers of women in prison who are serving short sentences or on remand, who are incarcerated for non-violent offences, and who pose minimal risk in terms of community safety. The Report also draws attention to the long- term disruption of children’s lives from their mothers’ incarceration.

The KWOOP report confirmed the high proportion of women in prison who have experienced multiple factors of disadvantage that have made them particularly vulnerable (histories of abuse and domestic and family violence, mental health and cognitive impairment issues, disability, drug and alcohol addiction, homelessness).

It will be critical in granting early release to women that these factors of vulnerability and their special needs be considered. They should be provided with appropriate support and access to services to reduce the risks of re-offending and re-imprisonment. There will also be urgent need to reduce their risks of exposure to COVID-19 as many also have impaired physical health.

Particular attention should be paid to the release of vulnerable incarcerated Aboriginal and Torres Strait Islander women and girls in YDC to safe environments on country and pregnant women and mothers with babies.

Short sentences / short terms remaining / remand populations

The flow of people in and out of custody in Australia is huge. [More than 160 people enter our adult prisons every day](#). [Over three-quarters of these people are on remand](#). Only about 160 people depart prisons every day too. If COVID-19 finds its way into prison, large numbers in prisons and YDC and within the community could become carriers if they are unable to self-isolate before or after they leave. It is also important to understand that prisons operate on the legitimacy of the system. When people in prison feel – rightly or wrongly – they are being treated unfairly, the risk of riots and breakouts increases. The capacity to manage the system may be affected, too, as community transmission and fear of infection in prison increase, and more correctional officers are required to self-isolate for long periods. Releasing some people from prison is part of the solution to “flattening” the COVID19 curve. NSW has passed legislation to release some low-risk and vulnerable people, although it does not cover unsentenced people.

We suggest that legislation across Australia to enable release is particularly appropriate for unsentenced people, who are entitled to the presumption of innocence, especially those charged with less serious offences. In relation to release of those on short sentences, with short periods remaining and unsentenced, bail conditions and electronic monitoring can help ensure community safety, in addition to the increasing restrictions imposed on all Australians to self-isolate.