



PRESS STATEMENT

PREVENT SOUTH AFRICAN CORRECTIONAL CENTRES FROM BECOMING KILLING FIELDS OF COVID-19: UNIVERSITY HUMAN RIGHTS CENTRES CALL FOR GOVERNMENT INTERVENTION

21 April 2020

The [Centre for Human Rights](#), University of Pretoria and the [Centre for Applied Legal Studies](#), University of the Witwatersrand, call on the South African government to act swiftly to reduce the further spread of COVID-19 in South African correctional centres. This can be done by releasing a limited number of incarcerated persons so as to reduce their risk of contracting the virus, and allowing for more effective social distancing within correctional centres.

So far, the Regulations issued under the Disaster Management Act have focused on two issues: limitation on visits to correctional centres and other places of detention, and a directive that “an accused person arrested for a petty offence must be released and warned to appear in court on a future date”. These measures are helpful, but do not go far enough. According to the Director of the Centre for Human Rights, Frans Viljoen: “It is imperative, in the light of the contagious nature of the COVID-19 virus, that the government takes more measures to ensure that South African correctional centres do not become killing fields for the virus.”

There is a need for the Department of Correctional Services (DCS) to develop an operational plan dealing with COVID-19 in correctional centres. The DCS operational plan should address issues such as preventative measures that have been taken or will be put in place by the DCS to prevent the spread of the virus in correctional centres. According to the Director of the Centre for Legal Studies, Tshepo Madlingozi: “The DCS operational plan must also detail how complaints of human rights violations in correctional centres will be reported; and how access to medical treatment for incarcerated persons living with chronic illness will be ensured.”

Additionally, in the light of recent information that there are a total of 99 COVID-19 infections in South African correctional centres, COVID-19 screening and testing in correctional centres has now become essential.

Incarcerated persons at elevated risk of contracting COVID-19

Incarcerated persons are at an elevated risk of contracting the COVID-19 virus. They are placed on permanent constricted lockdown and access to fresh air and ventilation is often lacking. Also, there is limited floor space, scanty sanitation and washing facilities. It is common knowledge that correctional centres are notoriously overcrowded. At the best of times, it is extremely difficult to ensure personal sanitation and social distancing in correctional centres. By keeping incarcerated persons in these conditions, they are put at an extremely elevated risk of being exposed to and contracting COVID-19. It should be kept in mind that the conditions of “lockdown”, which the whole of South Africa currently experiences, is a permanent feature of life in correctional centres. Solutions that address the core of this continuous elevated risk of incarcerated persons therefore need to be found.

South Africa’s obligation on the protection of incarcerated persons

It is in line with the South African Constitution and international legal obligations to prioritise the plight of incarcerated persons and to release at least some of them during this global pandemic.

While incarceration deprives incarcerated persons of their freedom of movement, section 35(2)(e) of the Constitution provides that incarcerated persons are to be detained under “conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”. In the midst of the COVID-19 crisis, the requirement of dignified incarceration demands that adjustments be made to the life and dignity of incarcerated persons.

The current COVID-19 crisis brings into stark focus the misconception that incarcerated persons lose their rights as they enter correctional centres, placing them at the mercy of their incarcerators. Judge Jansen JA, famously held in the case of *Mandela v Minister of Prisons* 1983(1) SA 938(A) (at 957E-F): “On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration.” Similarly, in the case of *Minister of Justice vs Hofmeyer* (1993) 3 SA 131 (AD) the highest court noted that incarcerated persons retain all their personal rights unless those rights are specifically “abridged or proscribed by law”.

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), stipulate that correctional centres “shall not impose or constitute a punishment additional to the deprivation of liberty imposed by the imprisonment, nor should they aggravate the suffering caused by the imprisonment”.

The African Commission on Human and Peoples’ Rights, in its recent Press Statement on human rights based effective response to the novel COVID-19 virus in Africa, called on states to “take measures to reduce congestion in prisons and places of detention” by releasing those held for “minor offences”, and those who “have been rehabilitated and pose limited risk to society; and persons in remand awaiting trial for minor offences”.

Limited release based on balancing of factors

While we do not advocate for the blanket release of all incarcerated persons, a balance has to be struck, as in many other spheres of the pandemic. In this instance, a balance must be struck between the risk to the incarcerated persons resulting from their prolonged detention, and the risk to the society resulting from the incarcerated persons’ release. While it is well-established that the protection of society is one of the aims of punishment, determining the extent and likelihood of risk is elusive in concrete cases.

One way of attempting to strike this balance is for the government to release those categories of incarcerated persons who pose the least risk to society. By releasing at least a significant number, the possibility of effective social distancing within correctional centres would be enhanced.

Categories of incarcerated persons that could be released

The **first category** of incarcerated persons that can be released are **trial-awaiting detainees** who do not pose a threat to the community. Under the South African Constitution, these detainees are presumed innocent. This fact should, particularly in the present circumstances, weigh heavily in favour of their release. Some trial-awaiting detainees are denied bail because they pose a clear risk of disappearing and of interfering with witnesses. A case for their prolonged detention may well be made, even during this period. However, many trial-awaiting detainees are in prison merely because they cannot fulfil the conditions of bail. In their case, the balance clearly tilts in favour of their release. Suspects or accused persons who are presumed to be innocent should not be exposed to an elevated risk of contracting COVID-19 just because they are unable to pay the required bail amount.

The **second category** of incarcerated persons are people who have been sentenced for **petty or ‘minor’ offences**. The sentences for these offences are often short terms of imprisonment or fines that those convicted of these offences cannot pay. The current Regulations issued under the Disaster Management Act directs that “an accused person arrested for a petty offence must be released and warned to appear in court on a future date”. It should be clarified that this directive is applicable also to incarcerated persons sentenced for these offences and not only to “accused persons” awaiting trial.

The **third category** of incarcerated persons are persons convicted of **offences that do not pose a threat to society and whose sentences will end in the upcoming months**, for example, in the next six months.

The **fourth category** of incarcerated persons are persons who show that they have rehabilitated and do not pose any risk to society. To the extent possible, the position of older incarcerated persons should be given particular consideration. **Parole boards** should be convened virtually to identify incarcerated persons who could be released on this basis.

More effective social distancing for remaining incarcerated persons

Once some incarcerated persons in the four categories mentioned above have been released, the circumstances in correctional centres would be more conducive to the effective social distancing of remaining incarcerated persons. In the process of securing their well-being, incarcerated persons at particular risk to develop COVID-19 symptoms within places of close confinement should be prioritised. These incarcerated persons include pregnant women; older persons, persons living with HIV or TB, or both; and persons with disabilities.

We therefore call on the government of South Africa to:

- Embark on the immediate, widespread and ongoing COVID-19 screening and testing of incarcerated persons;
- Ensure the screening and isolation of all persons who are incarcerated, as they pose a serious risk to already incarcerated persons;
- Require the Department of Correctional Services to develop a COVID-19 operational plan;
- Immediately take measures to decongest correctional centres in South Africa by releasing incarcerated persons who fall within the categories mentioned above;
- Prioritise the well-being of incarcerated persons that are at heightened risk of developing COVID-19 symptoms;

- Take steps to ensure that correctional centres are generally safe for the remaining incarcerated persons in order to prevent the spread of COVID-19 in correctional centres.
-

For more information, please contact:

Foluso Adegalu

Project Officer, Centre for Human Rights, University of Pretoria

Tel: 072 898 8307

foluso.adegalu@up.ac.za

www.chr.up.ac.za

Ms Sithuthukile Mkhize

Attorney, Centre for Applied Legal Studies, University of the Witwatersrand

Tel: 072 985 9190

sithuthukile.mkhize@wits.ac.za

www.wits.ac.za/cals