

## **Interim Guidance**

# **COVID-19: FOCUS ON PERSONS DEPRIVED OF THEIR LIBERTY**

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# COVID-19: Focus on Persons Deprived of Their Liberty

COVID-19 has been declared a global pandemic and as it is spreading, identified vulnerabilities such as the situation of persons deprived of their liberty in prisons, administrative detention centres, immigration detention centres and drug rehabilitation centres, require a specific focus.

Persons deprived of their liberty face higher vulnerabilities as the spread of the virus can expand rapidly due to the usually high concentration of persons deprived of their liberty in confined spaces and to the restricted access to hygiene and health care in some contexts. International standards highlight that states should ensure that persons in detention have access to the same standard of health care as is available in the community, and that this applies to all persons regardless of citizenship, nationality or migration status.

Maintaining health in detention centres is in the interest of the persons deprived of their liberty as well as of the staff of the facility and the community. The state has the obligation, [according to international human rights law](#)<sup>1</sup>, to ensure the health care of people in places of detention. If the risks related to the virus in places of detention are not addressed, the outbreak can also widen spread to the general public.

The series of messages below aim at addressing the specific issues of persons deprived of their liberty with the responsible services and ministries (Ministry of Justice/Ministry of Interior/Ministry of Health/Agencies in charge of migration, asylum and rehabilitation centres, etc.).

## KEY MESSAGES

### Engagement & Analysis<sup>2</sup>

- Analyse the situation of detention centers and places where persons are deprived of their liberty, including juvenile detention and rehabilitation centers, taking into consideration the specific context, the right to non-discrimination and equality in access to healthcare and health services, paying particular attention to persons deprived of liberty belonging to vulnerable or high-risk groups, such as the elderly, women, children, and persons with disabilities, amongst others. Since there is a high risk of the disease affecting persons in these closed or restricted settings, initiate a discussion with the stakeholders on the continued legality, necessity and proportionality of such measures given the current risks, and possible alternatives.
- Engagement with key stakeholders:
  - Resident Coordinator/Humanitarian Coordinator and United Nations Country Teams as well as competent authorities, at national and subnational level, (law enforcement and prison authorities, immigration officials, Corrections, Social Welfare, judiciary) and ministries (Interior, Home, Justice, Health etc) in order to initiate discussion and offer technical advice on using the key messages document. Discussions with key stakeholders should include the impact of any state of emergency and its specific measures to the situation of detention centres, possible opportunities for release and/or non-custodial alternatives to detention. For those individuals for whom continued detention or restrictions on freedom of movement remain necessary and proportionate, the preparedness measures that can be taken to manage the risks.
  - Human rights networks, National Human Rights Institutions and civil society organizations accessing detention centers should gather information, conduct health assessments, activate available monitoring on situation in places of detention and identify advocacy opportunities.
  - Detention centers monitoring bodies, including National Human Right Institutions and other entities with relevant monitoring mandates, should continue to have access to places of detention.
  - If already established in accordance with the Optional Protocol to the [Convention Against Torture](#)<sup>3</sup>, include the [National Preventive mechanisms](#).<sup>4</sup>

<sup>1</sup> <https://www.ohchr.org/EN/Issues/Health/Pages/InternationalStandards.aspx>

<sup>2</sup> <https://www.ohchr.org/Documents/Publications/Chapter31-24pp.pdf>

<sup>3</sup> <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

<sup>4</sup> <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>

## Advocacy

- Public authorities should take immediate steps to address prison overcrowding, including measures to respect WHO guidance on social distancing and other health measures. Release of individuals, including children, persons with underlying health conditions, persons with low risk profiles and who have committed minor and petty offences, persons with imminent release dates and those detained for offences not recognized under international law, should be prioritized. Release of children needs to be done in consultation and partnership with child protection actors and relevant government authorities to ensure adequate care arrangements.
- Authorities should urgently establish non-custodial alternatives to migrant detention in accordance with international law. Any deprivation of liberty must have sufficient legal grounds and, must take place in accordance with procedure established by law, while those detained are entitled to have their detention reviewed by a court of law. Authorities should be encouraged to examine carefully the legal basis for detention, and release anyone whose detention is arbitrary or otherwise does not comply with domestic or international standards. Authorities assessing whether detention is arbitrary should consider issues such as inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.
- Those who are arbitrarily detained should be immediately released as the prohibition of arbitrary detention is a non-derogable norm and their continued detention under the current public health emergency might also severely impact their right to health and their right to life. This includes people in pre-removal detention where deportations have been suspended due to the COVID situation, as in many of such cases, the grounds for their continued deprivation of liberty no longer exist.
- The risk of COVID-19 should be included in ongoing advocacy with authorities to improve conditions in places of detention, reduce overcrowding, and ensure compliance with international standards, including as regard to treatment of detainees<sup>5</sup>, without discrimination, including those subject to stricter security measures. Based on existing legislation, authorities could apply non-custodial measures particularly for older persons, ill people, or others with specific risks related to COVID-19.
- COVID-19 can be an opening for engagement with police, other law enforcement institutions as well as the judiciary about risks and opportunities related to pre-trial detention. Limitation of persons in pre-trial detention and implementation of non-custodial measures ([see Tokyo Rules<sup>6</sup>](#)) can be an effective measure that reduces risks of spreading COVID-19, which is beneficial for both detainees and law enforcement staff. Discharge is the earliest possible non-custodial measure which authorities are encouraged to apply, as applicable, at the pre-trial stage. Other non-custodial measures, such as conditional discharge, monetary fines, community service, probation and referral to attendance centers, may be applied at the sentencing stage. It should however be noted that cash bail systems may have discriminatory impact depending on the concerned persons age<sup>7</sup> or financial situation.
- In the case of children, authorities have the responsibility to ensure that the best interests of each individual child is the primary consideration and it is widely argued that detention even as a last resort, is never in the best interests of a child, especially when referring to child immigration detention. Thus, non-custodial alternatives to detention, which are family based or community based, should be favored for any person under 18 years, especially in the context of COVID-19 decongestion measures and increased risks to the right to life of all detainees and personnel.<sup>8</sup>
- COVID-19 can be an opportunity to engage immigration, law enforcement, border and other relevant agencies or officials as well as the judiciary in order to reduce the use of immigration detention generally, establish alternatives to immigration detention and to end as a matter of priority the immigration detention of children, families and other migrants in vulnerable situations. While immigration detention must always be an exceptional measure of last resort and strictly legal, necessary and proportionate based upon an individual assessment, consistent with the prohibition of arbitrary detention, some immigration detention, including the detention of children on the basis of their or their parents' immigration status, is prohibited under international human rights law. Governments should take steps to immediately end the practice of child immigration detention and prioritize non-custodial, community-based alternatives to detention for all migrants, taking a human rights-based approach.

<sup>5</sup> E.g. article 10 ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Human Rights Committee has stated that this expresses a norm of general international law not subject to derogation (General Comment No.29, para 13(a)). Specific provisions apply to juvenile offenders, e.g. article 37(c) of the Convention on the Rights of the Child and the SMRs.

<sup>6</sup> <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

<sup>7</sup> <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

<sup>8</sup> article 37(b) of the UN CRC which establishes that children should be deprived of liberty only as a last resort and for the shortest period, consistent with the best interests of the child.

## Health

- International standards<sup>9</sup> highlights that states should ensure that persons in detention have access to the same standard of health care as is available in the community, and that this applies to all persons regardless of citizenship, nationality or migration status.
- Any detention measures introduced for the purpose of managing risks to public health, including when applied to people arriving from other countries, must be necessary, proportionate and subject to regular review; must not be arbitrary or discriminatory, must be based on an individual assessment, must be authorized by law in accordance with applicable due process and procedural safeguards, must be for a limited time period and subject to periodic review, and must otherwise be in line with international standards. Health concerns do not justify the systematic detention of individuals or groups of migrants, including refugees.<sup>10</sup>
- Persons deprived of their liberty should receive a medical examination upon admission, and thereafter medical care and treatment shall be provided whenever necessary.<sup>11</sup> The purpose of health screening is to protect the detainee's health, detention centers staff as well as other detainees and to ensure that any illnesses are dealt with as soon as possible to avoid the spread of the virus.<sup>12</sup> All detainees should have access to medical care and treatment without discrimination.<sup>13</sup> Persons deprived of liberty who use drugs and receive harm reduction services should be allowed continued access to such services. Pro-active measures and monitoring should be put in place to ensure that essential personal hygiene items such as soap and sanitizer, as well as menstrual items for women and girls, are made available at no cost throughout their continued use beyond initial distribution point.
- In suspected or confirmed cases of COVID-19 all persons deprived of their liberty should be able to access healthcare, including urgent, specialised health care, without undue delay. Suspected case(s) should be isolated in a dignified conditions away from general population and measures should be put in place to mitigate violence or stigmatization against suspected cases. Detention centres' administrations should develop close links with community health services and other health-care providers.
- If people are released, medical screening and measures should be taken to ensure that ill people are taken care of and proper follow up, including health monitoring, is provided.
- Particular attention should be given to specific health needs of older persons and persons with underlying health conditions or heightened vulnerability, children in detention and those in detention with their mother, pregnant women, elderly and persons with disabilities. Health care services should be provided to gender specific needs at all times.
- Special attention to mental health issues among persons deprived of their liberty. The need for routine mental health and psychosocial support shall be provided immediately.
- Sexual and Reproductive Health shall be provided as part of routine health care to persons deprived of their liberty.
- Ensure that rationing of health responses and allocation decisions are guided by human rights standards based on clinical status and do not discriminate based on any other selection criteria, such as age, gender, social or ethnic affiliation, and disability.

## Housing

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

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<sup>9</sup> Rule 24 (1), United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). General Assembly resolution 70/175

<sup>10</sup> UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, available at: <https://www.refworld.org/docid/5e7132834.html>

<sup>11</sup> Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>. See also Rule 30 of the Nelson Mandela Rules. With regard to suspicion of contagious diseases, Rule 30(d) states that they must provide for the clinical isolation and adequate treatment of the prisoner during the infectious period.

<sup>12</sup> OHCHR (2005). Human rights and prisons. Manual on Human Rights Training for Prison Officials. Page 63. Available in: <https://www.ohchr.org/Documents/Publications/training11en.pdf>

<sup>13</sup> Article 12.1. of the International Covenant on Economic, Social and Cultural Rights recognizes everyone's right to health, including prisoners. Principle 9 of the Basic Principles for the Treatment of Prisoners states that "prisoners shall have access to health services available in the country without discrimination on the grounds of their legal situation". <https://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>. Rule 24 of the Nelson Mandela Rules states that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status".

rentals. In the case of unaccompanied children, special measures to safeguard their care and protection must be under-taken.

### Information

- Information on preventive health measures should be provided to all persons deprived of their liberty in a language and format they understand and that is accessible; and efforts should be made to improve the hygiene and the cleanliness of the detention places. Such measures should be gender, culture, abilities and age sensitive.
- Information on mitigating measures provided to persons deprived of their liberty as well as their families should be in languages and formats that are understandable and accessible to all, clear, and accurate. They should explain the measures that the detention center is taking to protect the health of persons deprived of their liberty and the public at large. Any restrictions on rights and freedoms must be consistent with international human rights norms and principles, including legality, proportionality, necessity and non-discrimination.

### Measures taken to prevent outbreaks in detention centres<sup>14</sup>

- While measures needed to prevent outbreaks of COVID-19 must be taken in places of detention, authorities need to ensure that all such measures respect human rights. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation. In order to protect non-derogable rights, including the right to life and prohibition of torture, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention may not be restricted<sup>15</sup>.
- Ability to meet with legal counsel must be maintained, and prison or detention authorities should ensure that lawyers can speak with their client confidentially. Suspending hearings may in fact exacerbate the risk of coronavirus in places of detention. Even in an officially declared state of emergency, States may not deviate from fundamental principles of fair trial, including the presumption of innocence<sup>16</sup>.
- Authorities should also guarantee maximum transparency in the adoption of preventive measures and a constant monitoring of their application. The substitution of in-person family visits by other measures, such as videoconferences, electronic communication and increased telephone communications (pay phones or mobile phones) may require sustained organizational effort from the place of detention administration. Any interference with privacy or family must not be arbitrary or unlawful.<sup>17</sup>
- Particular efforts should be made to ensure family visits and alternatives are provided to all detained children and other vulnerable persons in detention, including person with disabilities who may not otherwise be able to maintain contact through other means with their families.
- Isolation or quarantine measures in places of detention must be legal, proportional and necessary, time-bound, subject to review and should not result in de facto solitary confinement. Information about the whereabouts and condition of detainees should be communicated to the families. Quarantines should be time limited and should only be imposed if no alternative protective measure can be taken by authorities to prevent or respond to the spread of the infection.<sup>18</sup>
- Under no circumstances shall the isolation or quarantine be used to justify discrimination or the imposition of harsher or less adequate conditions on a particular group including children.

### Protection of families of persons deprived of their liberty

- State agencies who care for persons deprived of their liberty should be reminded that families and children of those persons are right holders with specific needs that must be known and considered. Families, especially women and children, are both protected and impacted by necessary prevention measures.
- While some preventive measures will alter family life including prison visitation, states should minimize creating avoidable rise in anxiety and stress levels, especially among children and the elderly. States should be attentive that response plans do not aggravate pre-existing economic hardship on women-led households.
- States' response plans need to take their rights and specific needs into consideration as well as avoid placing extra-burden upon them, especially women who in many countries are the primary care of predominantly male prison populations, or putting them at higher risk.

<sup>14</sup> <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov-technical-guidance/coronavirus-disease-covid-19-outbreak-technical-guidance-europe/preparedness,-prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention-2020>

<sup>15</sup> Article 9 of the ICCPR and General Comment No.35.

<sup>16</sup> Human Rights Committee General Comment No.29.

<sup>17</sup> Article 17 of the ICCPR.

<sup>18</sup> Coronavirus: Healthcare and human rights of people in prison, p 8, Briefing Note 16 March 2020, Penal Reform International, <https://cdn.penalreform.org/wp-content/uploads/2020/03/FINAL-Briefing-Coronavirus.pdf>.

### Staff in charge of and working in detention centres

- Rights of detention centres' staff must be respected. Senior management should be proactive in planning the work of members of staff during the COVID-19 pandemic, share the emergency preparedness plan, and provide support for relatives of members of staff carrying out critical functions.
- Specific training should be provided to all staff to increase knowledge, skills and behaviours related to necessary healthcare and hygiene provisions.<sup>19</sup> Prison or detention center staff should be provided with soap, hand sanitizer and personnel protective equipment. Given potential heightened risks there is need to ensure training and systems for child safeguarding.

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<sup>19</sup> Coronavirus: Healthcare and human rights of people in prison, p 10, Briefing Note 16 March 2020, Penal Reform International, <https://cdn.penalreform.org/wp-content/uploads/2020/03/FINAL-Briefing-Coronavirus.pdf>.