

1 April 2020

Rt Hon Robert Buckland QC MP  
Secretary of State and Lord Chancellor  
Ministry of Justice  
Queen Anne's Gate  
London SW1H 9AJ

Cc: Lucy Frazer QC MP

Dear Robert Buckland,

### **Covid19: the need for immediate further early release of prisoners**

Thank you for your letter of 31 March 2020 confirming your decision to release certain pregnant women and mothers in Mother and Baby Units on a temporary basis. We warmly welcome this step, alongside your stated intention to consider urgently whether other categories of people in prison can be released. Releasing prisoners who can be safely released during this time is entirely appropriate and in line with your moral and legal duties to protect lives for prisoners, those who care for them and the wider public. Crucially, we believe it is also "following the science", in line with the government's response in every other area of policy and operations. To that end, we enclose a report by Professor Coker, Emeritus Professor of Public Health, London School of Hygiene & Tropical Medicine, which sets out the up to date evidence concerning the nature, spread and transmission of Covid19 as it applies to prisons. We propose to publish that report shortly.

Decisive further action to release a substantial number of prisoners in England and Wales is required now in order to prevent loss of life on an unprecedented scale, as set out in our recent private correspondence. We also urge you to take urgent steps to encourage a significant reduction in the number of people sent to prison, including recalls and remands to custody, as well as the imposition of custodial sentences at this time.

As the leading penal reform organisations in this country we feel we will have no choice but to renew this request and the moral, legal and evidential reasons for it.

### *Covid19 in prisons so far*

According to your department's daily update on 31 March 2020 as of 17:00 on Monday 30 March 2020, 65 prisoners have tested positive for Covid19 across 23 prisons; 14 prison staff have tested positive for Covid19 across 8 prisons and four Prisoner Escort and Custody Services (PECS) staff have tested positive for COVID-19.

Two people have died in prison who had Covid19: the first was a man aged 84 who had been detained in a Category C prison in Cambridgeshire who died on 22 March 2020 in hospital and the second was a man aged 66 detained in prison in Manchester, who died on 25 March 2020.<sup>1</sup>

Staff shortages due to self-isolation have already been reported: as of 24 March 2020, you reported to the Justice Committee that 4000 prison staff were in self-isolation (approximately ten per cent of the work force). We understand that that figure has more than doubled in the intervening days.

On the ground we have seen dangerous practices reported in response to Covid-19, such as "cohorting" in Wandsworth prison, where prisoners with milder cold and flu-like symptoms are forced to share cells with confirmed Covid-19 patients in an "isolation" wing.<sup>2</sup> Family members have reported prisoners being transferred in from other prisons with no measures taken to quarantine on arrival.

The impact of the changes to the regime as a result of the virus have been severe, with reports that most prisoners are effectively in solitary confinement and some reporting reductions in food, putting health and safety at risk. Legal colleagues have been told, for example, that prisoners have reported that Ford and Springhill prisons are now only providing one pre-packed meal a day to prisoners and telling them everything else has to be purchased from canteen.

In calls to the Howard League legal advice line and the PRT advice line, children, young adults and adults have reported a number of concerns.

Young people have told the Howard League:

Most children and young adults now spending 23 or more hours a day alone in their cells with no activities or interventions other than education sheets under the door for some children;

- Acute anxiety among young people who use inhalers
- Young people have expressed concern about elderly relatives and parents and their inability to help them while stuck in prison
- Several young people who are eligible for early release have not had their applications processed or accepted;
- Variations in ability to access the outside world with some children being given additional phone credit and some young adults having barely any;
- Young adults being forced to share cells, including in one prison with confirmed cases of Covid19; and
- Some young people concerned about reductions in canteen (access to extra food that they usually rely on as at the best of times, food allocation in prison is meagre).

Calls to the Prison Reform Trust suggest:

- Phone calls limited to 5 minutes a day in some prisons
- Prisoners who are in the high risk groups defined by Government guidance are unable to effectively self-isolate in line with advice being given to people in the community

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<sup>1</sup> <https://www.bbc.co.uk/news/uk-england-cambridgeshire-52047003>

<sup>2</sup> The Guardian, UK prisoners with flu symptoms forced to share cells with those with Covid-19, 31 March 2020, available at: <https://www.theguardian.com/society/2020/mar/31/uk-prisoners-covid-19-symptoms-forced-share-cells>

- Prisoners have reported a lack of cleaning products such as anti-bacterial soap and disinfectant and so are unable to adhere to guidance and act to reduce risk to themselves and others around them
- Breakdowns in hot water supply to cells
- The use of pots for prisoners to defecate and urinate into in prisons where there is no in-cell sanitation

Not surprisingly, uncertainty over plans for early release, following your indication that they were under consideration, is a constant theme of the messages we are receiving.

### **The grave risks associated with Covid19 in prisons**

On 26 March 2020, the Prison Governors' Association noted that the prison service remains "an overcrowded Service" in which it is "impossible to mirror" Government guidance on managing the virus. The Association concluded that "Government must look at early release schemes at speed for lower risk offenders, this is particularly pertinent to women offenders who we know pose the least risk to society. This will reduce the level of overcrowding, always a good thing for stability during challenging times. It will also help delay the spread of the virus through prisons, so from a health perspective there is an imperative."<sup>3</sup> Largescale releases are required: As you know, almost 70% of prisons in England and Wales are overcrowded, (84 of the 121 prisons), with nearly 18,700 people held in overcrowded accommodation—more than a fifth of the prison population.<sup>4</sup>

As infection takes hold in prisons (which it inevitably will), prisoners who would otherwise have been safe to release to domestic circumstances in which both they and those around them could avoid infection, will instead become critically ill in an environment not equipped to treat them, placing themselves and public sector workers at grave risk of harm and death. Prisons are full of vulnerable people. People in contact with the criminal justice system, including those in prison and on probation, tend to be in poorer health than the general population and have a greater need for health and care. For many people detained in prison, their poor health status arises from, and/or has been exacerbated by, early childhood experiences (abuse, neglect and trauma) social circumstances (problems with housing and employment) and higher rates of smoking, alcohol and substance misuse;<sup>5</sup> There are high numbers of elderly prisoners who are at particular risk. The Department for Health's manual on 'Prevention of infection and communicable disease control in prisons and places of detention', produced in July 2011, following the swine flu outbreak, recognises that "*Prisons run the risk of significant and potentially more serious outbreaks, with large[r] numbers of cases than the community because large numbers of individuals live in close proximity in relatively crowded conditions, often with high degrees of social mixing during activities; the population is constantly turning over with admissions, discharges, transfers, access to healthcare facilities within prisons could be limited if demand is high; prisoners have a higher prevalence of respiratory illness (including asthma), immunosuppression (e.g. due to HIV infection) and other chronic illnesses than their peers in the community.*"<sup>6</sup>

<sup>3</sup> Prison Governors' Association, Press Release, 26 March 2020, <https://prison-governors-association.org.uk/prison-governors-association-covid-19/>

<sup>4</sup> Table 2.2, 2.3 and 2.4, Ministry of Justice (2019) Annual HM Prison and Probation Service digest: 2018 to 2019, London: Ministry of Justice

<sup>5</sup> Home Office, Public Health England and Revolving Doors Agency (2017), Rebalancing Act: A resource for Directors of Public Health, Police and Crime Commissioners, the police service and other health and justice commissioners, service providers and users

<sup>6</sup> This guidance refers to outbreaks of influenza, but the observations clearly also apply to the risks to prisoners from the present coronavirus pandemic.

In recent weeks we have seen that Covid19 can have serious consequences for people who were not previously thought to be at risk. Just this week, a 13 year old boy died of the virus in London<sup>7</sup> and the virus has killed many people who were not identified as particularly susceptible due to age or underlying illness. It has been seen to disproportionately affect men, and on that basis alone, the prison population, 95 per cent of whom are men, is especially vulnerable. It is also now becoming clearer that transmission can occur through those who do not show any symptoms or before symptoms manifest and therefore carriers may not be obvious to prison staff or prisoners themselves.

Many prisoners will also be at risk of harm and even death as a result of the conditions imposed to manage the virus. In the 12 months to December 2019, there were 300 deaths in prison custody and self-harm incidents reached a record high of 61,461 incidents in the same period, up 16% from the previous 12 months.<sup>8</sup> In 2015, the Supreme Court noted the risk of serious psychological harm caused by segregation in prison and that the Secretary of State's policy on segregation acknowledges that the number of self-inflicted deaths in segregated settings is disproportionate (*Bourgass & Hussain v SSJ* [2016] AC 384, paragraph 29). Prisoners are now routinely in conditions of solitary confinement at a time of heightened anxiety and depleted staffing means prisons are not sufficiently resourced to give vulnerable prisoners the support they need. The risk of self harm and even death must also be heightened.

The window of opportunity is closing – delay is now likely to be lethal for prisoners. But the risk extends much wider, in particular to prison staff and the wider public with whom both prison staff and prisoners released at the end of their sentence will inevitably come into contact.

Reported cases of infection in prisons appears now to be following the path predicted by epidemiologists and evident in the wider community both in this country and around the world, and are likely to surpass that pattern. As congregate settings, prisons act as “epidemiological pumps”, which can drive the spread of disease amongst the wider community. Explosive outbreaks within congregate settings have acted as preludes to wider transmission amongst the general population in the current coronavirus pandemic (e.g. the ski-chalet associated cluster in France, and the church and hospital clusters in South Korea). This will contribute to further overburdening of the already overstretched NHS. That is why so many countries have taken the step of releasing substantial numbers of prisoners:

- Northern Ireland has announced the release of 200 prisoners, approximately one-seventh of its prison population.<sup>9</sup>
- Ireland has released prisoners who had already been determined suitable for early release.<sup>10</sup>
- France has reduced short-term prison sentences and decreased number of entrants into system from 200 per day to around 30.<sup>11</sup> It has just announced the release of some 5000 prisoners.
- Netherlands has stopped those who were due to be detained on short sentences from doing so for the time being.<sup>12</sup>

<sup>7</sup> <https://www.theguardian.com/world/2020/mar/31/boy-13-die-london-after-testing-positive-for-coronavirus>

<sup>8</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/861732/safety-in-custody-q3-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861732/safety-in-custody-q3-2019.pdf)

<sup>9</sup> <https://www.justice-ni.gov.uk/news/covid-19-temporary-release-prisoners-scheme>

<sup>10</sup> <https://www.irishnews.com/coronavirus/2020/03/24/news/prisoners-to-be-released-early-in-northern-ireland-1876325/>

<sup>11</sup> <http://www.justice.gouv.fr/la-garde-des-sceaux-10016/covid-19-mesure-daccompagnement-penitentiaire-33010.html>

<sup>12</sup> Source: PRI Ultimate source: 'DJI treft preventieve corona-maatregelen', 13 March 2020, available at <https://www.dji.nl/persmedia/nieuws/2020/dji-treft-preventieve-coronamaatregelen.aspx>.

- USA – various states have released hundreds of prisoners<sup>13141516</sup> and the president has said that consideration is now being given to measures to free elderly, nonviolent prisoners.<sup>17</sup> California is to release some 3500 prisoners.<sup>18</sup>

These proactive steps are in line with the advice of international expert bodies including the United Nations High Commissioner for Human Rights<sup>19</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>20</sup>

To explain the need for such unusual action, and to bolster public confidence, we urge you to publish the scientific and medical advice which you have received, as the government has done in relation to many other controversial and difficult matters in recent weeks. We understand advice on the impact of COVID-19 within the prison system has also been presented to the Prime Minister and we ask that you confirm this and publish the advice.

### **The duty to take decisive action**

In these circumstances, failure to act is not only required on a humanitarian level but is **required** to comply with your **legal** obligations.

*The positive duty to protect life – at common law and in accordance with Articles 2 and 3 European Convention on Human Rights*

As you will be aware you have a positive obligation, at common law and under Articles 2 and 3 of the European Convention on Human rights, to protect persons who are detained by the state from death or serious harm.

The duty of protection applies to all persons who are detained (see, for example, *Keenan v United Kingdom* (2001) 33 EHRR 38 at [111]; *Kudla v Poland* (2002) 35 EHRR 11 at [94]). *Keenan* establishes the uncontroversial proposition that one of the reasons the state owes this duty is because of the inherent vulnerability of those who are detained by the state: see [110]. Put simply, the detained are unable to take matters into their own hands, and go elsewhere for help and assistance.

The duty is “*particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition*” (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, §22 *per* Lord Dyson).

There is a real and immediate risk that prisoners, and particularly vulnerable prisoners, who contract Covid-19 will suffer serious illness, or die. The State is required to take necessary and sufficient preventative operational measures to protect prisoners, and in the present circumstances, must do so as a matter of urgency.

<sup>13</sup> Source: PRI. Ultimate source: 9 ‘Ohio county to hold mass plea hearings to reduce jail population over coronavirus concerns’, 12 March 2020, available at <https://www.correctionsonline.com/coronavirus-covid19/articles/ohio-county-to-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concernsZhEvkxbZ5tpo3Tv/>

<sup>14</sup> [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html)

<sup>15</sup> [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html)

<sup>16</sup> <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>

<sup>17</sup> <https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3?r=US&IR=T>

<sup>18</sup> <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>

<sup>19</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

<sup>20</sup> <https://rm.coe.int/16809cfa4b>

### *The duty to have appropriate systems in place*

Articles 2 and 3 of the Convention comprise both a general duty to devise, apply and staff appropriate systems for the identification of those needing protection, together with an operational duty to act when someone is or should be known to be at real risk of harm.

The courts are both willing and able to provide detailed scrutiny of systems in order to determine whether the duties have been discharged (*McGlinchey v UK* (2003) 37 EHRR 821). In *McGlinchey* matters such as inadequate equipment, and gaps in staff cover, meant that the systems were insufficient.

In this case we suggest that, as a minimum, any proper system for identifying the vulnerable will need to comprise not just consultation with clinical staff, and through them clinical records, but also consultation with the prisoners themselves. Existing clinical knowledge of the prisoners will not always reveal relevant information. Prisoners need to be asked. All of this also needs to be done quickly.

Please note too that a proper system, to be lawful, will also need to discharge equality duties. Proper regard must be had to those with protected characteristics, who may be vulnerable for that reason, but who may also not be able to (for example) communicate their vulnerability.

It is also essential that any system for early release is occurs pursuant to a fair and transparent and published policy (as required by the Supreme Court in *Lumba v SSHD* (2011) UKSC 12). That is partly to avoid the risk of arbitrary and/or discriminatory decisions, but also to avoid the obvious tensions on the grounds if prisoners and prison staff do not understand what is going on or if decisions seems capricious or random to them.

### *The duty not to discriminate*

The state also has a legal duty to avoid indirect discrimination against prisoners with protected characteristics (which include age and disability), both in accordance with the Equality Act 2010 and Articles 2, 3, 8 and 14 of the European Convention on Human Rights.

## **Urgency and the need for decisive action at scale**

We do not underestimate the challenges the pandemic poses in respect of prisons and we accept the need to act responsibly and safely. We also recognise the duty to maintain public confidence in the administration of justice. However, it is now clear that taking urgent and immediate action to enable the safe release of a substantial number of prisoners is the responsible thing to do, for prisoners who are at risk of serious illness or death both as a result of the virus and the conditions necessitated by it, for staff working on the front line, and for the wider public – in particular the families of both prison staff and prisoners released at the end of their sentence - who will inevitably suffer from concentrations of infections in prisons. The public has understood and accepted extraordinary changes in the normal workings of society because of the government's strict policy of following the best scientific and medical advice. It is crucial that the same principle should apply to decisions relating to prisons and prisoners.

For the reasons we have outlined above, consideration of early release must include both those who are medically vulnerable and those outside the heightened Covid-19 risk

categories, but whose risk of causing serious harm does not require continued detention given the present circumstances.

We are very grateful for your helpful and prompt responses so far. We very much want to continue our constructive dialogue. We look forward to hearing from you with your plans for action.

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The Howard League for Penal Reform

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