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The effect of sentencing HIV-positive offenders to imprisonment

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DECLARATION

I, Linda Lydia Manyathi , hereby declare that **‘EFFECTIVENESS OF SENTENCING HIV-POSITIVE OFFENDER TO IMPRISONMENT’** is my work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

SIGNATURE

DATE

ACKNOWLEDGEMENT

To my Creator, thank you for being with me through this research, giving me support and strength to complete it.

To my late father, **Mr Melusi Zacharious Manyathi**, God could never have given me a better father. Thank you for the life you lived as my father. Understanding my stubbornness and supporting my dreams, regardless of how many times I failed. You never gave up on me. Thank you for setting a high standard for a man that deserves to be in my life.

Mrs. Sibongile Manyathi

My mother, my rock, my motivator, my encourager. You are the Proverbs 31 capable woman. Your hard work ethic always pushes me to do better because I do not want to disappoint you and myself.

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I would like to thank **Professor S. Hocto**r for reading, being patient with me and making sure that all the ts are crossed, ensuring this thesis flows and has a sound argument.

DEDICATION

I dedicate this dissertation to my son, **Malik Swelihle Manyathi**, for being the warmth of sunshine, joy and peace in in my heart. May you grow to be a God-loving and God-fearing man, uMama uyasithanda isithandwa sakhe.

And to my country **South Africa**. May we grow to love and care for one another in our fight for a better future. Stand united to form a stronger, triumphant nation.

ABSTRACT

South African correctional centres are overcrowded. There is high-risk sexual behaviour and a lack of nutritious diet, all of which contributes to increasing THE level of stress among inmates. This negatively affects the immune system. These correctional centre conditions are harsh, even to HIV-negative inmates, how much more SO to those who are HIV-positive. The typical lifespan of an HIV-positive person is 10 to 15 years, though, with the aid of ARVs, it can be prolonged. However, in order for ARVs to be effective one must exercise and eat a balanced diet. Re-infection, lack of exercise, lack of nutritious meals and high stress significantly reduce the effectiveness of ARVs. Therefore, offenders who are known to be HIV-positive and are then sentenced to life imprisonment are less likely to serve their full sentence. With overcrowding, HIV-related illnesses easily spread to other inmates and, to make matters worse, high-risk sexual behaviour increases the possibility of infection to HIV-negative inmates.

The Correctional Services Act provides that correctional institutions should make provision for: adequate accommodation, nutritious meals, segregation of inmates for medical reasons, safe custody, hygienic living conditions and health care. But, with the prevailing correctional centre conditions of overcrowding, malnutrition, lack of exercise and sexual abuse, it is clear that the Department is failing to deliver on the mandates given to it by the Correctional Services Act.

The result of this is that imprisonment for HIV-positive offenders becomes a very difficult experience, as overcrowding leads to low security, bed-sharing and the survival of the fittest. Overcrowding further gives power to gang activities within the correctional centres, because the conditions of low security require that inmates provide their own security, which is paid for at the cost of sexual favours and tattoos which may involve contaminated blades. This exposes other inmates to HIV infection and those who are already infected become re-infected.

Sentencing offenders that are known to be HIV-positive to imprisonment promotes the spread of HIV within correctional centres and into the general public. South Africa has the highest HIV infection rate in the whole world. The United States is looked at for possible solutions for curbing the spread of HIV, as there is no sentence that will suit such offenders. This dissertation

seeks to investigate possible measures that can be implemented in South African correctional centres to ensure that the spread of HIV in correctional centres is limited.

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Definitions

AIDS Acquired Immune Deficiency Syndrome.¹

ARV- Anti-Retro-Viral.²

HIV- Human Immunodeficiency Virus.³

Parole is an internationally accepted mechanism that allows for the conditional release of offenders from a correctional centre into the community prior to the expiration of their entire sentences of imprisonment, as imposed by a court of law.⁴

¹ <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/> accessed: 4/10/2016

² Ibid

³ Ibid

⁴ <http://www.dcs.gov.za/Services/CorrectionalSupervisionandParoleBoards.aspx>

CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

South Africa has the highest rate of new HIV infections in the world. In 2012, an estimate of 469 000 new infections were reported in South Africa.⁵ Two years later, 6.8 million people were announced to be living with HIV.⁶ These statistics are alarming when one considers the fact that South African has invested heavily in the management of HIV infections.⁷ There is a need for deep reflection on the mishaps that continue to contribute to the growing epidemic of HIV in South Africa. Of great concern is that the country is facing these problems notwithstanding the fact that it is a leading nation in HIV/Aids research.⁸ Finding a solution to this conundrum is a task of great importance. It will require extensive research and collaboration from all South African citizens. In responding to this call, the present study aims to consider various measures that can be implemented to curb the spread of HIV within South African correctional centres.

Statistics on the plight of the fight against HIV/Aids are not better in South African correctional centres. A 2013 report suggests that, on average, 80 per cent of convicted offenders who die in correctional centres of non-violent causes, die from HIV-related illnesses.⁹ Expressed differently; 588 inmates are dying annually from HIV/AIDS-related illnesses.¹⁰ The Judicial inspectorate report 2014/2015 report only states that there are 583 natural deaths of inmates for this period. The type of sickness that caused the death is not mentioned.¹¹ That raises questions because the 2013 judicial inspectorate report stated the cause of death of inmates, so it is

⁵Shisana O... *et al* "South African National HIV Prevalence, Incidence and Behaviour Survey, 2012" (2014) *Human Sciences Research Council* 57.

⁶ 'HIV and Aids estimates 2014- South Africa, available at <http://www.unaids.org/en/regionscountries/countries/southafrica> Accessed on the 2015/11/12 , accessed 2 August 2015.

⁷ 'The South African Government website', available at <http://www.gov.za/about-SA/Health> , accessed 3 November 2015

⁸ 'eNCA : infographic: A look at HIV/Aids in South Africa in 2014', available at <https://www.enca.com/south-africa/infograph-look-hiv-aids-south-africa-2014>, accessed 15 January 2016.

⁹'HIV-related illnesses' Aidsmap (November 2013), available at <http://www.aidsmap.com/HIV-related-illnesses/page/1254976/> accessed 21 January 2016.

¹⁰ Tshabalala VEM 'Annual Report for the period 1 April 2012 to 31 March 2013' (2013) *Judicial Inspectorate of Prisons* 69-71.

¹¹ Tshabalala VEM 'JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES ANNUAL REPORT FINAL 2014-2015' (1) –p91

expected that yearly reports after would continue on the same pattern and state the cause of death of inmates. The deaths due to HIV cannot be allowed to continue, especially in the modern age, where anti-retroviral drugs are freely available and literature on HIV prevention and management strategies are within arm's reach. It falls to this research undertaking to highlight measures that should be adopted in South African correctional centres, to fight the spread of HIV.

This dissertation is aimed at certain shortcomings of the current criminal legislative framework. Among these are Chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,¹² one of the aims of which is to punish the intentional spread of HIV/AIDS. The submission is that it is likely that the implications of imposing the sentence of life imprisonment in the Criminal Law Amendment Act 107 of 1997 were not properly considered. Implementation of this legislation is in fact, suspected to be directly contributing to the high rate of new HIV infections in South Africa. Implementation of this legislation has led to known HIV-positive inmates being held in the same overcrowded cell as other inmates whose HIV status is unknown.¹³ From the Sexual Offences Act it is established that the offender's HIV status is known by the judicial officer and those are enough reasons to refer the offender to a medical practitioner for assessment as soon as he is imprisoned and for the correctional centre to be made aware, so the offender gets a special diet and is enrolled for chronic medication. This, however, does not happen. HIV-positive offenders are instead sent to prison like any other inmate. The question then is how is the Department of Correctional Services supposed to know such information without attention being drawn to it by the sentencing presiding officer? This omission leads to an HIV-positive offender being subjected to harsh correctional centre conditions, where there are more chances of him/her being re-infected and also exposing other inmates to HIV infection.¹⁴

This then concentrates attention on the next set of inherent problems on which this dissertation is largely focused. South African correctional centres have a number of HIV-related deaths. Contributing factors to this state of affairs are: a failure to segregate HIV-positive inmates from those who are not; a lack of nutritious diet; an inability to manage the spread of infectious

¹² Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32, 2007, hereafter referred to as the 'Sexual offences Act'.

¹³ Criminal Law Amendment Act 107 of 1997, schedule 2 section 51 part I section 2 (a)(b)(c) 3 (a)(b)(c).

¹⁴ C, Van Wyk: 'The Impact of HIV/AIDS on Bail, Sentencing, and medical parole in South Africa' (2008) 23 *SAPR/PL* 50.

diseases; and overcrowding, which leads to the correctional centres not being able to give maximum supervision. This, in turn, leads to low security and helpless or unprotected inmates becoming victims to sexual abuse within correctional facilities.

This dissertation aims to highlight the conditions which contribute to the spread of HIV in South African correctional centres. In attempting to provide a solution to these problems, the dissertation will undertake a comparative study on the various measures that have been implemented in the correctional centres of the United States of America (hereafter referred to as the United States) so as to curb the spread of HIV. The United States has the highest correctional centre population in the world.¹⁵ Notwithstanding this fact, it has correctional centres which have a lower infection rate than those in South Africa. From this it may be argued that there is a lot to learn from preventative measures taken by the United States, which seem to be working well.

In setting the tone for this study, it is important to mention that the state may be “aware of” correctional centre conditions that perpetuate the spread of HIV and related illnesses. A number of key statutes have thus been promulgated. The submission advanced in this discussion holds that lack of proper implementation of the various strategies is what is leading to the increasing spread of HIV within South African correctional centres. Among these, we may highlight the Correctional Services Act,¹⁶ which, despite providing for detention under conditions of human dignity, security and protection for detained persons, adequate diet to promote good health, separation of sentenced inmates and those who are awaiting sentencing,¹⁷ is failing inmates.

1.2 THE PURPOSE OF THE RESEARCH

The purpose of the study as mentioned in the second paragraph above is to highlight the different strategies that can be implemented in South African correctional centres, to effectively limit the spread of HIV and related illnesses. To achieve this a comparison will be drawn between the measures adopted by the United States and those adopted by correctional centres in South Africa. The aim here is to take lessons from the United States which, in spite of having the highest correctional centre population in the world, has generally a lower HIV infection rate when compared to South Africa.

¹⁵ http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All, accessed 24 November 2015.

¹⁶ Correctional Services Act No 111 of 1998.

¹⁷ Ibid, section 7 1, 2(a) and (d) and section 8.

1.3 THE STATEMENT OF THE PROBLEM

The HIV epidemic in South Africa is generally growing at an alarming rate. The picture is not that much better in South African correctional centres, where it has been estimated that 80 per cent of ‘naturally’ classified deaths in correctional centres are observed to be from HIV-related illnesses.¹⁸ The Correctional Services Act imposes various obligations on correctional centres of working towards decent correctional centre conditions. However, this is far from being achieved, as reports suggest that the mortality within correctional centres is high. One such report finds that an estimated 17 018 inmates have died between 1998 and 2013. This is an alarming statistic, which reflects negatively on the effectiveness of the measures currently being implemented in South African correctional centres.

1.4 RESEARCH METHODOLOGY

A qualitative research methodology will be employed in this study. The study will include a comparative discussion on the measures adopted by the United States and South Africa to fight against the spread of HIV in correctional centres. Reference will be made to primary sources in the form of legislation and case law relevant to the topic. Secondary sources such as journals, textbooks and internet sources will be consulted.

1.5 RESEARCH QUESTIONS

Not knowing a question is to forfeit the answer. The following questions will be considered in this dissertation:

- 1) What is the purpose of imprisonment?
- 2) What are the problems, in respect of HIV-positive offenders, that contribute to the spread of HIV in South African correctional centres?
- 3) Is South Africa working effectively towards fulfilling the various statutes mandates of improving correctional centres’s conditions?
- 4) What are the measures that have been adopted by the correctional centres in the United States to curb the spread of HIV?
- 5) How effective are these measures and whether these measures will be effective if adopted by the correctional centres in South Africa?

¹⁸ Tshabalala VEM ‘Annual Report for the period 1 April 2012 to 31 March 2013’ (2013) Judicial Inspectorate of Prisons page 71

1.6 SEQUENCE OF CHAPTERS

This dissertation is made up of four chapters. Chapter One has outlined the background to the study and the purpose behind the research undertaking. Chapter Two essentially looks at current policies that are being used to try to curb the spread of HIV in South African correctional centres. The chapter investigates why these policies are ineffective in doing what they are designed to. Chapter Three examines the various measures that have been adopted by the United States correctional centres to fight the spread of HIV and other contagious diseases. The study ends with Chapter Four, a chapter containing recommendations and conclusions.

CHAPTER TWO

INHERENT PROBLEMS ASSOCIATED WITH IMPRISONMENT CONDITIONS

2.1 INTRODUCTION

Before South Africa was colonised, forms of punishment did not include imprisonment. Offenders were either fined by a chief in a tribal court or they were banished by their respective community and, as a last resort, were sentenced to death. However, the *status quo* changed in 1652 when the Dutch settlers arrived in Cape Town. Roman-Dutch law was introduced as the country's legal system which had a significant influence on criminal matters.¹⁹ The Roman Empire rarely used imprisonment to punish offenders.²⁰ The Romans saw imprisonment merely as a form of liberty deprivation and it was only used in the case of petty offences. In England, however, they had gaols and later they converted palaces to workhouses for the purpose of empowering the poor with skills.²¹ Conversion of these workhouses to correctional centres was very easy. This is how imprisonment started in England. This was adopted in South Africa, when England colonised the South Africa. Living conditions in the gaols and workhouses were very poor. They are said to have been filthy, insanitary and disease-infested.²²

Sentencing which precedes imprisonment is an action by judicial discretion in a formal criminal court, in which a convicted offender is imprisoned.²³ The purpose behind sentencing an offender to imprisonment, as stipulated in the Correctional Services Act, is to enable the guilty party to lead a socially responsible and crime-free life in the future.²⁴ An appeal court can interfere with the sentence that has been imposed on the offender but it has limited discretion and can only do so if the sentence brings about a sense of shock and is too severe, when

¹⁹ Terblanche SS. *The guide to sentencing in South Africa* (1999) 463.

²⁰ Ibid, 466.

²¹ Ibid, 472.

²² Ibid, 472.

²³ Ibid, 2

²⁴ Correctional Services Act, section 36.

compared to a sentence the appeal court would have imposed on the accused.²⁵ There are a number of forms of sentences that can be imposed by the court, for example: imprisonment with life imprisonment, with a life sentence being the highest, correctional supervision, a fine, periodical imprisonment and committal to an institution. This study will focus on life imprisonment of known HIV-positive offenders.

2.2 IMPORTANCE OF IMPRISONMENT AS A SENTENCE

A sentence to imprisonment is important in South Africa's criminal justice system because it protects the community by preventing re-offending. It provides a temporary sense of security and allows the victim to heal emotionally by not seeing the offender and knowing the offender cannot harm the victim again, as the offender is behind bars. The sense of security is temporary because all imprisonment sentences are subjected to parole after a certain period has been served with certain conditions.²⁶ Imprisonment punishes the offender and gives comfort to the victim that the offender's transgression against him or her did not go unnoticed.²⁷ At the same time it protects the offender from the vengeance of the community and gives the offender a chance to be a better person when being reintegrated into the community, by being given an opportunity to acquire skills and access to education while in the correctional centre.²⁸ Furthermore, the government is seen as not being barbaric by legalising the killing of its own people through the death sentence. Therefore imprisonment is a 'win-win' situation for all. But the question remains, whether the most extreme form of imprisonment, life imprisonment, provides the best sentence for sex offenders that are HIV-positive and have intentionally exposed their victims to HIV, as HIV-positive offenders expose other inmates to HIV and HIV-related illnesses, and the correctional centres living conditions cause them to die prematurely. The question further arises, whether in the light of this, imprisonment as a sentence needs to be re-evaluated to control the spread of HIV.

The contentions advanced in this discussion imply that the criminal justice system needs to take a stand regarding the spread of HIV by enforcing correctional centre laws that will demonstrate the acknowledgement of the existence of diseases that affect offenders. If the

²⁵ S v Bignaut 2008 (1) SACR 78 (SCA) at 81f – 83f.

²⁶ <http://www.dcs.gov.za/Services/CorrectionalSupervisionandParoleBoards.aspx>

²⁷ Published in Monograph No 45, Justice versus Retribution: Attitudes to Punishment in the Eastern Cape, February 2000

Accessed on <https://www.issafrica.org/pubs/Monographs/No45/RoleAndFunc.pris.html> on 16/3/2016

²⁸ Correctional Services

Accessed on <http://www.gov.za/about-government/government-system/justice-system/correctional-services> on 16/3/2016

intention is to continue using sentences of imprisonment there must be conditions that promote health and are consistent with human dignity.

An offender that dies while serving imprisonment defeats a primary aim of sentencing an offender to imprisonment, the aim being to rehabilitate the offender and for the offender to lead a socially-responsible and crime-free life in future.²⁹ How is the offender going to achieve that when he is six feet underground? In addition, other inmates may be following him, as they would have been exposed to the HIV virus and its related illnesses.

Passing long-term imprisonment sentences on offenders that are HIV-positive and who have committed serious offences is logically ineffective, considering the lifespan of an HIV-positive person and the conditions of South African correctional centres that accelerate the consequences of infection. ARVs need a nutritious diet for them to work effectively and re-infections cause the ARVs to be ineffective. Correctional centre food has poor nutrition value; it does not include fresh vegetables and fruits.³⁰ Sexual abuse is common in correctional centres and not every inmate wants to know their HIV status, as a result of which some are already infected but are not on ARVs, because they do not know their HIV status. This makes the fight against HIV within correctional centres ineffective. A former inmate, when asked how often sex incidents occur in jail, said 'it was an every night and every day situation.'³¹ While there are sexual behaviours (consensual or non-consensual)³² and with infectious tattooing being so prevalent in correctional centres, the HIV virus will dominate.³³

HIV-positive offenders, who have exposed their victims to HIV are not being punished in an effective manner. The life sentence that is prescribed by the mandatory and minimum sentences provision³⁴ serves to only punish, it neither deters nor rehabilitates the offender as most of them die while serving their life sentences. Life imprisonment does not mean that the offender, will spend the rest of their lives in a correctional centre; there is the possibility of parole

²⁹ Correctional Services Act, section 36.

³⁰ News 24 'Horror of South Africa's prisons: the SMSe'.

<http://www.news24.com/Archives/City-Press/Horror-of-South-Africas-prisons-the-SMSes-20150429> accessed on 28 April 2016.

³¹ Goyer KC & Gow J. 'HIV in Prison: Legal Implications for the Department of Correctional Services.' (2000) 11(3viennas) *AIDS Analysis Africa* 4.

³² News 24 'Horror of South Africa's prisons: the SMSe'

<http://www.news24.com/Archives/City-Press/Horror-of-South-Africas-prisons-the-SMSes-20150429> accessed on 28 April 2016.

³³ Goyer KC, Saloojee Y, Richer M... *et al.* 'HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission' (2004) Aids Law Project & Treatment Action Campaign (2004). P13.

³⁴ Criminal law Amendment Act of 105 1997 schedule 2 section 51.

consideration after 25 years being served.³⁵ If offenders that are not infected with HIV, do not get infected within the system or get exposed to HIV-related illnesses, they stand a chance to be considered for parole after serving 25 years of imprisonment. This gives the HIV-negative offender hope, which HIV-positive offenders do not get, it as they are likely to die long before that time. Life imprisonment does not mean “life”, with the preventive grounds for punishment overriding the rehabilitative or deterrent grounds. This is proven by the fact that even a life sentence can be considered for parole after an offender has served 25 years of imprisonment and is showing signs of rehabilitation.³⁶ Sentences for HIV offenders need to be crafted in a way that is tailor-made for the serious offences that they have committed, while also taking into consideration their frail health. Against this backdrop the argument holds that we are to improve correctional centre conditions if we want to control the spread of HIV and related illnesses in correctional centres.

2.3 WHAT IS WRONG WITH IMPRISONMENT FOR HIV-POSITIVE OFFENDERS?

Table 1 is from the Inspecting Judge of Prisons Annual Report 2013/2014.³⁷ Reading the data provided in the table in the “period in custody” column, 80% deaths of offenders, be it sentenced or not, were due to HIV-related illness and that none of the inmates lasted more than 13 years in correctional centres, as all the causes of death are HIV-related illness which include TB, pneumonia, renal failure and meningitis.³⁸ It is not known when these deceased offenders contracted HIV; whether it was before or after incarceration. Therefore the issue with sentencing HIV-positive offenders to long-term imprisonment is that the sentence is much longer than the lifespan of the offender, making the sentence practically unenforceable without infringing the objectives of sending the offender to imprisonment. HIV-positive offenders die prematurely from AIDS in correctional centres. This was also observed in the United States,³⁹ as correctional centres are not trained to deal with HIV-positive offenders.

³⁵ Correctional services Act 111 of 1998 section 73(6)(a).

³⁶ <http://www.dcs.gov.za/Services/CorrectionalSupervisionandParoleBoards.aspx> accessed on 4 April 2016.

³⁷ Tshabalala VEM ‘Annual Report for the period 1 April 2013 to 31 March 2014’ (2014) Judicial Inspectorate of Prisons page 71.

³⁸ ‘HIV-related illnesses’ *Aidsmap* (November 2013), available at <http://www.aidsmap.com/HIV-related-illnesses/page/1254976/> accessed on 21 January 2016.

³⁹ “While medical care is generally substandard for all prisoners, women face additional barriers to care, reflecting the lower value society places on caring for low-income women. Alarming, many women prisoners die prematurely of AIDS.” See, C Chandler, G Patton & J Job ‘Community-based alternative Sentencing for HIV-positive women in the criminal justice system’ (1999) 14(1) *Berkeley Women’s L.J.* 68.

Long imprisonment sentences contribute to overcrowding in correctional centres, as inmates are spending longer periods than when prisons were initially constructed for short-term imprisonment and more for labour intentions. Life sentences are expensive. It costs the state (tax-payers) R3 million to incarcerate one inmate for 25 years.⁴⁰

In the year 2003, the then Western Cape Health Minister, Piet Meyer, was reported in a newspaper, after visiting Brandvlei Prison in the Boland, that gangs in prison order known HIV-positive inmates to rape other inmates as a form of disciplining ritual. This type of punishment is called the slow poison.⁴¹ Because of HIV existence, imprisonment conditions need to be re-evaluated in order to curb the spread of this virus. Segregation of HIV-positive inmates from the uninfected inmates should be considered as a possible HIV infection prevention strategy in South African correctional centres

Table 1

Table 22: Natural Deaths – Cause and average period in custody

Sentenced Inmates			Remand Detainees		
Region	Causes of Death	Period in custody	Region	Causes of Death	Period in custody
EC	TB HIV Related Pneumonia Meningitis	Ranged from 1 day to 8 years.	EC	TB HIV Related Respiratory Failure Meningitis	Ranged from 5 days to 3 years.
FS/NC	TB Pneumonia HIV related	Ranged from 1 day to 9 years.	FS/NC	TB Retroviral diseases Pneumonia	Ranged from 3 day to 1 year 8 months.
GP	TB Renal Failure Meningitis Retroviral HIV related	Ranged from 1 day to 7 years.	GP	HIV related TB Renal failure	Ranged from 2 day to 2 years.
KZN	Pneumonia HIV related Respiratory Failure	Ranged from 3 days to 13 years.	KZN	TB Pneumonia Meningitis	Ranged from 6 days to 7 months.
LMN	Pneumonia Meningitis	Ranged from 1 day to 15 years.	LMN	TB Pneumonia	Ranged from 1 day to 4 years.
WC	TB Cancer Cardiac Failure	Ranged from 1 day to 5 years.	WC	TB Meningitis	Ranged from 1 day to 8 months.

⁴⁰ 'The State of South African Prisons 2014' *Nicro Public Education Series* (19 April 2014), available at <http://www.nicro.org.za/wp-content/uploads/2014/04/Public-Education-Paper-The-State-of-South-African-Prisons-2014.pdf>, accessed in 20 November 2015.

⁴¹ <http://www.iol.co.za/news/south-africa/death-by-slow-puncture-118145>

2.4 SENTENCE MUST BE PRACTICAL AND ENFORCEABLE

The *S v Mahlatsi*⁴² case is one example of where a long imprisonment sentence was criticised for being impractical, as it was beyond the lifespan of the offender. The court held that giving a 40-year-old man an imprisonment sentence of 50 years was unreasonable, especially considering that the estimated lifespan of a South African is 59.6 years. Lamprecht AJ (De Vos J and Phatudi AJ concurring) used the following reasoning to arrive at their decision:

‘In post-Methuselah Biblical terms, no person can usually live beyond the age of 120-years, but the Biblical norm is that an age of only in the region of 70 to 80-years is generally reached. We all know that for someone today to reach the age of, say, 95 or 100-years would be regarded as an extreme blessing, and an age beyond that a wonder of some sorts. In South Africa today, generally speaking, life expectancy of individuals is in the region of 59,6-years. So what might one ask is, what is the purpose of sentencing a 40-year-old individual like the appellant to an effective term of 50-years' imprisonment if one is not going to sentence him to life imprisonment? And, if that is too much, what would a more appropriate term of effective imprisonment be? If he serves the full sentence, he would be 90 years old when he is released⁴³’

The court also held that a life sentence is the maximum sentence that a court can impose on the offender, therefore, imposing a sentence that is larger than the life sentence can be seen as shocking.⁴⁴ With regards to a life sentence, a person can be considered for parole after 25 years and if he reaches the age of 65 years while serving his sentence he is automatically considered for parole.⁴⁵ Therefore the 50 years of the appellant are no different to the life sentence of his co-accused that were main perpetrators, as he will only be considered for parole after 25 years, too. The appeal court ordered that the five-years of the two other counts (14 and 17 count) to run concurrently with the first 1st count (count 13) of robbery and three years of the five-year sentence to run concurrently with count 13.⁴⁶ This brought the sentence to 37 years, which meant he could be considered for parole after 18 and a half years.

Life imprisonment is regarded as the ultimate punishment that any offender can receive. It is more for pleasing the victim and society than for it being actually practically enforceable to offenders that are HIV-positive to serve completely and achieve its imprisonment objectives, especially with the centres of correctional service conditions not being up to human rights

⁴² *S v Mahlatsi* 2013 (2) SACR 625 (GNP).

⁴³ *Ibid*, par 16.

⁴⁴ *S v Mahlatsi* 2013 (2) SACR 625 (GNP).

⁴⁵ Correctional services Act 111 of 1998 section 73(6) (a).

⁴⁶ *S v Mahlatsi* 2013 (2) SACR 625 (GNP).

standards. The assumption is that, since life imprisonment sentences still have the possibility of a parole after 25 years imprisonment,⁴⁷ it shows that the aim of life imprisonment is not for the offender to die while serving his/her sentence, but for the offender to realise how serious the offence he/she has committed was and to be remorseful and repent from his/her criminal ways. If the aim of a life imprisonment sentence is for the offender to die in a correctional centre that it is against the Constitution, because the right to life is the most fundamental right for every individual.⁴⁸ The death penalty was regarded as a degrading and inhumane punishment.⁴⁹ Therefore it ought not to be accepted that life imprisonment should be a “slow death penalty”.

HIV-positive offenders die prematurity while serving their life imprisonment sentences because of frail health and correctional centre conditions that accelerate the illness.⁵⁰ If personal circumstances, which include frail health, as one of the conditions that are considered when sentencing an offender,⁵¹ as Rumpff JA stated, “I would have been of the opinion that the facts of the present case justified a sentence of 15 years' imprisonment.” Given, however, his age and illness, “justice will be done if the sentence is 12 years' imprisonment.”⁵² This case shows that illness is taken into consideration when sentencing an offender. Why is HIV not seen as a disease that affects the health of a person? Why would a statutory law⁵³ overlook this personal circumstance which is considered in the principles of sentencing?

2.5 SPECIFIC CHALLENGES WITH IMPRISONMENT

2.5.1 Overcrowding

The judicial inspectorate report of 2014-2015⁵⁴ highlights that, over the years, it has been observed that the more correctional centres were becoming over-populated the higher the annual death rate of inmates. This confirms the close link between overcrowding and death of inmates. The report⁵⁵ does not specify the cause of death in detail, but only states whether it

⁴⁷ Correctional Services Act 111 of 1998 section 73(6)(a).

⁴⁸ Section 11, Chapter 2 of the Constitution of the Republic of South Africa.

⁴⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

⁵⁰ Goyer KC, Saloojee Y, Richer M... *et al* ‘HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission’ (2004) Aids Law Project & Treatment Action Campaign (2004). P17.

⁵¹ *S v Zinn* 1969 (2) SA 537 (A).

⁵² *Ibid* 542E.

⁵³ Criminal Law Amendment Act of 105 1997 schedule 2 section 51.

⁵⁴ Skweyiya T ‘Annual Report for the period 1 April 2014 to 31 March 2015’ (2015) Judicial Inspectorate of Prisons. 91.

⁵⁵ *Ibid*.

was natural or unnatural. This is disappointing, as HIV/AIDS is a serious issue in correctional centres and one would expect any natural death of an inmate to be specified whether it was HIV/AIDS related or not, especially when 649 complaints of sexual assaults were reported.⁵⁶

Overcrowding in prisons compromises security, which leads to inmates seeking protection from gangs in exchange for sexual favours, or for the supply of equipment that is necessary for the making of tattoos, which are used to prove allegiance to a gang. It is in this way that offenders get exposed to HIV reinfection.⁵⁷ This leads to a very high viral content which, in turn, fast-tracks the process of HIV becoming AIDS. The lack of fresh fruit and vegetables in correctional centres' meals makes it even harder to assist the immune system, even when ARVs are taken.⁵⁸

The following statistics paint a grim picture which make for uneasy reading. In 2013, South African correctional centres were declared to have the highest correctional centre populations in Africa and were ranked ninth in a list of the highest correctional centre population in the world. The correctional centres population in that year was estimated to be 160 000, of which 48 000 were awaiting-trial inmates.⁵⁹

Two years on, during his annual budget speech, Justice and Correctional Services Minister Michael Masutha said that the correctional centre population is currently at 159 241. Of these, more than 40 000 are remand or awaiting-trial detainees.⁶⁰ The Minister was also quoted as saying that the Department only had 120 000 beds for 159 241 inmates.⁶¹ This means that 39 241 inmates in correctional centres are either sharing a bed or sleeping on the floor. The inmates sharing a bed are most likely to be subjected to non-consensual/consensual sexual behaviour

⁵⁶ Skweyiya T 'Annual Report for the period 1 April 2014 to 31 March 2015' (2015) Judicial Inspectorate of Prisons. 78.

⁵⁷ Goyer KC, Saloojee Y, Richer M ... *et al* 'HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission' (2004) Aids Law Project & Treatment Action Campaign (2004). P18.

⁵⁸ Ibid,13.

⁵⁹ SAPA 'SA prisons 'most crowded in Africa' *IOL News February (11 2013)* available at, <http://www.iol.co.za/news/crime-courts/sa-prisons-most-crowded-in-africa-1.1468154#.Vky0B9lrKM8>

⁶⁰ '10 things to know about South African Correctional Centres' *Wits Justice Project* (21 May 2015), available at, <http://witsjusticeproject.com/2015/05/21/10-things-to-know-about-south-african-correctional-centres>, accessed 18 November 2015.

⁶¹ Essop R 'Prison overcrowding due to remand detainees' *Eye Witness News* (20 May 2015) available at <http://ewn.co.za/2015/05/20/Remand-detainees-blamed-for-overcrowding-in-prisons>, accessed 18 November 2015).

⁶¹ Ibid, in their annual report 2013/2014 the DCS stated that overcrowding levels were at 29.70%. According to EWN this week, Minister Masutha said that South African prisons have enough bed space for only about 120 000 out of 159 241 inmates.

as rent for the bed space. Consensual sexual behaviour contributes to the spread of HIV within correctional centres. Sharing of beds due to overcrowding encourages it.

These cases of insufficient basic needs like beds contribute to inmates being exposed to HIV.⁶² “According to a criminal law expert, homosexual activities (also in correctional context) such as consensual sex per rectum used to be known as sodomy in pre-democratic South Africa. However, since 1994, sodomy does not qualify as a common law crime. In terms of Section 9(3) of the Constitution (1996), the State is forbidden to interfere or discriminate against the sexual orientation of any person and, therefore, consensual sex or homosexuality became a non-consenting act between participating partners. However, HIV/Aids, transmitted through unprotected sexual activities with an infected partner, has become a major concern for correctional authorities. Section 35 (2) (e) of the Constitution of the Republic of South Africa specifically deals with health-care issues of inmates in correctional context, including that of HIV/Aids and other communicable diseases.”⁶³

Life imprisonment also contributes to overcrowding,⁶⁴ because correctional centres were not designed with the view that the human population would increase so rapidly. The reasoning behind this is that during planning it was thought that imprisoned offenders would be rotated, so that new ones come in as the old ones leave. Such thinking did not take into account the fact that the crime committed would be so violent that it requires the offenders to be locked up for a very long period of time. This is observed from the floor spacing per cell calculation. The ‘floor space norm’ in South Africa is said to be 3.5m² for communal cells (ablution area included) and 5.5 m² for single cells.⁶⁵ According to the South Africa's National Building Regulations (SANBR), the minimum allowable floor area for any liveable room is 6 m².⁶⁶ With inmates staying for longer periods the rotation cycle was disturbed.

⁶² Zungu R & Potgieter PJ ‘The prevalence of consensual sex in South African male correctional centres’ (2011) 24(2) *Acta Criminologica* 65. Southern African Journal of Criminology Centre.

⁶³ Zungu R & Potgieter PJ ‘The prevalence of consensual sex in South African male correctional centres’ (2011) 24(2) *Acta Criminologica* 65. Southern African Journal of Criminology Centre.

⁶⁴ J Van Zyl ‘Annual Report for the period 1 April 2008 to 31 March 2009’ (2009) *Judicial Inspectorate of Prisons* 17.

⁶⁵ Ibid.

⁶⁶ DJ Hoffman & T Viljoen. ‘Evaluation of office space utilization in South African municipalities’ (2013) *Journal of Construction* 14.

Table 2**Average inmate population from 2009/10 to 2013/2014:**

Financial year	Remand detainees		Sentenced offenders		Total inmates	
	Female	Male	Female	Male	Female	Male
2009/10	1 027	47 398	2 581	11 2883	3 608	160 281
2010/11	963	46 794	2 625	11 0714	3 588	157 508
2011/12	1 030	44 868	2 735	11 0309	3 765	155 177
2012/13	988	44 742	2 392	10 2486	3 380	150 608
2013/14	1 005	43 853	2 490	10 5206	3 495	149 058

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The Report⁶⁸ stated that there were 104 670 sentenced inmates in 2013 and 110 412 in 2014, which gives us an average of 107 541 sentenced inmates per year. The reader should note the discrepancy of the figure of the average sentenced inmates for 2013/14 given by the Department of Correctional Services Annual Report 2013/2014⁶⁹ and the figure calculated from the data given by the Inspecting Judge of Prison Report.⁷⁰ This Report⁷¹ also shows a pie chart that reflects inmates sentenced to life imprisonment for 2013/14 to be 11% of which the data was analysed to read that 11 829.51 inmates are serving life imprisonment for 2013/14. This is more like the following calculation:

Average of sentenced inmates for 2014 and 2015

$104\,670 + 110\,412 = 215\,082 / 2 = 107\,541$ average inmates sentenced for year 2014/15.

11% inmates serving life sentenced of the average sentenced inmates for 2013/2014

$107541 \times (11/100) = 11\,829,51$ inmates serving life sentences in year 2014/15.

This is interpreted to read that if these 11 829,51 inmates serving life sentences after 25 years, that is if they make it out alive, the Department would have spent R 35 046 912 000 after 25 years. This amount is based on the assumption that the cost of incarceration of R329.20 a day does not increase for the next 25 years. This is highly unlikely, and the Department would have paid far in excess of R 35 046 912 000 after 25 years for 11 829 inmates.

⁶⁷ Department of Correctional Services *Annual Report* (2014) 26.

⁶⁸ Department of Correctional Services *Annual Report* (2013) figure 4, 37.

⁶⁹ Department of Correctional Services *Annual Report* (2014) 26.

⁷⁰ Department of Correctional Services *Annual Report* (2013) figure 4, 41.

⁷¹ Ibid, figure 7.

Table 3**Table 21: Costs of Incarceration (R329.20)**

	Per Person	Per 100 People
1 day	R 329.20	R 32,920.00
1 week	R 2,304.40	R 230,440.00
1 month	R 9,876.00	R 987,600.00
3 months	R 29,628.00	R 2,962,800.00
6 months	R 59,256.00	R 5,925,600.00
12 months	R 118,512.00	R 11,851,200.00
24 months	R 237,024.00	R 23,702,400.00
3 Years	R 355,536.00	R 35,553,600.00
5 Years	R 592,560.00	R 59,256,000.00
7 Years	R 829,584.00	R 82,958,400.00
10 Years	R 1,185,120.00	R 118,512,000.00
15 Years	R 1,777,680.00	R 177,768,000.00
20 Years	R 2,370,240.00	R 237,024,000.00
25 Years	R 2,962,800.00	R 296,280,000.00

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Goyer's writing, 13 years ago,⁷³ suggested that the sentencing and the bail procedures be re-evaluated and re-considered as they directly impact on the overcrowding in the correctional services that leads to easy spread of HIV/AIDS and related illness. However, there is not much that has been done to adjust sentencing and bail policies to accommodate these challenges in the interim.

Goyer further states that overcrowding does not only affect sentenced inmates but also awaiting-trial inmates, which has consequence for the general public and becomes a public health issue.⁷⁴ She explains that correctional centre conditions make it very unlikely for HIV-positive inmates to survive incarceration in a correctional centre, which means there is no re-integration to the community after being released and no rehabilitation as a consequence of the inmates dying while serving their imprisonment sentences.⁷⁵ The aims of a sentence of

⁷² Department of Correctional Services *Annual Report* (2014) 24.

⁷³ Goyer, K. C. 'Prison health is public health: HIV/AIDS and the case for prison reform' SA Crime Quarterly 2 (2002) 25.

⁷⁴ Ibid.

⁷⁵ Ibid.

imprisonment, which seek to rehabilitate and re-integrate the offender back into the community, are not being achieved.⁷⁶

The disadvantages of the sentence of imprisonment for such offenders is that correctional centres have undesirable conditions of overcrowding, malnutrition, homosexual activity, stress and use of contaminated cutting instruments, which compromise health and safety, and have the effect of exacerbating the overall health of all inmates, particularly those living with HIV or AIDS.⁷⁷ These conditions lead to such offenders not even serving half of their sentences as they die prematurely because the harsh prison conditions accelerate their deaths.⁷⁸

The main issue with overcrowding is that the consequences that come as a result of it are life-threatening. Overcrowding leads to violence as inmates are fighting over limited resources and the stress levels are high from being locked in one cell for long hours.⁷⁹ It becomes impossible for the correctional centre authority to provide security for each inmate who is their responsibility.⁸⁰ Therefore the gangs take over and offer protection for a price, namely sexual favours and organising supplies that the gang members need, like cigarettes. Being a gang member means having a tattoo as well to prove membership and allegiance to it. This, too, comes with its own inherent health risks.

The judicial inspectorate report 2014-2015⁸¹ emphasises that the Criminal Procedure Act⁸² provides a solution for overcrowding in correctional centres by stating that if correctional centres are overcrowded bail must be given to certain detainees. The report⁸³ states that there is no evidence of correctional centres applying S63A of the Criminal Procedure Act.⁸⁴

In summary, imprisonment is expensive, it denies hope of life after imprisonment for HIV-positive offenders and contributes to overcrowding and to the spread of HIV within correctional

⁷⁶ Correctional Services Act, section 36.

⁷⁷ Goyer KC 'HIV/AIDS in prison: Problems, policies and potential' (2003) 79 *Institute for Security Studies Monographs* 36.

⁷⁸ Goyer KC, Saloojee Y, Richer M... *et al* 'HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission' (2004) Aids Law Project & Treatment Action Campaign (2004). P18, Ibid, 17

⁷⁹ The Department of Correctional Services *Annual Report* (2009) 26.

⁸⁰ Ibid.

⁸¹ Skweyiya T 'Annual Report for the period 1 April 2014 to 31 March 2015' (2015) Judicial Inspectorate of Prisons.

⁸² Criminal Procedure Act 51 of 1977.

⁸³ Skweyiya T 'Annual Report for the period 1 April 2014 to 31 March 2015' (2015) Judicial Inspectorate of Prisons.

⁸⁴ Skweyiya T 'Annual Report for the period 1 April 2014 to 31 March 2015' (2015) Judicial Inspectorate of Prisons. 44

centres. Overcrowding leads to low security and violence occurs uncontrollably, which leads to protection being offered for the price of high-risk sexual behaviour. This contributes to high stress and on a low nutritional diet and lack of exercise the immune system becomes compromised and that accelerates HIV-AIDS, which leads to death, as medical parole is not easily given.⁸⁵

If the protection price offered by the gangs in correctional centres is not high-risk sexual behaviour and the individual can afford to provide supplies that are needed by gang members offering protection, the HIV-positive inmate can expose other inmates to HIV through the tattooing that every gang member undergoes at the same time, with use of one sharp object as incision instruments.⁸⁶ Should the inmates survive the correctional centre, they go back to communities where they expose their partners to HIV and STIs.⁸⁷ Therefore the HIV struggle becomes a never-ending cycle.

2.5.2 Sexual abuse in correctional centres

The Department of Correctional Services Report does not have statistics of inmates who complain of rape while in custody, regardless of the acknowledgment that rape does happen within their centres.⁸⁸ Rape is still reported as an assault which causes it to draw less attention than what it deserves.⁸⁹

There are three types of sexual activity that take place in correctional centres.⁹⁰ There is one where an inmate is raped and converted to a “wifie”, which means that inmate will be continuously raped by his perpetrator until his sentence is served in the correctional centre, or he dies. It is called a prison marriage. The perpetrator normally provides protection for his victim and other provisions, therefore if there is any consent it is coercive.⁹¹

⁸⁵ The Department of Correctional Services Annual Report (2009) 26.

⁸⁶ Goyer KC, Saloojee Y, Richer M K Goyer, Y Saloojee, M Richer... et al ‘HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission’ (2004) Aids Law Project & Treatment Acton Campaign (2004). P18,
Ibid, p20.

⁸⁷ Goyer KC (note 50 above).

⁸⁸ Muntingh, Lukas; Satardien, Zain. "Sexual Violence in Prisons - Part 1: The Duty to Provide Safe Custody and the Nature of Prison Sex." South African Journal of Criminal Justice 24.1 (2011): 4.

⁸⁹ Ibid.

⁹⁰ Ibid, p20.

⁹¹ Ibid, p20.

The second sexual activity is *chitha pondo*, where both parties engage in a sexual relationship for mutual sexual gratification purposes. Both parties take turns in penetrating each other in this process, but there are no feelings of love.⁹²

The third sexual activity is similar to the second one, except that it involves feelings of love.⁹³ The common thing about all these three sexual activities is that, without protection, bodily fluids are being exchanged, exposing both participants to HIV. This contributes to the spread of HIV in correctional centres. The Department of Correctional Services has a legal duty to protect inmates from sexual violence. This duty arises from the inmate's right to safe custody that is given by the Constitution.⁹⁴

The *Mail & Guardian* newspaper shared a story of three offenders who are rape survivors. One offender, Vincent, was gang-raped in an overcrowded cell in the Western Cape Correctional Centre as an awaiting-trial inmate. He tried to seek help from correctional centre guards, nurses and even magistrates, but no one assisted him. He was even told by some that such incidents are to be expected during a correctional centre stay. This was his first sexual encounter and three years later, when he finally got medical help, he found out he was HIV-positive. He knows it was because of that sexual assault.⁹⁵

The second offender to share his experience was Francois, who said that he was violently gang-raped twice in the Eastern Cape Correctional Centre. Francois received no counselling assistance, even though he reported the incident to correctional centre wardens. He then tried to commit suicide and failed. He sued the Department of Correctional Services upon his release from jail. He accepted a settlement when it was promised that other inmates would be protected from what he suffered. When nothing happened that showed intervention by the Department of Correctional Services, he decided to speak to the media.⁹⁶

Thabo from Limpopo is the third offender. He was imprisoned at the age of 21 and was repeatedly raped during his decade-long correctional centre sentence. He also attempted suicide but was unsuccessful. As a result he has contracted HIV and he now struggles to communicate with people.⁹⁷

⁹² Ibid, p21.

⁹³ Ibid.

⁹⁴ Ibid, p5.

⁹⁵ Keehn E & Gear S 'Male prison rape survivors speak out' *Mail and Guardian Online* (14 May 2015) available at <http://mg.co.za/article/2015-05-13-male-prison-rape-survivors-speak-out>, accessed 20 January 2016.

⁹⁶ Ibid.

⁹⁷ Ibid.

These testimonies show that sexual assaults in correctional facilities happen all over the country. Sending an offender that is known to be HIV-positive to such environments contributes to the spread of HIV and it has the effect of reducing the life-span of the HIV-positive offenders by exposing them to a stressful environment of overcrowding, with poor nutrition and re-infection with high a viral load. The following statement from Goyer may be noted:

“Lawyers for Human Rights estimates that 65% of inmates in South African correctional centres participate in sexual activity. Among inmates awaiting trial, many of whom are held in the same cells as convicted inmates, an estimated 80% are robbed and raped by other inmates before they are officially charged. At several correctional centres in South Africa, correctional centre staff reported that inmates commonly participate in sexual activity, either voluntarily or through threats and coercion. According to one prison social worker, even though many inmates and correctional centre guards will not admit or discuss it, prostitution and rape (sexual assault) are ‘rife.’⁹⁸

2.5.3 Contagious diseases

The graph that was presented in the report by the Inspecting Judge of Prisons was formatted into the table below and the total of inmates’ deaths that were classified as natural deaths was 17 018 from 1998 -2013, a period of 16 years.

Table 4

Table of recorded natural deaths in correctional centres from 1998 -2013

YEAR	No. of natural deaths in Correctional Centres
1998	534
1999	737
2000	1 087
2001	1 169
2002	1 389
2003	1 683
2004	1 689
2005	1 507
2006	1 249

⁹⁸ Goyer KC, Saloojee Y, Richer M ... *et al* . ‘HIV/AIDS in prison: treatment, intervention, and reform. A submission to the Jali Commission’ (2004) *Aids Law Project & Treatment Action Campaign* (2004).

2007	1 056
2008	982
2009	992
2010	900
2011	804
2012	652
2013	588
Total	17 018

In 2008 the Inspecting Judge of Correctional centres (Judge Deon Hurter van Zyl) received a report of 1155 deaths in correctional centres for all South African correctional centres. But as he was compiling his report the data drawn from the correctional service department was 1048 natural deaths in South African correctional centres. The following term a new Inspecting Judge of Correctional centres was appointed (Judge Vuka Eliakim Maswazi Tshabalala), whose office compiled the 2012/2013 annual report that shows a new figure for the 2008 natural deaths to be 982. As a researcher, these discrepancies indicate inaccurate data collected instead of just “typing errors” and they call for an independent investigation (inquiry). The late Justice Thembile Skweyiya was appointed Inspecting Judge of Correctional centres on 1 April 2015. He was laid to rest on 6 of September 2015⁹⁹. Michael Masondo is the current acting Inspecting Judge of Correctional centres in South Africa.¹⁰⁰

The statistics of inmates who presumably died of natural causes from 1998-2013 is 17 018. This number is too high for people who are in custody and in care of the state, compared to the general public, that have to fend for their survival while exposing themselves to lots of dangers. Natural deaths should be minimum for inmates in general because the state is legally liable to provide adequate accommodation¹⁰¹, nutritional meals that support good health¹⁰² and safety and security¹⁰³ while in their custody, not forgetting medication for any illness that the inmate

⁹⁹ ‘UPDATED: Former ConCourt judge Skweyiya dies’ *ENCA* (1 September 2015) available at <https://www.enca.com/south-africa/former-concourt-judge-skweyiya-dies>, accessed 15 November 2015.

¹⁰⁰ Correctional Services. Judicial Inspectorate for Correctional Services Quarterly Performance Report (September – December 2013) https://pmg.org.za/committee-meeting/16863/_on_20_November_2015.

¹⁰¹ Section 7 Correctional Services Act.

¹⁰² *Ibid*, Section 8.

¹⁰³ *Ibid*, Section 26.

might be suffering from¹⁰⁴ and exercise and reading material¹⁰⁵ and mostly segregation of inmates for health reasons¹⁰⁶ and hygienic living environment.¹⁰⁷ Therefore, ideally inmates should be living longer, but instead 17 018 inmates have died as from 1998 to 2013.

Any death that is due to a disease that is HIV-related should be classified as an HIV death because that offender would have survived that diseases had his immune system not been attacked by the HIV. But that is not the case in South Africa, death due to diseases like tuberculosis, cancer, strokes, heart attacks are classified as a natural death.¹⁰⁸ This is misleading and results in the root of the problem not being addressed because deaths are being wrongly classified. The Act¹⁰⁹ does not describe what type of deaths are natural or unnatural¹¹⁰ making the classification even harder. This not only occurs in South Africa but also in the US where you find prisons classifying death that resulted from the correctional centres officials failing to supply chronic medication, as natural death.¹¹¹

The Inspecting Judge of Correctional centres, Van Zyl, in his annual report¹¹² explains that the issue with wrongly classify unnatural death as natural is that such deaths are automatically excluded from being subjected to *post-mortem* examination independent investigations in terms of the Inquest Act.¹¹³ He also suggests that all deaths be subject to *post-mortem* examination. It is submitted that this is correct, for the reason that the state must show accountability to the families of the deceased offender, regardless of their low social status and lack of education regarding their rights. This is because research shows that most inmates are from disadvantaged communities¹¹⁴. Such persons are normally mistreated by formal structures.

¹⁰⁴ Ibid, Section 12.

¹⁰⁵ Ibid, Section 18.

¹⁰⁶ Ibid, Section 30(1)(c).

¹⁰⁷ Ibid, Section 9.

¹⁰⁸ Department of Correctional services *Annual Report* (2009) 24.

¹⁰⁹ Correctional Services Act.

¹¹⁰ Department of Correctional services *Annual Report* (2014) 24.

¹¹¹ 'Soon after I got there, the girl in my cell with me got really sick. One night she started screaming for oxygen. She had a heart condition and HIV, and she was kicking from heroin. The guard came to the door and told her to shut up. But she was having even more trouble breathing, and she begged for help. Later, the guard threw a bag in the room and told her to "blow in this bitch." She kept screaming for help. I tried to help her through the night. Finally, I fell asleep. When I woke in the morning, she was dead', see Chandler, Patton & Job (note 25 above) 71.

¹¹² Department of Correctional services *Annual Report* (2009) 24.

¹¹³ Inquest Act No 58 of 1959, Section 2.

¹¹⁴ Goyer KC, Saloojee Y, Richer M (note 98) 11.

2.5.4 Access to health care in correctional centres

The Deputy Minister of Correctional Services, Thabang Makwetla reported that correctional centres have better health care systems than public health care.¹¹⁵ The reality is that access to such health care is a challenge; as there are few correctional centre guards, inmates need to be escorted to health care and the guard must wait until the procedure is finished and then return the inmate to his cell.¹¹⁶ As a result, access to health care is delayed. What is more worrying is that if a person with TB does skip medication or does not take it properly, then that person is more likely to develop drug-resistant TB. This means that the drugs normally used to treat TB no longer work on the person who is infected with drug resistant TB.¹¹⁷ This is a problem, as ventilation in correctional centres is poor and inmates spend long hours in an overcrowded cell. With limited access to health-care, correctional centres are a hotspot for contracting contagious diseases. It is estimated that an inmate is more likely to contract TB within a year of incarceration than a person living with HIV who is not incarceration.¹¹⁸

2.5.5 Other factors contributing to the spread of HIV in correctional centres

It is a fact that overcrowding leads to easy contraction of contagious diseases. The correctional centre environment is said to be ideal for the rapid spread of contagious diseases such as TB, HIV/AIDS and the H1N1 flu virus.¹¹⁹ The HIV-related illnesses thrive in correctional centre environments because, with little ventilation, and being cooped up in one cell for hours, TB, syphilis and other STIs are easily spread.¹²⁰ HIV deaths are recorded as natural deaths, regardless of the fact that the reason the persons could no longer respond to treatment was because the immune system was attacked by the HIV virus. KC Goyer¹²¹ explains that TB is more common because all that is required for it to spread is a cough from an inmate suffering from it and droplets from that contaminated air inhaled by another inmate.¹²² With sexual activities being prohibited in a correctional centre it results in no condoms being provided, making the prohibited sexual activities that do take place high-risk.

¹¹⁵ 'Public vs Public Health: What are the facts?' *Mail and Guardian Online* (18 December 2014), available at <http://mq.co.za/article/2014-12-18-do-prisoners-have-access-to-better-medical-facilities-than-the-public>, accessed 24 February 2016.

¹¹⁶ Ibid.

¹¹⁷ 'Drug resistant TB' *Centre for Disease Control and Prevention*, accessed at <http://www.cdc.gov/tb/topic/drtb/> 24 February 2016.

¹¹⁸ 'Public vs Public Health: What are the facts?' (note 115 above).

¹¹⁹ Department of Correctional services *Annual Report* (2009) 37.

¹²⁰ Goyer, (note 44 above) 25.

¹²¹ Ibid.

¹²² Ibid.

South Africa is one of the countries with high numbers for HIV infection rates. Is sentencing an offender who has intentionally exposed their victims to HIV/AIDS to life imprisonment without taking precautions that they do not continue exposing other inmates to this merciless virus not contributing to the high infection rate of HIV in South Africa? Is this not the same thing that KC Goyer has warned against;¹²³ the unconscious spread of HIV by correctional institutions? Goyer draws attention to the fact that only a small percentage of inmates remain in correctional centres. Out of 100% of inmates in the correctional facilities 75% are released back to communities. This means if inmates get infected in a correctional centre with HIV, they go back to communities to spread HIV. It is very unfortunate that the communities that get affected the most are the disadvantaged communities, because this is where these inmates are coming from. This ends up affecting the whole country, hence the reasoning that government needs to use appropriate designs and implementation of procedures to respond to the HIV challenge in South Africa.

KC Goyer¹²⁴ explains that the gang-related violence, including high-risk sexual behaviours, is one of the most common ways of transmitting HIV. She explains that it is not just the high-risk behaviour but transmission per exposure, as it is affected by the viral load in the presence of other sexually transmitted infections. She explains that the viral load in body fluids increases as the infection progresses, which means that the inmate transmits the virus faster. She says that this can be lowered by ARVs. The issue is that if the inmate is aware of their HIV status they might not even want to take those ARVs and that will put other offenders at risk, which and that will limit the chances of sentencing achieving its aims. She says that an HIV-infected inmate is more likely to advance more quickly than that of someone who has been living with HIV, but who has access to good nutrition, good health care and a supportive environment.

This might seem futile, but if the aim is to have fewer criminal offences and an HIV-free generation, the only chance to realize this is to take care of inmates' health, as it is part of public health. The present author agrees with Goyer, that rehabilitation cannot take place without first providing offenders with conditions of detention that are consistent with human dignity. If conditions of detention are structured with the best intentions for an inmate's health, public health will improve.

¹²³ Goyer, (note 44 above).

¹²⁴ Ibid.

What was a daunting fact in this article¹²⁵ is where the author described overcrowding. A cell that is supposed to accommodate 18 offenders is filled with 60 offenders. She explained how diseases like TB (tuberculosis) thrive in such environments as they are transmitted by inhaling infected droplets of the sputum expelled by coughing. This is an HIV-related illness but it can be contracted by anyone, regardless of their HIV status

2.5.6 The Department of Correctional Services can be subjected to delictual claims

In 2012 it was reported that the Department of Correctional Services owes R1.3 billion for damages to inmates and former inmates for bodily injury/assaults and rape while in custody.¹²⁶ Out of the R1.3 billion, R4.5m was for rape claims.¹²⁷ In 2014, the Department of Correctional Services declared itself to be owing R984 317 000 million, R5 259 000 million being for rape claims.¹²⁸ The Department needs to act pro-actively in order to prevent such delictual liability, which is paid with taxpayers' money.

If offenders that have intentionally exposed their victims to HIV/AIDS are charged with attempted murder, it is also possible for the Correctional Services Department to have a delictual claim against it for exposing uninfected inmates to HIV/AIDS, as they are made to share common cells when the correctional centre does allow segregation of offenders for health reasons. It should be remembered that the state has sentenced the offender to life imprisonment because he has intentionally exposed his vulnerable sexual victims to HIV. The state is aware of the offender's HIV-positive status and makes no use of a medical practitioner to see him and to make recommendations for his incarceration conditions to lower the chances of further HIV exposure to other inmates. There is foresight to the exposure of HIV to other inmates and failure to make the right call amounts to intentional omission. Correctional centre health research papers have drawn attention to this spread of HIV in correctional centres, yet no preventative measures have been taken by the Department of Correctional Services. If this can be proved in a court of law, the Department will be paying many delict claims, which could have been prevented if the Department had acted pro-actively.

¹²⁵ Ibid.

¹²⁶ I, Rawoot 'Report shows sorry state of South Africa's prisons' *Mail and Guardian Online* (15 October 2015), available at <http://m.g.co.za/article/2012-10-14-report-shows-sorry-state-of-sa-prisons>, accessed 18 November 2015.

¹²⁷ Ibid.

¹²⁸ Department of Correctional Services *Annual Report* (2014) 146.

The problem is that offenders do not undergo an HIV test before going into correctional centres. If the offender reports a rape within the correctional centre, it cannot be proved beyond reasonable doubt that they contracted the HIV during the rape incident, as they could already have been HIV infected. As a result, the offender cannot claim exposure during the rape incident.

Neethling¹²⁹ states that the Government can be held civilly liable for contagious diseases among inmates if a causal link can be established. This article makes it clear that an inmate is a government responsibility, therefore conducting an HIV test, with or without the inmate's knowledge, is in for the best interest of the inmate and other inmates in making the criminal justice system effective.

In *Lee v Minister of Correctional Services*¹³⁰, the applicant was detained in Pollsmoor maximum security correctional centre for four and half years. During his third year of incarceration he was diagnosed with tuberculosis (TB). In spite of the fact that his condition would be contagious at least for two weeks, he was sent back to his cell with at least one inmate sharing the cell with him. After his release he sued the Minister for delictual damages for contracting TB while in the Department's care. The applicant succeeded in the High Court in his claim but the Supreme Court of Appeal overturned the decision of the High Court on the applicant's claim on a narrow factual point on the application of the test for causation. The Applicant appealed the decision of the Supreme Court of Appeal at the Constitutional Court on the basis that:

"The case concerns whether the applicant's detention and the systemic failure to take preventative and precautionary measures by the Correctional Services authorities caused the applicant to be infected with TB while in detention. The complaint is that the unlawful detention and specific omissions violated the applicant's right to freedom and security of the person and the right to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at state expense. The question is whether the causation aspect of the common law test for delictual liability was

¹²⁹ J, Neethling 'Delictual Liability of Prison Authorities for Contagious Diseases among Inmates: *Lee v Minister of Correctional Services* (2011) 6 SA 564 (WCC); *Minister of Correctional Services: regspraak*' (2012) 3 SA 617 (SCA) (2013) 1 TSAR 177-186.

¹³⁰ *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC); *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA).

established and, if not, whether the common law needs to be developed to prevent an unjust outcome.”¹³¹

In the Constitutional Court, “The majority noted that there is a legal duty on the responsible authorities to provide adequate health care services as part of the constitutional right of all prisoners to conditions of detention that are consistent with human dignity. In upholding Mr Lee’s claim, the majority held that there is a probable chain of causation between the negligent omissions by the responsible authorities and Mr Lee’s infection with TB.”¹³²

The appellant won the case in the Constitutional Court and the Cape High Court was to decide on the compensation amount.

The *Lee* case¹³³ contributes to this research, as it shows the failure of correctional centres to protect other inmates’ health, by continuing to imprison hold an inmate who has been diagnosed with TB with other inmates. This is so, even though that inmate, regardless of starting medication, presents a high risk of spreading TB for at least two weeks. Inmates living with HIV are at an even higher risk of contracting TB, as their immune system is compromised.

2.6 MEASURES TO CURB THE SPREAD OF HIV IN SOUTH AFRICAN CORRECTIONAL CENTRES

2.6.1 Condom distribution

In 1992, the then Minister of Correctional Services refused to have condoms distributed in correctional centres because they were seen to be promoting sex in correctional centres. Later, with changes in policy, condoms were distributed to inmates, but an inmate could not get a condom unless he underwent education about HIV/Aids. Condoms were only available to inmates if requested from the nurse.¹³⁴

Condom distribution then become ineffective, because inmates are embarrassed about requesting condoms as they will be labelled as homosexuals, which is still a taboo in South Africa. An inmate would have sex with all his cell mates but deny it in the morning.¹³⁵

¹³¹ Ibid, paragraph 2.

¹³² <http://www.polity.org.za/article/lee-v-minister-of-correctional-services-cct-2012-2012-zacc-30-2012-12-13>

¹³³ Lee v Minister of Correctional Services 2011 (6) SA 564 (WCC); Minister of Correctional Services v Lee 2012 (3) SA 617 (SCA).

¹³⁴ Goyer K.C ‘HIV Policy in South African Prisons’ *Institute for Security Studies*, accessed at <https://www.issafrica.org/Pubs/Monographs/No79/Chap3.pdf> 13 February 2016.

¹³⁵ Gear S ‘Behind Bars of South African Prison’ accessed at <http://www.csvr.org.za/index.php/media-articles/latest-csvr-in-the-media/1972-behind-the-bars-of-south-african-prisons-.html>, on 11 December 2015.

2.6.2 Voluntary HIV testing

It is stated that about 97% of inmates voluntarily tested for HIV and 6.35 % tested positive for HIV.¹³⁶ These are positive statistics, as they indicate that inmates want to know their HIV status and give an indicate how many inmates are HIV-positive.

The problem is that this voluntary testing is done randomly and it is not known how many inmates came into the system already infected and how many are leaving the correctional centres infected.

2.6.3 Segregation of HIV-positive inmates

In 1992 there was a policy that encouraged the segregation of offenders, who were considered high risk, from the general correctional centre population until their HIV results came back.¹³⁷ The offenders that were classified as high risk (i.e. who have the possibility of having sexually transmitted diseases), were illegal immigrants, sexual offenders, those who had had sex while abroad. The offenders that were considered high risk were segregated from HIV-positive offenders and the general correctional centre population. In the late 1990s this policy came under scrutiny and was held to be fuelled by fear and lack of knowledge of the Guidelines on HIV Infection and AIDS Control of the World Health Organization. This policy was discontinued,¹³⁸ with no procedure in place for preventing what this policy was trying to prevent, which is exposure of other inmates to HIV and sexually transmitted diseases. This policy, that was found to be fuelled by lack of knowledge at least promoted the health of inmates in correctional centres.

2.7 MEASURES BEING USED TO SUSTAIN THE HEALTH OF HIV-POSITIVE INMATES

2.7.1 Access to ARVs

For inmates that are already on ARVs when they go into a correctional centre, the system makes it possible for them to continue receiving their ARVs. The offenders that were voluntarily tested and were found HIV-positive are put on ARVs by the system once their CD4 count has reached a certain level. In the Annual report of the Department of Correctional Service, the

¹³⁶ Public vs Public Health: What are the facts?' (note 115 above).

¹³⁷ Goyer KC (note 134 above) 51.

¹³⁸ Ibid, 52.

Minister said that the Department intended to increase access to ARVs by 94%.¹³⁹ This would be beneficial to HIV-positive inmates and indicates that the Department is dealing with HIV in correctional centres.

2.7.2 Access to special dietary requirements

The Department does provide for special dietary requirements for those inmates where they have been prescribed. But there are complaints from inmates that this diet provision is not regular and is as sometimes not provided.¹⁴⁰

2.8 OTHER COUNTRIES AFFECTED

South Africa is not the only country with the problem of HIV and its related illnesses thriving in correctional centres. In North America, US correctional centres were found with the highest HIV/Aids cases. It was 2.4% higher than the general public in the year 2007. South America is struggling with HIV/AIDS infection in their correctional centres (Brazil with an estimate of 3.2 to 20% and Argentina with an estimated infection rate of 10%). Europe is also a victim to HIV infection in correctional centres. Russia had an estimation of 846 000 inmates infected with HIV in the year 2010. France has a low infection rate of less than 2% because of the early prevention interventions but it is none-the-less affected too.¹⁴¹ In Asia, HIV infection is estimated to be above 10% In India, Maharashtra had a high of 24% in 2008. This makes correctional centres in the whole world hotbeds for this virus.¹⁴²

Since the US has the highest correctional centre population in the world, we shall focus on examining the HIV challenges experienced in their jails and correctional centres. In the next chapter the strategies they have employed to control the spread of HIV will be examined. The jails in Chicago, Detroit and San Francisco were found to have a prevalence of viral hepatitis, viruses and co-infection with HIV.¹⁴³ What was interesting in this study is that it states that inmates who were found to be HIV-positive were also found to have the hepatitis C virus.¹⁴⁴

¹³⁹ Department of Correctional Services *Annual Report* (2014) 50.

¹⁴⁰ Public vs Public Health: What are the facts?' (note 115 above).

¹⁴¹ 'Prisoners and HIV/Aids' Avert available at, <http://www.avert.org/prisoners-hiv aids.htm>, accessed 17 November 2015.

¹⁴² Ibid.

¹⁴³ Hennessey K...*et al* 'Prevalence of Infection with Hepatitis B and C Viruses and Co-infection with HIV in Three Jails: A case of viral Hepatitis Prevention in Jails in the United States' 86(1) (2009) *Journal of Urban Health* 97.

¹⁴⁴ Ibid.

This shows that HIV is normally accompanied by other viruses. Even if the inmate does not pass on the HIV, it is guaranteed that at least other HIV-related infections will be passed on.

2.9 CONCLUSION

Imprisonment is still a relevant sentence for our society but its conditions need to change to accommodate diseases that affect the quality of life and life-span inmates. This will not only ensure the sentence's proper functionality, but will protect public health and restore hope in the criminal justice system.

The following chapter will examine at how USA is dealing with HIV within their correctional centres. Criminals have rights, too, and are still human beings. The society is judged by the way it treats its most vulnerable.

CHAPTER THREE

WHAT THE USA HAS DONE TO CURB THE SPREAD OF HIV AND STIs IN CORRECTIONAL CENTRES

3.1 INTRODUCTION

The population of the United States of America was estimated at 325 127 634 on 1 July 2015.¹⁴⁵ Their correctional centre population in 2013 was estimated to be 2 217 000, including pre-trial detainees or remand inmates.¹⁴⁶ The United States has the highest correctional centre population in the world.¹⁴⁷

Out of 54.95 million South Africans, one in 10 is living with HIV/AIDS. It was reported in mid-year 2015¹⁴⁸ that 6.9 million South Africans were reported to be living with HIV/AIDS,¹⁴⁹ whereas in the United States 1.2 million people were reported to be living with HIV/Aids in the year 2014. The HIV infection rate was reported to be stable, at 50 000 people per year.¹⁵⁰ In South Africa the HIV/AIDS infection rate increased by 2.17 million during 2010-2015.¹⁵¹ In 2013 there were 340 000 new HIV infections.¹⁵² Looking at the general population of new HIV infection rates of both countries, one had to look at institutions in both countries where individuals are more exposed to chances of contracting HIV/Aids. These places are correctional centres. This is because inmates get exposed to unconsented or consented unprotected sexual intercourse while in correctional centres.¹⁵³

¹⁴⁵ 'US. Population' *World meters*, available at, <http://www.worldometers.info/world-population/us-population/>, accessed on the 24 November 2015.

¹⁴⁶ 'United States of America' *World Prison*, available at, <http://prisonstudies.org/country/united-states-america> accessed 24 November 2015.

¹⁴⁷ 'Highest to lowest prison population total' available at, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All, accessed 24 November 2015.

¹⁴⁸ News 24, available at, <http://www.news24.com/SouthAfrica/News/One-in-10-South-Africans-living-with-HIV-Stats-SA-20150723> accessed 11 July 2016.

¹⁴⁹ Ibid.

¹⁵⁰ 'HIV in the United States: At A Glance' available at, <http://www.cdc.gov/hiv/statistics/overview/ataglance.html> accessed 11 Jul. 16.

¹⁵¹ 'News 24', available at, <http://www.news24.com/SouthAfrica/News/One-in-10-South-Africans-living-with-HIV-Stats-SA-20150723> accessed 11 July 2016.

¹⁵² 'HIV AND AIDS IN SOUTH AFRICA' available at, <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> accessed 11 Jul. 16.

¹⁵³ 'Prison Rape Widely Ignored by Authorities' ABC news, available at, <http://abcnews.go.com/W1NT/story?id=131113&page>. Accessed 11 Jul. 16

The HIV infection rate in the correctional centres of the United States is lower than that of South African correctional centres. In 2013 it was reported that 21 000 inmates tested HIV-positive on an everyday bases out of 103 400 inmates in South Africa. In the US, the inmates prisons (correctional centres) and jails are tested upon entry and upon release.¹⁵⁴ Thus it is possible to determine when an inmate contracted HIV. There is a lot to learn from preventative measures taken in the United States, which seem to be working with great effect.

The discussion in this chapter draws attention to the various ways used by organisations working hand in hand to assist inmates suffering with HIV/AIDS to manage and cope with living with the infection in and out of correctional centres. This is achieved through the provision of counselling in all affected areas, pre-release management and access to medication, food stamps and transitional housing.¹⁵⁵ While in correctional centres inmates receive help through various forms of training, which enables them to sharpen their skills, making the search for a job less cumbersome. The aim is to fully integrate inmates back into the community. This keeps inmates out of relapsing back to criminal activities.¹⁵⁶

Chapter Three will focus on the correctional centres of the United States because as in South Africa, there is a problem with overcrowding in correctional centres. To make matters worse, the prevalence of HIV in the United States is high.¹⁵⁷ There will also be a discussion on the measures that have been employed in the United States to curb the spread of HIV. Finally, the strengths and weaknesses of these measures will be assessed.

3.2 STRATEGIES ADOPTED TO CURB THE SPREAD OF HIV IN THE UNITED STATES CORRECTIONAL CENTRES

The following is a list of the various strategies that have been employed in the United States correctional centres to fight the spread of HIV. Each of these strategies will be discussed in greater detail.

¹⁵⁴ United States of America' *World Prison*, available at, <http://prisonstudies.org/country/united-states-america> accessed 24 November 2015.

¹⁵⁵ Ibid

¹⁵⁶ 'Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook' RAND, available at <http://www.rand.org/news/press/2013/08/22.html> accessed 11July 2016

¹⁵⁷ 'HIV and Aids social issues' Avert, available at, <http://www.avert.org/professionals/hiv-social-issues/key-affected-populations/prisoners>, accessed 24 November 2015.

1. Mandatory HIV screening
2. Segregation of inmates
3. Condom distribution and provision of sterile injection equipment
4. ARVs
5. Nutritious diet
6. Education on HIV
7. Discharge planning
8. Chemical castration

The identification, prevention and treatment of HIV inmates is considered to be imperative. The submission advanced in this discussion holds that provision of continued assistance to discharged inmates is just as important.¹⁵⁸ The above seven strategies have been used in the US to control the spread of HIV/Aids in correctional centers.

3.2.1 Mandatory HIV testing upon conviction

Mandatory HIV testing is carried out by nurses on offenders entering and leaving correctional facilities. These tests are done in order to ascertain and keep a record of the HIV status of all inmates. The spread of contagious diseases in most correctional facilities has prompted officials to carry out mandatory HIV testing. As a result, offenders are now screened for HIV and for other contagious diseases that can affect other inmates.¹⁵⁹

Pin-pointing a problem is vital to the effective management thereof. Prisons in the United States have taken heed of this, by employing this technique when it comes to dealing with HIV infection and the spread of HIV-related illnesses within correctional service institutions. To achieve this all inmates have to go through mandatory HIV testing upon admission.¹⁶⁰ This strategy has assisted inmates in getting the required medical assistance in the form of immediate placement on antiviral drugs. When considering the state's legal obligation to the

¹⁵⁸ 'University of Texas: History and importance of HIV testing Policy' *The University of Texas*, available at, www.utexas.edu/cola/.../HIV%20Policy%20Brief%20-%20Final.pdf, accessed on 5 December 2015.

¹⁵⁹ G Marilou, J Jacob and L Cormier 'Total control: A critical analysis of mandatory HIV testing in US prisons (2013) 9(3) *Journal of Forensic Nursing* 155.

¹⁶⁰ Ibid.

welfare of inmates who, upon incarceration, become the state's immediate responsibility, mandatory HIV testing is said to be a justifiable invasion of an inmate's bodily integrity.

Gagnon records that in the United States inmates are subject to mandatory HIV testing. Notwithstanding this, many organisations are against such testing but the fact remains that it has reduced the prevalence of HIV within correctional centres.¹⁶¹ The mandatory testing of HIV has been objected to, on the following grounds:

1. Mandatory HIV testing is deemed to be aggressive because it applies to all inmates and it is conducted regardless of the inmate's consent.
2. It is said to be coercive, as the offender can be subjected to disciplinary procedures if they do not subject themselves to it.
3. It is different from routine testing, as it does not have an option to opt-out or opt-in. Their argument is that routine testing should be conducted in all correctional facilities with an option of opt-out.
4. It violates the fundamental right to make autonomous decisions. The argument accepts that human rights can be limited, but it argues that the extent of the violation should be taken into consideration.¹⁶²

Opposition to mandatory HIV testing suggests the following:

‘As part of pre-test counselling, nurses should provide knowledge on HIV prevention and transmission, assess risk factors and practices that may place the person at risk for HIV transmission, explore the clinical and prevention benefits of knowing one's serological status, as well as the potential impact of testing positive for HIV in prison such as stigmatization, exclusion, and violence.’¹⁶³

The argument draws attention to the fact that policies on HIV testing clearly state that it must be free and voluntary and that mandatory testing is in contradiction of these policies.¹⁶⁴ In mitigation, where inmates consent to testing they must first be counselled and be well informed

¹⁶¹ Ibid 149.

¹⁶² R Sarumi & A Strode ‘New law on HIV testing in Botswana: The implications for healthcare professionals’ (2015) 16(1) *S Afr J HIV Med* 4.

¹⁶³ G Marilou, J Jacob and L Cormier (note 159 above) 160.

¹⁶⁴ Ibid.

about HIV. Where results come back positive, adequate support should be afforded to ensure linkage to medical care and counselling.¹⁶⁵

The coercive nature of mandatory HIV testing makes it impossible to achieve free and voluntary testing in correctional centres. The argument warns of a thin line in correctional centres between mandatory testing and routine testing.

In spite of arguments against it, when one considers the bigger picture, mandatory HIV testing is necessary. The strategy is necessary in safeguarding the health of HIV-positive inmates, that of other inmates and that of the general population. It is accepted that mandatory HIV testing is highly intrusive to the bodily integrity of inmates, but the increasing spread of HIV dictates that, regardless of an offender's consent to testing, other inmates must be protected at all cost by controlling the viral load of the ones infected with HIV. As a result, arguments that are against mandatory testing do not carry as much weight when looking at what mandatory HIV testing aims to achieve and has achieved. In an ideal situation, where there was a cure for HIV and the spread thereof was not precarious to the extent that it poses a threat to human lives, it could be said that the limitation of the right to bodily integrity is not reasonably justified.

3.2.1.1 The importance of mandatory HIV testing

Mandatory HIV testing is crucial, as it helps extend the lifespan of HIV-positive inmates. This is achieved through the protection of inmates from being used as weapons or stigmatised and discriminated against. It also helps fight the spread of HIV within correctional centres, thereby protecting other inmates from being exposed to HIV/AIDS and its related illnesses. Inmates who are already infected with HIV receive the necessary information on how to manage the illness, even on the outside.¹⁶⁶

Mandatory HIV testing is an important part of maintaining good correctional health. It helps to identify infected inmates and treats them to prevent HIV in prison. There is also support given to offenders once they are liberated. Mandatory testing of HIV is important, as it helps with early diagnosis and the quick provision of antiviral treatment (ARVs) helps in reducing the

¹⁶⁵ Ibid.

¹⁶⁶ University of Texas: History and importance of HIV testing Policy' (note 5 above).

morbidity and mortality associated with HIV. Research shows that people who know their HIV status are less likely to engage in dangerous activities.¹⁶⁷

Arguments for mandatory testing for HIV are summarised in the following points:

1. “Allow correctional centre systems to know exactly how many inmates are living with HIV;
2. Provide those living with HIV with necessary care, support and treatment;
3. Protect staff and fellow inmates from contracting HIV in correctional centres;
4. Protect third parties, such as partners and other persons with whom an inmate is likely to have contact after release from the correctional centre, from contracting HIV.”¹⁶⁸

3.2.1.2 Misuse of Mandatory HIV testing

While mandatory HIV testing has made many gains towards controlling the spread of HIV, there is still misuse of the measure within correctional centres. Correctional centre authorities often use it as an initiation process for new offenders. This helps correctional centre officials in managing and controlling offenders. They call this process of controlling inmates the mortification process and explain it as a strategy which psychologically strips the offender of all self-esteem, so they will conform to their new roles of always taking instruction and not questioning it.¹⁶⁹

Mandatory HIV testing has been misused in correctional centres. The strategy is often abused in the form of an identification device which is used to justify segregation, discrimination, stigmatisation and the mistreatment of HIV-positive offenders, whereas it should be used as a strategy to fight the spread of HIV. Because it is done regardless of the inmate’s consent it causes tension between inmates and correctional centre staff as nurses instead of using care when testing offenders, end up just doing the job, regardless of who is hurt during the process.¹⁷⁰

Mandatory HIV testing has been used to discriminate against HIV-positive inmates. This is due to lack of education about HIV, namely what it is, how it is contracted and how contracting

¹⁶⁷ Solomon, Liza *et al.* “Survey Finds That Many Prisons and Jails Have Room To Improve HIV Testing And Coordination Of Postrelease Treatment.” *Health Affairs (Project Hope)* 33.3 (2014): 434–442. PMC. Web. 11 July 2016.

¹⁶⁸ HIV insite: <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S10.1X> accessed on 20/01/2016

¹⁶⁹ G Marilou, J Jacob and L Cormier (note 159 above) 160.

¹⁷⁰ Ibid.

HIV can be prevented. Information on how to care for HIV-positive inmates is also lacking. From this we can learn lessons on the need for implementation of intensive education for correctional centre staff and all inmates before appropriate measures on curbing the spread of HIV are initiated.

3.2.1.3 Confidentiality of HIV test results

The results of HIV tests are meant to be confidential, but, given the settings of correctional centres, results are often not confidential because inmates are segregated after being tested.¹⁷¹

“Correctional centre officials use HIV antibody test results to make decisions about housing and segregation, work assignments, and visiting privileges, among other matters. It has been common practice to bar inmates with HIV (or AIDS) from kitchen work. In some jurisdictions, results of HIV tests go directly to the correctional centre staff.”¹⁷²

HIV-positive inmates are kept separate from the uninfected ones.¹⁷³ This automatically makes their HIV status known to everyone in the correctional centre community, as they will have to go to collect medication and sometimes they are made to stand in queues while waiting to collect.¹⁷⁴ This is a serious issue as it leads to inmates being ill-treated by correctional centre wardens and other inmates because of their HIV status.

It is argued that “confidentiality of medical information in the correctional centre setting is virtually impossible to maintain. Where quarantines exist, confidentiality cannot. Persons other than medical staff members may handle medical records, and medical personnel may not be meticulous about protecting privacy. Once information is released in a correctional centre, it travels rapidly. Many people in the correctional centre setting believe they have a particular need to know who in the institution is infected with HIV. It has been argued that inmates have a greater need for privacy than those outside because they live in a closed community where violence is common.”¹⁷⁵

3.2.2 Segregation of inmates according to their HIV status

¹⁷¹ <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S10.1X>

¹⁷² Ibid.

¹⁷³ Chandler, G Patton & J Job ‘Community-based alternative Sentencing for HIV-positive women in the criminal justice system’ (1999) 14(1) *Berkeley Women’s L.J.* 71.

¹⁷⁴ C Kurt ‘Organista HIV prevention with Latinos’ (2012) *Theory, Research, and Practice OUP USA* 213.

¹⁷⁵ Ibid.

The need for focusing on the provision of proper medical assistance to HIV-positive prisoners will require segregation of the HIV-positive inmate from the uninfected ones. This segregation not only protects the uninfected ones from being infected but also the infected ones from discrimination, which is usually violent.¹⁷⁶ The blanket HIV testing and segregation seems to be the most sensible solution for controlling the spread of HIV within correctional centres. This should theoretically make treatment of and education about HIV much more effective, as it supports groups and HIV educational programmes that can be formed within the correctional institution.

3.2.2.1 Advantages of segregation

1. Protects uninfected inmates from being exposed to HIV
2. Protects the infected ones from discrimination, commonly expressed in violence
3. Allows identification of HIV-positive inmates. This is followed by a close monitoring of health for treatment purposes
4. It helps target specific areas of education and counselling after observation of high-risk behaviour has been identified.
5. Segregation allows a tailor-made scheme of educational and counselling programmes

Testing and separating is said to be the most sensible procedure for slowing down the spread of HIV/AIDS within correctional centres, but it has been misused in other facilities as an opportunity to discriminate against inmates that are HIV-positive.¹⁷⁷ Discrimination takes the form of denial of the exercise of rights or the restriction of services.¹⁷⁸ The argument advanced that segregation of HIV-positive inmates should only go as far as limiting contact between inmates and never to the extent of denying rights and privileges. The argument holds that this strategy should not be used as a means of not caring for inmates.¹⁷⁹ Segregation of HIV-positive

¹⁷⁶ HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA

<https://www.aclu.org/sentenced-stigma-segregation-hivpositiveprisoners-alabama-and-south-carolina> on 2/2/2016.

¹⁷⁷ 'Sentenced to Stigma' <https://www.hrw.org/report/2010/04/14/sentenced-stigma/segregation-hiv-positive-prisoners-alabama-and-south-carolina> accessed on 11 July 2016.

¹⁷⁸ Ibid.

¹⁷⁹ Goyer KC. 'POLICY OPTIONS: HIV/Aids in Prison, Problems, Policies and Potential' Published in Monograph No 79, February 2003. Available at, <https://www.issafrica.org/Pubs/Monographs/No79/Chap2.html> on 11/7/2016.

inmates is soon coming to an end in the United States, because of the misuse mentioned earlier.¹⁸⁰

3.2.3 Condom distribution

Overcrowding and the sharing of beds and blankets contributes to men having sex with other men. It is said that consensual sexual activities occur in correctional centres just as frequently as cases of rape take place and that, in mitigation of the consequences, condoms are distributed in some United States correctional centres.¹⁸¹

The main argument for not giving condoms in correctional centres is that these institutions are public places and sexual intercourse in public places is forbidden. Supplying inmates with condoms is therefore promoting sexual activities in correctional centres.¹⁸²

The reality is that sexual activities happen with or without permission, because it is a natural act. If condoms are not given in correctional centres because they promote sexual activities, then what is being done to ensure that correctional centres do not allow in sexual intercourse in a public space, especially if they are going to be sharing beds as a result of overcrowding?

A correctional institution that makes condoms available on a dispensing machine that is placed in a discreet location fears that condoms will be easily misused for drug smuggling.¹⁸³ Therefore these condom distribution machines are placed in an open place that can be monitored. A man would rather have sex without a condom because it is still a taboo for a man to sleep with another man willingly, even in correctional centres. Asking for condoms is therefore rather embarrassing.¹⁸⁴ This poses a challenge in the distribution of condoms within correctional services.

¹⁸⁰ 'Federal judge approves settlement to end segregation of HIV-positive inmates' JURIST. Available at, <http://www.jurist.org/paperchase/2013/10/federal-judge-approves-settlement-to-end-segregation-of-hiv-positive-inmates.php> on 11/7/2016.

¹⁸¹ 'HIV and Aids social issues' (note 157 above).

¹⁸² Ibid.

¹⁸³ California Prisons Aim To Keep Sex Between Inmates Safe, If Illegal <http://www.npr.org/2015/01/21/378678167/california-prisons-aim-to-keep-sex-between-inmates-safe-if-illegal> accessed on 2/2/2016.

¹⁸⁴ Jürgens R, Nowak M, Day M. HIV and incarceration: prisons and detention. Journal of the International AIDS Society. 2011;14:26. doi:10.1186/1758-2652-14-26.

The advantages of the distribution of condoms in correctional centres include the practice of safer sexual activities. This lowers the rate in which new HIV infections occur¹⁸⁵ and the spread of sexually transmitted diseases are also controlled.¹⁸⁶

3.2.4 ARVs (Anti-retroviral drugs)

After being subjected to mandatory HIV testing, inmates who are found to be HIV-positive are segregated. Those that need to be put on antiviral drugs are then placed on such treatment arrangements are made so that those already on ARV's continue receiving the medication. The following is what has been observed about ARVs in some United States correctional centres:

‘In many correctional centres, antiretroviral therapy is administered under direct observation to inmates. Observers have reported that adherence to antiretroviral therapy among inmates apparently has been good. At Rikers Island in New York City, patients’ CD4 counts rose in a pattern almost identical to that found in clinical trials. Among 170 correctional centre patients in Wisconsin who self-administered medications, improvements in CD4 and viral measures were comparable with those found in community patients. A 1996 survey of 205 HIV-infected inmates eligible for potent antiretroviral therapy that found an acceptance rate of 80% and an adherence rate of 84% also found that adherence was 82% in those who received directly observed therapy, and 85 % in those who self-administered medication.’¹⁸⁷

3.2.5 Nutrition for HIV-positive inmates

In order for ARVs to work effectively in offenders living with HIV, a nutritious diet is necessary.¹⁸⁸ The correctional centres in the United States claim that they meet the daily dietary requirement of 2 400-2 800 calories for a male person and 1 800 – 2 000 calories for every inmate. In spite of this, a correctional centre in Pennsylvania is being sued for serving portions that are ‘not enough to even fill a 5-year-old child’ as it is only 2 818 calories per day.¹⁸⁹ It is

¹⁸⁵ Ibid.

¹⁸⁶ K Hennessey (note 143 above).

¹⁸⁷ <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S10.1X> accessed 24 November 2015.

¹⁸⁸ ‘HIV and Aids social issues’ (note 157 above).

¹⁸⁹ <https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal#.BmR19jCQ8> accessed 24 November 2015.

alleged that inmates in New York are eating toothpaste, toilet paper and drinking lots of water, which leads to excessive weight loss.¹⁹⁰

There are non-governmental organisations that assist with growing food for institutions such as schools, prisons and churches.¹⁹¹ These organizations might not be enough to reach all correctional centres in the United States, but the idea can be implemented within correctional centres.

3.2.6 Education about HIV in correctional centres

Education about HIV is important as it helps those persons living with HIV as well as those who are HIV-negative to understand what HIV is and how it is transmitted in correctional centres and out of correctional centres. Peer-counselling assists couples who are diagnosed with HIV to accept their condition and this helps reduce transmission to other persons. A lack of education about HIV has led to prevention policies that are against human rights.¹⁹² Quality of life for persons who are HIV-positive has been improved because of the education that correctional centre staff receive.¹⁹³

‘Inmates and correctional centre staff should be informed about HIV/AIDS and about ways to prevent HIV transmission, with special reference to the likely risks of transmission within correctional centre environments and to the needs of inmates after release’¹⁹⁴

3.2.7 Discharge planning

Discharge planning involves the management of the release of inmates that are HIV-positive and who were receiving treatment during incarceration. Measures are taken that attempt to help with the transportation, accommodation, employment and health facility where offenders can continue to receive treatment.

¹⁹⁰ Ibid.

¹⁹¹ ‘Prison gardens help inmates grow their own food — and skills’ (1 January 2014) <http://www.npr.org/sections/thesalt/2014/01/12/261397333/prison-gardens-help-inmates-grow-their-own-food-and-skills> accessed 24 Feb 2016.

¹⁹² <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S10.1X> accessed 24 November 2015.

¹⁹³ Ibid.

¹⁹⁴ ‘Effectiveness of interventions to address HIV in prisons’ World Health Organisation, available at, http://www.avert.org/professionals/hiv-social-issues/key-affected-populations/prisoners#footnote36_n5sqgh7, accessed 22 January 2015.

These are normally organised by NGOs who work together with correctional centres so that the transition to life outside correctional centres can be smooth. This has helped ex-convicts not to stop the taking of ARVs and for them not to continue spreading HIV as they organise and participate in support groups on the outside.

3.2.8 Chemical castration

‘In the US, a number of states have an option of chemical castration for rapists and paedophiles, which results to reduced imprisonment sentence. This is not permanent but it has permanent effects in body chemistry with increased period of using, like bone density loss increasing with length’¹⁹⁵.

3.3 CONCLUSION

In spite of the weaknesses identified in the strategies discussed in this chapter, there are good strides that have been made in lowering the spread of HIV in the United States. The following chapter will discuss the strategies that have been adopted according to the various policies in South African correctional centres. These, however, have these have not been implemented.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

4.1 RECOMMENDATIONS

Inmates have the right to adequate accommodation, balanced nutrition, exercise and access to reading material.¹⁹⁶ This is despite the fact that “adequate” has been ruled as what the state can afford.¹⁹⁷ It is vital that living condition in correctional centres are aligned with human rights standards, to ensure that offenders who are living with HIV live long enough to serve most of their maximum sentences.

South Africa is not the only country that is suffering with a high rate of inmates who are infected with HIV/AIDS. It is therefore it is imperative that South Africa learns from other

¹⁹⁵ Chemical castration-https://en.wikipedia.org/wiki/Chemical_castration: accessed on 22/8/16

¹⁹⁶ Section 35 (2)(e) of The Bill of Rights of the Constitution of the Republic of South African. (1996).

¹⁹⁷ Mubangizi J.C, *The Protection of Human Rights in South Africa* 2ed (2013) 100, ‘In the Van Biljion case the judge held that in determining what is adequate regard must be made to what the state can afford.’

countries of the different strategies they can implement to fight high HIV/AIDS prevalence in correctional centres.

The Correctional Services Act¹⁹⁸ provides that detention centres must be up to the standard of human dignity, security and protection for the detained persons, adequate diet to promote good health and the separation of sentenced and those waiting sentencing.¹⁹⁹ The Department needs to deliver on its legal duties.

The Department of Correctional Services has a strategic report plan for 2015 to 2020, concerning the epidemic that is HIV/AIDS in prisons. The plan aims to identify more offenders who are suffering from HIV. This is to be achieved through the increase of HIV testing from a baseline of 68% to 98%. The plan is there to ensure that HIV-positive offenders get access to ARVs and that those who are suffering from TB also get access to the necessary treatment. Further plans are directed at increasing nutrition in meals by 10%, and to decrease overcrowding by 35%, by providing 28 000 bed spaces.

From the reading of the Department's strategic plan, a few gaps become apparent. In the plan there is no mention of how preventative measures are going to be employed to ensure that these objectives are achieved. As the table below indicates, the strategies are not specific, which makes it impossible to access them or even believe that the strategies do exist. The following are strategies suggested by the Department of Correctional Services to employ in order to achieve its objectives curbing the spread of HIV in South Africa. The following strategies if used correctly, should curb the spread of HIV within correctional centres.

¹⁹⁸ Correctional services Act. Act No. 111, 1998.

¹⁹⁹ Ibid, Section 7 1, 2(a) and (d) and section 8.

7.4.1.1. Subprogramme: Health Care Services

Sub-Programme purpose: Ensure that inmates are provided with appropriate access to health care services.

Strategic objective	Provide inmates with HIV and AIDS, and TB services to improve life expectancy.	
Objective statement	Increase the percentage of inmates who are HIV positive and qualify for Antiretroviral Therapy (ART) from 95.70% (15 417/16 109) to 98% (32 160/32 816) in 2019/20 and increase the TB cure rate from 75.22% (337/448) to 85% (2 324/2 734) in 2019/20.	
Baseline	ART: 95.70% (15 417/ 16 109) TB: 75.22% (337/448)	
Strategic performance indicator	Percentage of inmates on ART.	98% (32 160/3 2816)
	TB (new pulmonary) cure rate of offenders.	85% (2 324/2 734)
Justification	In order to comply with international, national Department of Health and departmental legislation and policies, the Department is obliged to provide services that will improve the health status and life expectancy of all inmates by combating HIV, TB, sexually transmitted infections and other acute and chronic conditions. This will be achieved through a combination of prevention approaches, which is a mix of medical, behavioral, social and structural interventions that will have an impact on reducing and mitigating vulnerability to HIV and AIDS, and TB.	
Links	Millennium Development Goals: 4, 5 and 6. Outcome 2: A long and healthy life for all South Africans. Outcome 3: All people in South Africa are and feel safe. NDP Chapter 10	

7.4.1.2. Sub-Programme: Nutritional Services

Sub-Programme purpose: Provide inmates with appropriate nutritional services during the period of incarceration.

Strategic objective	Provide inmates with appropriate nutritional services.	
Objective statement	Provide inmates with appropriate nutritional services in accordance with applicable health care norms and standards by ensuring the implementation of prescribed therapeutic diets to improve inmates' nutritional status from 10% (15 428/154 278) to 15% (24 124/160 831) by 2019/20.	
Justification	To comply with international, national and departmental legislation and policies, the Department is obliged to provide services that will improve the nutritional status of all inmates through the promotion of healthy lifestyles and the provision of integrated and high-quality nutrition services.	
Links	Millennium Development Goals 4, 5 and 6. Outcome 2: A long and healthy life for all South Africans. Outcome 3: All people in South Africa are and feel safe. NDP Chapter 10	

4.1.1 Strategy to combat overcrowding within correctional centres

The report shows that an estimate of 109 men were above the age of 71, which makes them automatically eligible for parole, to reduce overcrowding.

There were 20 606 men that were serving time for sexual offences²⁰¹; this is an indication that imprisonment for committing of sexual offences is not effective. Considering the fact that imprisonment is expensive, cost-effective ways ought to be found to ensure that the offender never re-offends and to deter people considering it. The perfect sentence would be voluntary castration²⁰² for schedule 6 offenders and community service for three years. It is cheap, the community will be satisfied as the punishment will fit the crime. This makes it an effective sentence even though chances of any man in his sober senses submitting to it are very slim. This will contribute to reducing overcrowding and reduce the spread of HIV/AIDS in correctional centres. The guilty will have a choice of voluntary castration or life imprisonment. The voluntary part will ensure the constitutionality of this sentence, as the offender will have to consent to it in writing in front of the presiding officer.

In South Africa, castration is only used through in street justice, especially in cases of child rapists. In Johannesburg, Katlehong, a man that was caught red-handed raping a five-year-old child was dragged out by community members and assaulted before being castrated. The police found him in a pool of his own blood, with his private parts next to him. No one was talking to the police to say who assaulted and castrated the man.²⁰³ About seven states in the United States are using chemical castration for serious sexual offences and it is involuntary. South Africa should consider the same to lower violent sexual crimes.

In the 1990s it was investigated whether or not chemical castration can be used as a sentence in South Africa, but it was refused, as research showed that the crime of rape has more to do with power and violence.²⁰⁴ This research needs to be re-visited, because a sentence of chemical castration would remove the power of a rapist to commit rape in the future, making the sentence effective.

²⁰¹ Department of Correctional Services Strategic plan for 2015-2020 19.

²⁰² Medical Definition of CASTRATE. 1. a: to deprive of the testes : geld b : to deprive of the ovaries : spay. 2. : to render impotent or deprive of vitality especially by psychological means <uses these ideas.

²⁰³ Mail and Guardian. 'Community mum on Rapist's castration' <http://mg.co.za/article/2004-02-11-community-mum-on-rapists-castration> accessed on 22/8/16.

²⁰⁴ ibid

Voluntary chemical castration would be effective as it will send a message to other sex offenders how much the government is against such criminal acts. Some offenders even ask for castration.²⁰⁵ If South Africa made it an optional sentence for sexual offenders whose victims are children and disabled people, South Africa might be surprised by the response it would get from offenders.

4.1.2 Strategies to lower the spread of HIV/AIDS in correctional centres

Spironolactone and finasteride²⁰⁶ are drugs that lowers a men's sexual drive. It works more like a temporal chemical castration. If the correctional department does not want to hand out condoms in correctional centres, such drugs should be considered, because they are the only measure that can work towards ensuring there is no sexual activities that occur within the correctional centres. Most of the sexual activities are risky, as they are unprotected and in most cases are without consent. This often leads to the rapid transmission of HIV within correctional centres.²⁰⁷ Medical intervention is better because there is no need to segregate inmates because of their HIV status, therefore minimising the negative and discriminatory nature of segregation. If there is no segregation according to HIV status then there will be more confidentiality for inmates who tested HIV-positive.

4.1.3 Mandatory screening of contagious diseases and STIs

Mandatory screening of contagious diseases and STIs for offenders who are sentenced to prison and the immediate treatment of such diseases will lower the spread of contagious diseases within correctional institutions. These measures will also ensure that inmates who tested positive for such STDs are treated and inmates who tested positive for contagious diseases are segregated while being treated. The 2014/2015 Department of Correctional Services report states that even correctional centre officials are infected with TB, because offenders do not disclose upon entry that they are suffering from TB.²⁰⁸ If officials are affected by contagious diseases, how much more so are other inmates who have to share one cell with poor ventilation?

4.1.4 Mandatory HIV testing

²⁰⁵ G. SEALEY 'Some Sex Offenders Opt for Castration' <http://abcnews.go.com/US/story?id=93947>. accessed on 18/3/2016.

²⁰⁶ 'Anaphrodisiac' *Wikipedia*, available at <https://en.wikipedia.org/wiki/Anaphrodisiac>, accessed 24 November 2015.

²⁰⁷ Department of Correctional Services Strategic plan for 2015-2020 19.

²⁰⁸ Department OF Correctional Services | vote no. 21annual report2014| 2015 financial year –p67.

Since the Department has been able to get 68%²⁰⁹ of offenders to voluntarily test for HIV, the Department does not need to employ mandatory HIV testing. The Department can work with various NGOs to ensure that HIV testing is free and voluntary. It can ensure that inmates that tested positive immediately get access to ARVs and support groups. Inmates that refuse to be tested can indemnify the Department of Correctional Services for contracting HIV/Aids or HIV-related illness while in custody.

Mandatory testing is said to be one of the tools for “identifying sero-positive inmates and to gather information regarding the dynamics of transmission”²¹⁰ Sero-positive inmates are inmates who tested neither positive nor negative for HIV.

It is vital that the Department does HIV testing at an entry stage and a release stage. This will help to reveal inmates that need to be put onto a discharge plan to get care and support for HIV on the outside.

4.1.5 Segregation of HIV-positive inmates

The World Health Organisation does not approve segregation of inmates who are HIV-positive.²¹¹ New HIV infection rates are soaring in South Africa.²¹² Drastic measures to prevent the spread of infection must be taken. Measures that are looking out for number one, which is our country, need to be considered. Segregation seemed to be effective in the US, but highly misused.²¹³ Segregation of HIV-infected inmates has also been suggested by authors such as Naser and Pretorius.²¹⁴

In South African correctional centres, because of gangs that seem to make it impossible to govern, voluntary segregation offered to offenders who are HIV-positive could be effective is suggested, as it might offer the HIV-positive offenders educational programmes that are tailor-made for their needs. This will be for the greater good of not just correctional centre health but public health, too. The judicial inspectorate report shows that most inmates are requesting to

²⁰⁹ Department of Correctional Services Strategic plan for 2015-2020 – p8.

²¹⁰ J Naser & M Pretorius ‘AIDS in Prisons’ (1993) 6(1) *Acta Criminologica* 26.

²¹¹ ‘Effectiveness of interventions to address HIV in Prisons’
http://www.who.int/hiv/idu/OMS_E4Acomprehensive_WEB.pdf accessed on 12/7/2016.

²¹² ‘News 24’, available at, <http://www.news24.com/SouthAfrica/News/One-in-10-South-Africans-living-with-HIV-Stats-SA-20150723> accessed 11 July 2016.

²¹³ HIV-positive prisoners in Alabama and South Carolina.
<https://www.aclu.org/sentenced-stigma-segregation-hivpositiveprisoners-alabama-and-south-carolina> accessed on 2/2/2016.

²¹⁴ Ibid, 28.

be segregated for other reasons than HIV. This request is the most frequent of the complaints they receive.²¹⁵

4.1.6 Discharge planning

Discharge planning is vital in ensuring that the hard work that has been put into curbing the spread of HIV in correctional centres continues when the offender is released. If a former offender can be assured of accommodation, occupation and a local health facility to source their ARVs, as well as a support group on the outside, the offenders will have a purpose in life and hopefully not engage in criminal offences in the future.²¹⁶

4.1.7 HIV education

NGOs that specialise in education about HIV/AIDS can be invited to correctional centres to conduct demonstrative learning about HIV/AIDS. Group discussions will cover how it is contracted, to eliminate all untrue theories that other inmates might know. The facilitators can target interested inmates for peer education training, as peer education is more effective in settings like correctional centres.²¹⁷ This must be an ongoing learning programme.

4.1.8 Condom distribution

Condoms are already available in correctional centres, but are not easily accessible. The condoms should be made easily accessible to inmates so that they can be used effectively. Regardless of the misuse the condoms could be subjected to, the reality is that what happens in correctional centre cells at night cannot be controlled.²¹⁸

4.1.9 Medical parole

Medical parole or “compassionate release is a process by which inmates in criminal justice systems may be eligible for immediate early release on grounds of “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing”²¹⁹ If offenders have someone who can take care of them who is aware

²¹⁵ Skweyiya T ‘Annual Report for the period 1 April 2014 to 31 March 2015’ (2015) Judicial Inspectorate of Prisons. 85.

²¹⁶ D Valderruten ‘It Takes A Community: The Challenges of Discharge Planning’ <http://www.thebody.com/content/art14521.html>, accessed 20 February 2016.

²¹⁷ Peer Education Rigorous Evidence – Usable Results <http://www.jhsph.edu/research/centres-and-institutes/research-to-prevention/publications/peereducation.pdf> accessed on 20 February 2016

²¹⁸ J Naser & M Pretorius (note 136 above) 30.

²¹⁹ https://en.wikipedia.org/wiki/Compassionate_release

of their critical stage, after consultation with that person (family, relative or friend) responsible for the offender, that individual should be considered when deciding to release an offender on medical parole. Releasing an offender on medical parole when there is no one who wants to care for him can be a problem, or if the family cannot afford his burial costs. Medical parole gives the offender a dignified death and the Department saves on burial costs.²²⁰

4.1.10 Nutritional requirements for offenders with a positive HIV status

This is a difficult topic for many to comprehend, as an offender has committed a crime and should be punished for it. So, how is providing his nutritional requirements assisting in punishing for him/her for the crimes committed? In response, the reality is that public policy dictates that even if an offender has committed cruel crimes within the community, it is better to keep them well-fed and behind bars than terminally sick on a hospital bed. Therefore the question is how can they at least work for the food they are eating? Having them grow their own food will ensure that there is some hardship that is felt. When this measure is adopted, inmates get some form of exercise and the cost of supplying fruit and vegetables is kept low. The United States have NGOs that help to make this possible. These NGOs specialize in gardening and they work with schools, communities and prisons in creating gardens.

With correctional centre conditions being so rough, the stress levels are high. With the lack of a nutritional diet that helps to reduce stress, and lack of exercise, the immune system of an HIV-positive inmate deteriorates faster than normal. It is also argued that more often than not people who are sent to jail, especially for long-term imprisonment, do not finish their sentences, as they die well before finishing serving it. The ones that make it out alive expose the public to HIV and HIV-related illnesses.²²¹

Correctional centre diet does not consist of fresh fruit and vegetables, which are essential for HIV-positive inmates, because they build the immune system and delay the process of HIV becoming AIDS. What is more concerning is that correctional centre security does not even

²²⁰ Ibid.

²²¹ Goyer KC (note 42 above).

allow such foods in, as they say they could be injected with drugs. They are instead sold within the black market inside the correctional centre, where they are very expensive.²²²

South African correctional centres are capable of being self-sustainable and produce their own fresh fruit and vegetables, as has been done in the past.²²³ This will boost the correctional centre diet, thereby benefitting the inmates living with HIV.

In order for the Department of Correctional Services to be able to adequately provide the much-needed nutritional diet that will be pivotal to the effective use of ARVs, there is a need for the Department to invest more in farming its own food. This to be achieved with the help of NGOs. Fortunately, in the Department's report it is stated that they intend to working with NGOs and the community to fight against the spread of HIV.²²⁴

4.1.11 Prison conditions that will be conducive for HIV-positive offenders

With new HIV infection rates being so high in South Africa, the Department needs to revive training and working farms for the incarceration of inmates. Offenders whose HIV status is known can be detained on such farms, because they will be able to get access to nutritional diets which they will be producing. Manual labour will help them to exercise.

4.2 CONCLUSION

South Africa is in crisis, with a high new HIV infection number of 469 000, which is the highest in the world.²²⁵ Correctional centre conditions in South Africa are seen as the main reasons for spreading HIV infection within correctional centres and to the public once offenders are released back into their communities. Correctional centres are suspected to be contributing to the spread of HIV and contagious diseases as a result of overcrowding, which promotes sexual violence and sexual activity.

The correctional centres in the United States were assessed for effective strategies that can be used to curb and spread of HIV, as well as the treatment offenders living with HIV/AIDS. The

²²² Goyer KC, Saloojee Y, Richer M(note 98 above).

²²³ Department of Correctional Services *Annual Report* (2009) 53.

²²⁴ Department of Correctional Services *Strategic Plan for 2015-2020* 8.

As a Department, we will be strengthening community partnerships and stakeholder involvement. We will engage with NGOs, churches, women, youth, business associations and trade unions in a structured manner in our rehabilitation programmes for the effective reintegration of lawfully released offenders.

²²⁵ Shisana O... et al (note 5 above)54.

United States has the highest correctional centre population in the world and, like correctional centre in South Africa, there are challenges of overcrowding. The following were strategies that were examined. Their advantages and disadvantages were assessed. They were also suggested for South African correctional centres.

1. Mandatory HIV screening
2. Segregation of inmates
3. Condom distribution and provision of sterile injection equipment
4. ARVs
5. Nutritious diet
6. Education on HIV
7. Discharge planning

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