



SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE ON THE 2012/13 ANNUAL REPORTS OF THE DEPARTMENT OF CORRECTIONAL SERVICES AND THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES

Introduction

This submission deals with the annual reports for 2012/13 of the Department of Correctional Services (DCS) and the Judicial Inspectorate for Correctional Services (JICS). The submission attempts to provide comment on general issues that are regarded as critical to the constitutional obligations and legislative requirements placed on the DCS. To this end, and by no means exhaustive, the following are addressed:

- the reliability of the annual report;
- cooperation with other departments in the cluster;
- underspending by the DCS;
- access control systems;
- literacy and education, and
- the shift system

The issues raised are by no means new and some have indeed been identified as problems for many years.

Reliability of the DCS Annual Report

The Auditor General comments on the usefulness of the annual performance report.¹ It notes a range of problems with the report, such as lack of information to explain variances, vague performance targets, targets that cannot be measured and unreliable information collected. This is of grave concern since the annual report is the most important tool for accounting to

¹ Department of Correctional Services (2013) *Annual Report 2012/13*, pp. 120-123.

Parliament and the public on how the budget was utilised. Material problems with the annual report, as noted by the Auditor General, are thus obstacles to a transparent and accountable executive. The inevitable question becomes: Can we trust what is presented in the annual report? We submit that the Portfolio Committee should interrogate the DCS on what steps will be taken to address the concerns raised by the Auditor General.

Cooperation with other departments

JICS reports that there has been a slight increase in the number of awaiting trial prisoners and this is reason for concern.² Further reason for concern is the lengthy periods that accused persons remain in custody awaiting trial which seem to be a particular problem in the Eastern Cape.³ While it is accepted that the DCS is at the end of the line and it has little direct control over who is sent to it, it is also evident that not enough is being done to manage this proactively in cooperation with other departments in the cluster.

The first issue concerns the number of people arrested by SAPS. In 2011/12 SAPS executed 1 613 254 arrests⁴ or roughly 3045 per 100 000 of the total population (all ages, genders and races). It should be noted that the majority (52%) of the arrests executed by SAPS were not for priority crimes⁵ and were merely categorised as “Other” (these are crimes presumably less serious than Shoplifting). Even if only 10 per cent of the “Other” cases end up in DCS custody, it is still an estimated 83 000 people who may remain with DCS for a relatively short period. Within the cluster a real attempt should be made at changing current arrests practices as it places avoidable burdens on DCS and the court system.

Secondly, the amended Correctional Services Act, through section 49G, places a two-year limit on the duration of pre-trial detention. It remains CSPRI’s position that the mechanism,

² Office of the Inspecting Judge (2013) *Annual Report of the Judicial Inspectorate for Correctional Services 2012/13*, p. 37.

³ Office of the Inspecting Judge (2013) *Annual Report of the Judicial Inspectorate for Correctional Services 2012/13*, p. 39.

⁴ SAPS (2012) *SAPS Annual Report 2011/12*, p. 66-67.

⁵ Priority crimes include the following: Murder (including farm murders); Attempted murders (including attempted farm murders); Sexual offences (including rape and attempted rape and indecent assault); Assault GBH ; Common assault; Aggravated robbery (includes hijacking of cars and trucks, house robbery, business robbery, CIT robbery, bank robbery and robbery with a firearm); Common robbery; Arson; Malicious damage to property; Illegal possession of firearms and ammunition; Drug-related crime (offences under the Drugs and Drug Trafficking Act, 1992 (Act No. 40 of 1992) and the Medicines and Related Substances Amendment Act); Driving under the influence of liquor and drugs; Burglary at residential premises; Burglary at business premises; Theft of motor vehicle and motorcycle; Theft of or from motor vehicles; Stock theft; Commercial crime (fraud); Shoplifting; Other theft.

however well intended, is not going to have the desired effect as it does not compel a court to conduct an inquiry into lengthy delays in trials. Moreover, two years is too long a time limit. What is required is a mechanism in law that established at a much earlier stage whether there is sufficient evidence to proceed with a trial.

Redpath, in her analysis of the performance of the NPA, comes to the conclusion that “[Yet] the performance data suggests that NPA policy providing for a wide discretion being exercised in the decision not to prosecute has been broadly interpreted, making a decision to prosecute the exception rather than the rule.”⁶ For example, of the 517 101 new dockets (of a general criminal nature) the NPA received in 2005/6 from the police, only 14% resulted in prosecutions and in 60% the prosecution declined to prosecute. However, many accused persons remain in custody for a few weeks or even months before the prosecution decides to withdraw. DCS needs to engage the NPA and the judiciary to design more effective mechanism in law to reduce the number of people placed unnecessarily in its care awaiting trial.

Thirdly, it remains the case that the majority of sentenced admissions are for less than two years and they therefore also constitute the majority of releases. This has two important consequences. The first is that these prisoners are excluded from having a sentence plan by virtue of section 38(1A)(a) of the Correctional Services Act and will thus not benefit from the services arising from such a plan. Their imprisonment will therefore have no purpose except punishment. The second consequence is that they will be exposed to the risks associated with imprisonment, such as the gang culture, being raped and being exposed to anti-social influences. In the case of first-time and young prisoners, the consequences can be devastating. The need remains for comprehensive sentencing reform and DCS needs to play a more active role in supporting such reform and, more specifically, reinventing correctional supervision as a sentencing option so that the courts will again have trust in this sentencing option.

Fourth, a recent decision of the Supreme Court of Appeal (SCA) is of relevance to the DCS and we wish to bring it to the attention of the Portfolio Committee. The issue is of relevance as it concerns certain offenders sentenced to life imprisonment. This should be seen against the background that there are nearly 12 000 prisoners serving life imprisonment compared to the 400 in 1994. All possible measures should therefore be explored and utilized to limit the

⁶ Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS Monograph No. 186, p. 41.

number of people sentenced to life imprisonment. *Chake v S*⁷ concerns the effect of a series of amendments that, ultimately, had an ostensibly 'undesirable' effect on the provisions of the Criminal Procedure Act (CPA). Prior to any amendments, the CPA provided for the automatic right of appeal where an offender had been sentenced to life imprisonment by a regional court. This means that the appellant need not have applied for leave to appeal to the High Court. He could have simply brought the matter before the High Court. Certain amendments to the Child Justice Act repealed the CPA provision regarding automatic appeal. A High Court decision, *S v Alam*⁸, interpreted the repealing provisions so as to not have rendered the automatic appeal provision no longer applicable to adults. The Chake court decided, correctly, in our view, that such an interpretation went beyond the established principles of statutory interpretation, and held, that the automatic appeal provision had in fact been repealed. The approach of the SCA is correct in law. However, it does mean that offenders sentenced to life imprisonment by a Regional Court that once enjoyed the right to automatic appeal, a valuable protection of the right to liberty, must apply for leave to appeal prior to bringing such matter before a High Court. This state of affairs can only be changed by legislative amendment.

Underspending by DCS

Table 1 below reflects the underspending per programme in DCS during the year reported on.⁹ On the total budget there was an underspent of 2.18%. This low percentage obscures two important issues. The first is that the value of the underspent amounted to R386.7 million which is, by all accounts, a considerable amount of money. The second issue is that the most substantial underspending occurred in the programmes specifically aimed at reducing re-offending, namely Rehabilitation (13%) and Social Reintegration (9.6%). In both instances the reason provided is the delay in filling vacant posts.¹⁰

Table 1

Programme	Appropriation	Actual	Underspent	%
Administration	4,770,671,000	4,655,952,000	114,719,000	2.40
Incarceration	9,498,331,000	9,478,466,000	19,865,000	0.21
Rehabilitation	967,505,000	841,626,000	125,879,000	13.01

⁷ *Chake v S* (824/2012) [2013] ZASCA 141 (30 September 2013).

⁸ *S v Alam* 2011 (2) SACR 553 (WCC).

⁹ Department of Correctional Services (2013) *Annual Report 2012/13*, p. 113.

¹⁰ Department of Correctional Services (2013) *Annual Report 2012/13*, p. 119.

Care	1,724,490,000	1,668,873,000	55,617,000	3.23
Social Reintegration	739,286,000	668,637,000	70,649,000	9.56
Total	17,700,283,000	17,313,554,000	386,729,000	2.18

Addressing impunity

In July 2013 the Prevention and Combating of Torture of Persons Act (13 of 2013) came into force. This is of particular importance to the DCS and JICS, as torture is now a punishable offence under South African law. Article 2 of the UNCAT obliges South Africa to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” There is indeed reason for concern and JICS recorded in 2012/13 a total 3370 complaints from prisoners alleging that they had been assaulted by officials; this was an increase of 73%.¹¹ Attention is also drawn to seven unnatural deaths of prisoners in KwaZulu-Natal recorded since 2009 where officials were implicated. However, none of these officials have been prosecuted. Despite the high number of complaints alleging assault by an official, only 170 disciplinary actions were instituted for assault. However, the figures provided by DCS do not distinguish whether this was committed against a colleague or a prisoner.¹² The current situation reflects *de facto* impunity.

The UN Commission on Human Rights defines impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”¹³ The duty to combat impunity rests firmly with the State and Principle 20 of the 1996 UN Report of the Independent Expert on the Question of Impunity made it clear that impunity is a consequence of “the failure of States to meet their obligations under international law to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, ensure that they are prosecuted and tried and provide the victims with effective remedies.”¹⁴

¹¹ Office of the Inspecting Judge (2013) *Annual Report of the Judicial Inspectorate for Correctional Services*, p. 47

¹² Department of Correctional Services (2013) *Annual Report 2012/13*, p. 107.

¹³ E/CN.4/2005/102/Add.1 Definitions. This definition differs slightly from the one adopted in 1996 (E/CN.4/Sub.2/1996/18) by adding the words “if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”

¹⁴ E/CN.4/Sub.2/1996/18.

It is ultimately in the interest of DCS to ensure that officials who perpetrate rights violations against prisoners are held accountable. To this end, CSPRI submits that the DCS should submit figures to the Portfolio Committee regarding assaults where officials are implicated with reference to the following:

- The number of complaints alleging assault by an official on a prisoner
- The number of disciplinary actions taken against officials for assaulting prisoners
- The number of instances where JICS recommended disciplinary action against officials for assaulting prisoners and the action taken by the DCS in such recommendations.

Access control systems

The DCS Annual Report reflects that in only 7 of the 78 prisons fitted with access control systems that these systems were functional.¹⁵ There is of course a history to the access control systems as the awarded tender was the subject of an SIU investigation. The Portfolio Committee received a briefing on the results of the investigation in November 2009¹⁶ and it is not necessary to repeat the contents thereof. According to reports at the time the tender for the access control systems amounted to R237 million and was one of four contracts investigated by the SIU.¹⁷

Four years later, only 7 of the 78 access control systems are functioning (14 less than the preceding year) despite the DCS giving the undertaking that all 78 will be functional by 31 March 2013. Bearing in mind that the awarding of the tender was, according to the SIU, done in a corrupt manner, it only makes matters worse that there is now almost nothing to show for the R237 million spent. Not only has a large amount of public funds been wasted, but the criminal case against the implicated companies and individuals appear to have ground to a halt.

¹⁵ Department of Correctional Services (2013) *Annual Report 2012/13*, p. 55.

¹⁶ Briefing by SIU to the Portfolio Committee on Correctional Services. PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 4 October 2013.

¹⁷ These were a catering contract to the value of R717 million; an access control tender for R237 million; a fencing contract for R587 million; and a tender for televisions at R224 million ('Prisons graft: Bosasa's empire of influence' Mail and Guardian, 20 November 2009, <http://mg.co.za/article/2009-11-20-prisons-graft-bosasa-empire-of-influence> Accessed 4 October 2013.)

The reasons cited by the DCS relate to apparent problems in integration of different security technologies used.¹⁸ However, on the same page of the Annual Report it is stated that the DCS does not have a security technology strategy nor does it have the expertise to develop such a strategy. This does not bode well for DCS in the light of the saga with the access control systems.

In view of the above, it is submitted that the Portfolio Committee (1) enquires from the National Prosecuting Authority regarding progress on the criminal prosecution of the implicated persons, and (2) requests the DCS to explain its plan of action to rectify the situation.

Literacy and education

Under the Rehabilitation programme outputs in respect of literacy, education and skills training are reported. These are summarised in Table 2 below. With reference to outputs that would prepare prisoners for employment upon release by providing them with access to skills training and education, the results are dismal. Less than 25% (25 631) of sentenced prisoners were involved in such activities, assuming that there are no double counts. It is also under this programme that the most substantial underspent was, totalling R125. 8 million or 13% of the programme budget.

Table 2

	Target	Actual	Percentage
Literacy training		1345	Literacy baseline survey not done
AET programmes	17100	9720	56.8
FET mainstream	39966	638	1.6
FET College	10396	3525	33.9
Formal schooling	17856	2935	16.4
Skills development	8334	4188	50.3
Production workshops	73464	1515	2.1
Agriculture	73464	3110	4.2
Total	240580	25631	

It should be noted that not one of the listed targets were reached, even if it was rather modest. The performance in respect of providing access to education and training is simply not good

¹⁸ Department of Correctional Services (2013) *Annual Report 2012/13*, p. 55.

enough and falls far short from the duty in law of “promoting the social responsibility and human development of all sentenced offenders”.¹⁹

Infrastructure development

Under the Incarceration Programme information on three infrastructure projects is provided:

- the creation of 1045 new bed spaces,
- the upgrading of three females facilities in Gauteng, and
- the creation of three new or upgraded school facilities.²⁰

In all three instances the targets were not achieved at all. These are important planned improvements to the prisons system and in line with improving conditions of imprisonment and providing education to more prisoners. The reasons for the non-completion of these projects are not clear and it is simply stated that there were unspecified delays and that the business case for the female facilities were not submitted by the Region.

Shift system

A Management Audit released by the Department of Public Service and Administration (DPSA) in 2000 found the following:

In common with many other organisations, the DCS is finding that a system that depends upon overtime and premium weekend payments to cover a 7-day operation soon faces difficulties and can be held to ransom. Because staff members rely on overtime to boost a low basic income there is always the motivation to corrupt the system to create unnecessary hours. This is often accompanied by unfair distribution of overtime to favour individuals in positions of power in unions or other non-managerial groups. There is a need to replace the current system with a fresh package that will at once provide fair remuneration and benefits to staff members and remove overtime from the service.²¹

¹⁹ s 2(c) Correctional Services Act (111 of 1998).

²⁰ Department of Correctional Services (2013) *Annual Report 2012/13*, p. 57-58.

²¹ Department of Public Service and Administration (1999), pp. 15-16.

In 2004 an agreement was reportedly reached between the Department and unions to implement a Seven Day Establishment (SDE) scheduled to commence on 1 June 2005.²² The implementation of the SDE, however, suffered serious delays, and when it was finally implemented it had adverse consequences on operations. One reason for the delay was that monies allocated to the SDE were re-allocated to fund other departmental programmes.²³ The SDE was then implemented with effect from 1 July 2009, some four years late but with immediate and substantial savings to the tune of R900 million.²⁴ However, it ran into difficulties and POPCRU obtained an interdict against the DCS regarding the implementation of the SDE.²⁵ Since then it appears to have been a situation of stalemate.

The DCS Annual Report notes that the negotiations with trade unions are still underway and as far as could be established, the situation has not changed. Thus, 14 years after the DPSA recommended an SDE, the situation remains unresolved. This has had serious consequences for the Department's ability to implement the services required by law. This is an untenable situation and requires urgent attention.

Conclusion

It appears that the DCS is again heading for a period of increased instability. The recent and sudden retirement of the National Commissioner without a successor lined up, raises questions about the process being followed. Regardless of that, it does not bode well for the Department. Moreover, two key senior managers are in acting positions (Chief Financial Officer and CDC Strategic Management).

²² Department of Correctional Services (2005) *Annual Report 2004/5*, pp. 18 and 47.

²³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 February 2010, <http://www.pmg.org.za/report/20100217-problems-within-department-correctional-services> Accessed 8 December 2011.

²⁴ Department of Correctional Services (2009) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 20.

²⁵ The interdict stipulated the following: (1) Interdicting and restraining all officials lower in rank from implementing any shift system in the Department or any part thereof [including all management Areas, Correctional Centres, Correctional Facilities, Divisions or Offices], in terms of which the work hours of centre-based correctional officials are changed, (2) Interdicting and restraining the National Commissioner as the respondent from instituting, or continuing with, disciplinary proceedings against any centre-based correctional officials, who failed and/or refused to perform work in accordance with the shift system implemented by any official of a lower rank other than the National Commissioner. (3) Interdicting and restraining the National Commissioner as the respondent from making or continuing to make deductions in respect of unpaid leave, from the salaries of officials who failed and/or refused to perform work in accordance with a shift system implemented by any official of a lower rank other than the National Commissioner as the respondent. (Press release by POPCRU, 'POPCRU's Urgent Labour Court Application granted on Shift System' 11 February 2011, <http://popcru.org.za/?p=249> Accessed 4 October 2013).

The Inspecting Judge notes that the unrests in prisons during 2012/3 have their roots in the fact that prisoners are frustrated with their conditions and treatment. Consistently there are reports of assaults on prisoners and other forms of ill treatment, yet the DCS fails to address these challenges in a meaningful manner. There is thus a well-founded fear that the situation may indeed become worse if key issues pertaining to prisoners' conditions and treatment are not addressed.

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