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LAWYERS FOR HUMAN RIGHTS

LHR Written Submissions

Department of Correctional Services' 2013/2014 Annual Report

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Introduction

1. Lawyers for Human Rights established the Penal Reform Programme in July of 2014 amid concerns for the protection of the rights of prisoners and detainees and constitutional compliance in relation to the imposition of punishment, sentencing, independent oversight and conditions of detention. Particular areas of interest include prison overcrowding, independent oversight and sentencing reform.

2. As requested by the Portfolio Committee on Justice and Correctional Services, these submissions will focus specifically on the Department of Correctional Services' management of remand detainees and remand detention facilities.

Some preliminary comments

Statistics

3. Generally, the statistics published in the Department's annual reports are of limited use. The Department of Correctional Services (the Department) releases the total

inmate population and the extent to which it is comprised of remand detainees and sentenced offenders. It does not report on the categories of sentence length nor the provincial prison populations. The lack of detail in the annual report thus makes it very difficult for stakeholders to offer any meaningful input on strategies for improvement. Concerned stakeholders are therefore compelled to look further for meaningful information, the efforts of which are frequently met with resistance by the Department, despite the fact that there is no good reason to keep such information out of the public domain.

4. The following examples illustrate the importance of failing regularly to report such information to the public. Prisons are occupied at the fairly moderate rate of approximately 130%. This average figure is misleading, however, for certain facilities are occupied at a rate of 170 – 260%, (although we are not told this in the annual report) and have been for several years.

5. What we do know, however, is that 43 712 out of 157 179 inmates are remand detainees. This means that despite the prison population having increased over the last financial year, the number of remand detainees has decreased slightly by 2%.

6. Although this is a welcome development, the number of remand detainees, when compared to the Department's own benchmark of 25 000, exceeds available space by 75%. Moreover, according to the Department's September 2014 statistical records, certain remand facilities (RDFs) are extremely overcrowded. Pollsmoor and Malmesbury RDFs, for example, are occupied at a rate of 258% and 245% respectively. (These figures are not in the annual report.)

7. Importantly, overcrowding in remand detention facilities is not a new problem. In fact, the Judicial Inspectorate has lamented the degree of overcrowding in almost all of its annual reports since its inception in 1998.[1]

8. When it comes to sentenced admissions to prison, the population, having peaked in 2004 at 134 487, has dropped steadily subsequently, and, at 107 696, is only slightly

[1] In 2004, for example, Judge Fagan described the problem of overcrowding as "an on-going breach of prisoners' rights to adequate accommodation."

higher than it was in 2013, when, at 104 670, it was at its lowest. Nevertheless, this still represents an increase of 17 per cent since 1994. And, with 10 868 prisoners serving sentences of life imprisonment – a stunning and unprecedented 2353 per cent increase since 1995 - sentenced offenders are serving longer sentences than ever before. It is unclear whether the Department is equipped to deal with the unique challenges of this category of inmate. Given, however, the somewhat dismal statistics regarding participation in training programmes[2] it would appear that the Department is not equipped at all. Importantly, we share the same concern regarding the number of inmates receiving psychological and social work care.[3]

Remand detainees

9. There are two major concerns when it comes to remand detainees: 1) the level of overcrowding in certain facilities; and 2) the lengthy period that detainees are compelled to await trial whist incarcerated.

10. Uncontroversially, both of these issues are linked to the continued and persistent delay of criminal matters, and, regarding overcrowding, to the more obvious problem of a lack of accommodation capacity.

11. Importantly, poor conditions of detention, to which overcrowding most definitely contributes, amounts to ill-treatment. A brief comment on the United Nations Convention against Torture thus follows immediately below.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

12. The South African Government ratified UNCAT in December 1998. After many years, the legislature domesticated the crime of torture as was required by article four of UNCAT.

13. For the purpose of these submissions, it is vitally important that the Committee note that international law and commentary have made it abundantly clear that

[2] DCS 2013/2014 Annual Report, pg 47.

[3] DCS 2013/2014 Annual Report, pg 48.

overcrowding in itself (i.e. the simple breach of space norms without any exacerbating factors) amounts to ill treatment.[4]

14. Accordingly, as long as prisons remain overcrowded, the government is in breach of its international treaty obligations, not only in terms of UNCAT, but also the ICCPR and African Charter on Human and Peoples Rights (in addition, of course, to South Africa's own constitutional and constitutional legislation).

Overcrowding and available accommodation

15. The inevitable result of extreme overcrowding is that remand detainees are compelled to endure conditions which are a material violation of their right to be detained in adequate accommodation and in conditions which are consistent with human dignity, and which do not place their physical health or safety at risk. These rights are set out in section 35(2)(e) of the Constitution and Chapters Three and Five of the Correctional Services Act 111 of 1998.

16. The annual report makes it clear that the use of section 49G of the Correctional Services Act and the release of those remand detainees eligible for bail (presumably in terms of section 63A of the Criminal Procedure Act) has made certain inroads into combating overcrowding. Importantly, however, these developments yield only modest results. For example, were the more overcrowded remand facilities to release all detainees eligible for bail – 15% according to the annual report – the difference would in such centres would be marginal at best. It would, however, make a marked difference to those centres experiencing moderate overcrowding. It is unclear why or whether section 63A is being used to its full capacity. It is thus important to know how many inmates at each RDF qualify for bail in terms of section 63A. Again, such information is not readily available.

17. Although building additional space is not a popular choice, the extreme cases of overcrowding tend to be in a handful of RDFs that are situated in major cities, such as

[4] See *Peers v Greece* (2001) 33 EHRR 51; *Kalashnikov v Russia* (2003) 36 EHRR 34 *Poltoratskiy v Ukraine* (application no 38812/97; unreported judgment of 29 April 2003). Similarly, the Human Rights Committee has found that overcrowding constitutes a violation of Article 10(1) of the International Covenant on Civil and Political Rights, which requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". See *Girjadat Siewpersaud v Trinidad and Tobago*, Communication No. 938/2000 of the Human Rights Committee, para 6.3.

Cape Town and Johannesburg, or, in situations where one facility is required to service a large geographical rural area. Given that adding capacity to such centres has proven effective in the past, it is unclear why this has not been done to a greater degree,[5] especially since only a few centres would need to be altered.

18. We discuss the relevance of continued delays under the heading below.

Lengthy periods of incarceration whilst awaiting trial

19. On 31 March 2011, 24 305 remand detainees out of 50 511 (48%) had been in custody for longer than three months. Approximately 14% (3403) of these remand detainees had been detained for over 12 months, and 3-4% (972) for over two years. This means that literally thousands of people in South Africa spend long stretches without access to educational or rehabilitative programs. In addition, more than half of those in remand detention will be released due to acquittal or their charges being withdrawn or struck off the roll.[6]

20. The Constitution makes it clear that an accused person has the right to a speedy trial as well as the right not to be detained arbitrarily or without just cause.[7] The former means that the Department of Justice and Constitutional Development, as well as the Judiciary, do all that they can to establish and implement court backlog reduction programmes. Reportedly, these have been in place for several years. Unfortunately, it would appear that such programmes have not made any meaningful difference in the time it takes for a crime to be investigated and the trial to then commence and be finalised.[8]

21. When it comes to the question of liberty and detention, not only does the government have a duty to prosecute trials speedily, but also continually to justify an accused's continued remand. The constitutional principle of proportionality and the fundamental 'right to not to detained arbitrarily or without just cause' require this.[9] Unfortunately,

[5] See Judicial Inspectorate Annual Report 2008/2009 and 2009/2010.

[6] See V Karth "Between a Rock and a Hard Place: Bail decisions in three South African courts." Research paper, Open Society Foundation for South Africa, Cape Town.

[7] Section 35(3)(c) and section 12(1)(a).

[8] C Ballard 'A Statute of Liberty? The right to bail and a case for legislative reform' in the South African Journal of Criminal Justice 2012.

[9] Section 12(1)(a) of the Constitution.

suspects are remanded time and time again on the basis of glib justification, such as 'further investigation' or 'a lost docket.'[10] Despite ample examples of courts expressing frustration at such delays,[11] there has been little improvement.

22. It is worth noting that countries with similar concerns in relation to remand detention (those in Latin America stand out) have managed to curb mass overcrowding through two types of processes: mandatory review mechanisms and custody time limit. It is important to pause here and mentioned that section 49G of the Correctional Services Act is, misleadingly, titled 'custody time limit'. It is not. It is simply a review mechanism whereby detainees who have been incarcerated awaiting trial for more than two years are brought before a court for the purpose of having their remand detention extended. Below the recommendations that follow immediately, we discuss some of the ways in which foreign jurisdictions have attempted, and succeeded, in curbing remand overcrowding.

Recommendations

23. LHR is certainly alive to the fact that curbing overcrowding in RDFs is a complicated and multi-faceted problem. However, there are certain legislative options readily available.

24. First, the Criminal Procedure Act provides for the release of an accused on bail if a magistrate is satisfied that "the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety..."[12] The provision only applies, however, to remand detainees who have been granted bail but cannot afford it and are thus incarcerated pending trial.

25. It seems that such remand detainees account for between 15 and 20% of the remand detainee population. Thus, as discussed above, this provision could certainly prove to be effective in certain centres.

[10] UWC Court Monitoring project. More details available on request. See generally C Ballard 'A Statute of Liberty? The right to bail and a case for legislative reform' in the South African Journal of Criminal Justice 2012, page 24.

[11] See S v Vermaas 1996 (1) SACR 528 (T); S v Kok 2003 (2) SACR 5 (SCA).

[12] Section 63A

26. Secondly, the Criminal Procedure Act states that a magistrate or judge before whom criminal proceedings are pending, "shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the ... accused." The fact that an accused has been incarcerated in overcrowded conditions for an unnecessarily long period of time would certainly have an effect on the "personal circumstances of the accused," one of the factors the court must take into account in carrying out such as inquiry.

27. Thirdly, as required by the NPA's ATD Guidelines, prosecutors should reconsider bail if an accused has been in custody for longer than six months amd ensure that the investigations and presentation of the state's evidence are fast-tracked in such matters.[13] These processes could be made more efficient were the prosecutorial agents to refer to the information provided tabled before Parliament in terms of section 342A(7) of the CPA, which stipulates that the National Director of Public Prosecutions must submit, within 14 days after the end of January and of July of each year, a report to the Cabinet member responsible for the administration of justice, in respect of each accused whose trial has not yet commenced in respect of the leading of evidence ... and who, by the end of the month in question, has been in custody for a continuous period exceeding:

(i) 18 months from date of arrest, where the trial is to be conducted in a High Court;

(ii) 12 months from date of arrest, where the trial is to be conducted in a regional court; and

(iii) six months from date of arrest, where the trial is to be conducted in a magistrate's court"

28. Ultimately, however, the successful reduction of the remand detention population depends on the implementation of effective backlog-reduction programmes, a bail protocol that takes into account the detainee population. The Department of Justice

[13] In 2005 the NPA published a set of guidelines (ATD Guidelines) intended to intended to sensitise prosecutors as to the various options available to try to reduce the number of awaiting-trial detainees. For the most part they are a condensed version of the statutory bail provisions. They do, however, offer a couple of meaningful recommendations. It is worth noting, however, that as early as 1999 the NPA was making a concerted effort to combat case backlogs. Such efforts included the institution of Saturday courts and the deployment of more experienced magistrates and court officials to the busier court centres in the country

and Constitutional Development should prioritise such initiatives.

Comparative examples

Custody time limit

29. Most countries with the Latin American region have time limits on pre-trial custody. Venezuelan law stipulates that under no circumstances may an accused person be detained for longer than the possible minimum sentence for the alleged crime, nor may the detention exceed two years.[14] In Guatemala, pursuant to various reforms which began in 1994, detention may not last for more than one year, or for a period exceeding the punishment for the alleged offence.[15] The criminal code of Bolivia fixes the maximum custody period at 18 months.[16] Similar provisions exist in Costa Rica,[17] Ecuador,[18] El Salvador,[19] Honduras[20] and Peru.[21]

30. While a capping is no doubt a helpful way of ensuring that investigations are processed within a certain time, it is not a guaranteed solution to the problem of unjustified lengthy detention. Generally, maximum periods are lengthy in themselves. It is thus foreseeable that a detainee could be held in custody longer than it would necessarily take to prosecute a certain (usually, less serious) offence but for a period less than the prescribed maximum. Thus, while the so-called 'custody time limit' provision is a commendable movement towards preventing lengthy detainments, two years is a very long time to wait, especially if the case against the accused is a relatively simple one.

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[14] Venezuela, Criminal Procedure Statute of 1998 (Codigo Processal Penal).

[15] Decree No. 51-92

[16] Law No. 1.970

[17] Detention cannot exceed 12 months (Law No. 7.594)

[18] Pre-trial detention may not exceed six months one year in the case of crimes punishable by incarceration (Law No. 000. RO/Sup 360).

[19] Detention cannot exceed the maximum sentence provided for in the law or 12 months (in less serious crimes) or 24 months (serious offences).

[20] The general rule is one year unless the crime is punishable with more than six years in prison, in which case the maximum is two years.

[21] Pre-trial detention may not last more than nine months. In complex cases, pre-trial custody shall not exceed 18 months. (Decree No. 005-2003-JUS)

Mandatory review

31. A prosecuting authority cannot simply rely on formulaic reasons to justify the continued detention of a suspect. The actions of the state must be transparent and additional reasons must be supplied to the court should the state seek to argue in favour of continued detention. Latin American jurisdictions, again, serve as good examples of where the automatic review of bail decisions have been built into the respective current criminal codes.

32. A system of mandatory review is a check on unnecessary delays and reduces, to some extent, the burden on the accused of finding "new facts" with which to present a fresh bail application. The intricacies and reasons for delays in the prosecution of cases is not the kind of knowledge a detained accused can ascertain easily. Moreover, it is unlikely that an accused would be familiar with liberty jurisprudence to the extent that he or she would be able to argue in favour of the state demonstrating reasons beyond those given at the initial bail hearing justifying his or her continued detention. If, however, such facts must be brought before a court at specified intervals, the chance of the accused being detained further simply because he or she cannot get hold of information, would be reduced significantly. This, it is argued, accords better with section 35(1)(f) of the Constitution and the objectives "traditionally ascribed to the institution of bail, namely, to maximise personal liberty.' It is also in accordance with the Constitution's founding values of accountability, responsiveness and openness.