



LHR WRITTEN SUBMISSIONS

THE ADMINISTRATION OF PAROLE AND CORRECTIONAL SUPERVISION, AND THE PURPOSE AND IMPACT OF THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES

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INTRODUCTION TO LHR'S PENAL REFORM PROGRAMME

1. Lawyers for Human Rights established the Penal Reform Programme (PRP) in July of 2014 amid concerns for the protection of the rights of prisoners and detainees in correctional settings. The PRP's particular areas of interest concern constitutional compliance in relation to the imposition of punishment, sentencing, independent oversight and conditions of detention, prison overcrowding and sentencing reform.

2. These submissions focus specifically on the administration of parole as it relates to offenders serving sentences of life imprisonment and the purpose of the Judicial Inspectorate for Correctional Services (JICS).
3. The PRP has extensive experience as it relates to both sets of issues. In respect of parole, LHR represents a significant number of inmates serving sentences of life imprisonment at correctional centres across the country and is thus in the process of engaging with the Department and the Minister regarding some of the systemic delays experienced by its clients. In respect of JICS, LHR has been involved in the process of engagement between various stakeholders and this Committee over the years regarding JICS' legislative establishment and is well-versed in not only the issue of operational independence, but the various issues concerning JICS' legislative mandate.

THE ADMINISTRATION OF PAROLE IN RESPECT OF INMATES SERVING LIFE SENTENCES

4. The most frequent complaint the PRP receives concerns the administration process for life offenders eligible for parole. Large groups of inmates from correctional centres around the country have approached LHR for assistance in respect of systemic delays in the administration of the parole process. Accordingly, each of these groups is comprised of inmates that fall into one of the following categories:
 - 4.1. **Category 1:** eligible for parole but waiting for the correctional centre's Case Management Committee (CMC) to complete the compilation of his profile report;
 - 4.2. **Category 2:** awaiting consideration from the Correctional Supervision and Parole Board (parole board);
 - 4.3. **Category 3:** awaiting consideration from the National Council of Provinces (NCC);
 - 4.4. **Category 4:** awaiting consideration from the office of the Minister of Justice and Correctional Services; or
 - 4.5. **Category 5:** awaiting the re-submission of his report by the CMC to the NCCS after having been refused parole initially by the NCCS.

5. The issues in respect of each category are discussed directly below and conclusions and recommendations thereafter.

CATEGORY 1 – CASE MANAGEMENT COMMITTEE

6. The CMC is required to ensure that the following information is provided to the parole board:
 - 6.1.a G326 profile report, which comprises of:
 - 6.1.1. a SAPS62 (report on the offence);
 - 6.1.2. a SAPS69 (report on criminal record)
 - 6.1.3. a report on the conduct, disciplinary record, adaptation, training, aptitude, physical and mental health state of an offender;
 - 6.1.4. a report on the likelihood of the offender's relapse into crime, the risk posed and the manner in which this risk can be reduced;
 - 6.1.5. the confirmation of support systems and employment offers; and
 - 6.1.6. the possible placement of an offender on parole, and the conditions for such placement.
 - 6.2. Reports documenting the offender's:
 - 6.2.1. behavioural change programs;
 - 6.2.2. self-development programs;
 - 6.2.3. support systems;
 - 6.2.4. community acceptability;
 - 6.2.5. adaptation in prison; and
 - 6.2.6. participation in restorative justice.
7. Inmates in this category are compelled to endure extreme delays on the part of the CMC in ensuring that a complete file is handed to the relevant parole board. The overwhelming causes of the delay in the finalising of an offender's parole file are outstanding psychologist and social worker reports. Offenders frequently wait periods of six to eighteen months for these reports to be completed.

CATEGORY 2 – PAROLE BOARD

8. Generally, the parole boards function well and the Department should be commended for this. It appears that parole boards convene frequently enough to ensure that once an offender's parole file has been submitted, he or she does not have to wait an unreasonably long period of time before being considered. It is worth mentioning, however, that parole boards are frequently compelled to send an offender's parole file back to the CMC on the grounds that it has come to them incomplete.

CATEGORIES 3, 4 AND 5 – NCCS AND MINISTER'S OFFICE

9. Offenders awaiting decisions from the NCCS are compelled to wait anything from four to eighteen months for a decision, and, at least another six to twelve months thereafter for confirmation of that decision from the Minister's office.
10. The Minister's office generally does not interfere with the recommendation of the NCCS except in political, high profile matters.
11. With limited exceptions, the NCCS refuses to recommend that first time applicants be released on parole despite their being a positive recommendation from the parole board. The reasons justifying the recommendation are invariably the following:
 - 11.1. The offender undergo additional "restorative justice programmes"; and/or
 - 11.2. The offender engage in additional VOD (victim offender dialogue) programmes; and/or
 - 11.3. The offender participate in additional vocational training.
12. Importantly, these reasons are not indications that an offender has *not* participated in such activities. For, generally, an offender at this stage of the parole application proceedings has exhausted all available programmes at the relevant correctional centre. It seems, therefore, that the NCCS is using perfunctory reasons simply to ensure that an offender remain another 12-24 months in prison. It is thus worth noting that those offenders that are able to

afford private legal representation and challenge the NCCS's and Minister's decisions are, almost always, successful on review in the High Court.

13. To the extent that the NCCS's reasons justifying non-release are accurate reflections of an offender's failure to participate in various programmes, it is worth noting that this is usually the fault of the correctional centre for not having certain programmes available, such as restorative justice, or for having failed to contact the victim/s of the inmate's offence for a VOD. This means that time and time again offenders are being penalised for the failures of the Department.

CONCLUSIONS AND RECOMMENDATIONS

14. An offender enjoys the right to be considered for parole. Accordingly, such delays amount, unquestionably, to unjustified rights violations in respect of the rights to just administrative action and liberty.
15. In respect of offenders experiencing delays at the CMC stage, it is clear that the Department is failing in its efforts to secure the long term employment of professional staff equipped to carry out psychological reports. Such failure has been acknowledged in the Department's own annual reports over the years as well as those of the Judicial Inspectorate for Correctional Services.
16. The systemic problem of post vacancy must be urgently remedied in order to avoid the continued rights violations of offenders, not only in respect of parole, but also in respect of their rights to health care.
17. In respect of offenders experiencing delays at the NCCS stage, it appears that the NCCS is experiencing a large backlog of cases for consideration, exacerbated by the fact that it is comprised of a larger group of individuals that does not meet nearly as frequently as the parole boards do.
18. Importantly, the NCCS, as described in statute, is a body intended to assist the Department and Minister with policy considerations pertaining to correctional

services and penology.¹ This is not to say that the NCCS does not play an important role in the parole process. Rather, the Department should re-evaluate its composition as well as the frequency with which it meets in an effort to ensure expediency. LHR currently represents groups of 20 – 120 lifers at various correctional centres around the country, including Leeuwkop Medium, Mthatha Medium, Zondewater, Kgosi Mampuru II, Kirkwood and Mdantsane Correctional Centres.

19. In an effort to avoid large-scale review litigation LHR has requested a meeting with the Minister to discuss the systemic delays faced affecting our clients. There has been no response from the Minister, although the Department has indicated its willingness to engage with the affected clients (albeit only after having been threatened with litigation). There has been no direct engagement in respect of systemic delays plaguing the system as a whole.

20. Inmates are dependent on the authorities in ways that ordinary citizens are not. Prison authorities must thus provide directly for them.² If the rights to just administration and liberty are to have any meaningful application in the correctional setting, then the systemic delays in parole administration that the Department has failed to address over the years, must be remedied. Given the ongoing failure of the Department in this respect, the inescapable conclusion is that it does not take the rights of prisoners seriously.

21. The rate at which offenders are being sentenced to longer sentences has increased drastically. And the number of offenders serving sentences of life imprisonment has increased by more than 3000% since 1995 (see attached graphs).

¹¹ Section 84 of the Correctional Services Act states:

Functions and duties of National Council

(1) The primary function of the National Council is to advise, at the request of the Minister or on its own accord, in developing policy in regard to the correctional system and the sentencing process.

² *Van Biljon and Others v Minister of Correctional Services* 1997 (4) SA 441 (C).

22. The problems associated with the parole administration of offenders serving life sentences will thus only become more pronounced unless the Department overhauls the manner in which it processes parole applicants.

THE PURPOSE AND IMPACT OF THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES

23. The deficiencies in the legislative establishment of JICS have been canvassed extensively before this committee, particularly during the years 2011-2013 (see Sonke Gender Justice memorandum on Committee/stakeholder engagement). Sadly, this process of engagement, despite rigorous encouragement on the part of stakeholders, did not yield any tangible results in the form of legislative reform.

24. Accordingly, the purpose of these submissions is not to repeat what has already been stated. Rather, it is to notify the Committee that LHR, representing Sonke Gender Justice, will soon be filing an application challenging the legislative establishment of JICS.

25. The application explores the arguments that have been presented before this Committee numerous times before. These, briefly, are as follows

25.1. The notion of independent oversight is based on the premise that transparency and accountability are key features in a democracy, requiring that the exercise of executive power be checked by an organ or body which is distinct from and independent of it.

25.2. The obligation on the State to *'respect, protect, promote and fulfil'* the rights in the Bill of Rights inevitably gives rise to a duty to establish and maintain an efficient prison oversight mechanism in order to secure accountability of the Department for the proper treatment of inmates

25.3. Oversight measures must be reasonable and effective.³ ,

³ As the Constitutional Court held in *Glenister*, it is an implicit requirement of section 7(2) that the steps which the State takes to meet its obligations under that section must be reasonable and effective

25.4. To the extent that the state has failed to ensure such measures, such failure violates a number of fundamental rights, including the rights to dignity, life, to be free from ill treatment and torture and to be detained in conditions of detention consistent with human dignity.

25.5. The state has failed to ensure such measures on the grounds that JICS is inherently lacking in the necessary institutional independence:

25.5.1. Although JICS is described in section 85(1) as “*an independent office under the control of the Inspecting Judge*”, the location of JICS (and with it the ICCV system) within DCS, with close financial and administrative links between the two, undermines the actual and perceived independence of JICS.

25.5.2. In terms of section 95 of the Act, JICS is totally dependent on the Department for its funding, and under section 88A(1)(b) the CEO of JICS is accountable to the Commissioner for all monies received by JICS. This statutory scheme creates the risk that DCS could limit the funding made available to JICS.⁴

25.5.3. JICS’s lack of financial independence from DCS is not of theoretical concern only; it has in fact impacted negatively on the ability of JICS to function effectively by rendering JICS under-capacitated due to a lack of funds required to fill essential posts. JICS’ annual reports are replete with examples:

25.5.3.1. *The 2011/2012 JICS Annual Report states: “The JICS’ financial dependence on the DCS has, from time to time, caused serious operational challenges to the JICS inasmuch as the DCS has at times imposed, or attempted to impose, its internal financial and administrative policies and procedures on the JICS. This frequently leads to delays in service delivery.”*

25.5.3.2. *In the 2012/2013 Annual Report Judge Tshabalala stated: “Section 91 of the CSA states that the DCS is responsible for all*

⁴ In *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) the Constitutional Court pointed out that the arrangement where a department makes funds available from its own budget to a public entity for the performance of certain functions is fundamentally unsuited to independent institutions. It is submitted that this is particularly so in the case of an oversight body such as JICS, which is required to monitor and maintain an arms-length relationship with DCS

expenses of the Inspectorate. (This section has huge implications for the overall structural and operational independence of the Inspectorate as an oversight body, which has a filtering down effect on its effectiveness in fulfilling its mandate.)...In the Inspectorate's 2011/2012 Annual Report it was reported that the Inspectorate needs structural change. While restructuring was approved towards the end of 2012, there are no funds to finance posts on the new fixed establishment necessary for efficient and effective functioning. The Inspectorate's budget for the same year comprised 0.1% of the DCS budget. For the 2013/2014 financial year, the Inspectorate was informed that it would receive the same budget as the 2012 financial year, notwithstanding restructuring and three additional regional offices. This situation also affects the asset and infrastructural requirements of the Inspectorate

25.5.3.3. In the 2013/2014 Annual Report Judge Tshabalala stated: "As note in the Inspectorate's 2012/2013 Annual Report the Minister of Correctional Services approved the new post establishment which paved the way for a restructuring process. Further noted in the Annual Report was the lack of funding that was made available for vacant posts. To date, the Department has not committed itself to providing the additional funding for all vacant posts on the new structure. The Inspectorate has no option but to continue appointing employees on a contractual basis. In the interim, valuable employees with institutional knowledge are lost due to the temporary nature of their employment and prospects of fixed employment elsewhere, notwithstanding the fact that the organisation has invested a lot of time in equipping them with the knowledge in the area of corrections and human rights. The situational analysis continues to dampen the morale of all staff members who are executing the duties of other functionaries where those posts are not fulfilled by contract or permanent employees." (p 23)

"The Inspectorate submitted its 2014/2015 budget for the funding of posts on the new approved structure. [This] structure filled and funded would bring about better operational prospects for the

organization. Since the last job evaluation process and up until the endorsement of the new structure above, additional pivotal posts continue to be identified... The new structure makes provision for only four Inspectors nationwide. Effectively our main object is reporting on the treatment of inmates and the conditions of correctional centres and remand centres. This is impossible with only four Inspectors. ... [T]he Inspectorate's ultimate goal is to align its management regions with that of the Department. The Inspectorate has four management regions. The Department has six management regions.... A strategic planning session will be hosted to discuss the prospects of further expansion after finalisation of the funding allocation for the above structure.

25.5.3.4. The 2014/2015 Annual Report states: "The work of the Inspectorate continues to be constrained by its reliance on the Department for funding and for key aspects of its operation, including in the filling of posts and in procurement. The Inspectorate recommends more autonomy in this regard." (p 15)

"Performance delivery of the Inspectorate has been affected by instability of leadership, inadequate and inappropriate staffing patterns, as well as unstable and insecure ICT systems. Many senior positions remain unfilled, which has resulted in managers often performing the tasks of two people. In particular, the position of the CEO remains unfilled. While the establishment of new posts has been approved, funding approval has been delayed, which has resulted in many employees having to be employed on a contractual basis." (p 22)

"During the year under review, the Inspectorate has 45 fixed funded permanent positions. While a new post establishment for 101 employees has been approved, a third of the staff complement of the organisation is comprised of contract posts. These posts expired in September 2015 and had to be re-advertised in order for the contract posts to be extended for a period of three years. While a three-year contract does stabilise the situation of a current employee, the number of contract staff is not ideal. Advertising and finalising these

contract posts places an enormous burden on the human resources unit, which is under-capacitated.”