Comment on the Correctional Matters Amendment Bill [41 of 2010]

A. Insertion of the definition of remand detainee by clause 1(b) of the Bill

'Remand detainee'—

(a) means a person detained in a remand detention facility awaiting the finalisation of his or her trial until being convicted or acquitted, inclusive of the period during which the conviction or acquittal are subject to review or appeal, if such person has not commenced serving such sentence or is not already serving a prior sentence;

General

1. It may be remarked that the definition suggests that a person who has been convicted and is awaiting sentence is no longer a remand detainee. Currently, persons convicted but awaiting sentence are still considered remand detainees and held in custody with other detainees awaiting trial or sentence.

2. Persons should be considered remand detainees until such time as a sentence of imprisonment is imposed. Accused persons may receive sentences which do not include imprisonment and it would be untenable should such persons be detained with persons serving sentences.

3. It is recommended that the definition be amended to include persons convicted but awaiting the imposition of their sentence. (Note: acceptance of this recommendation would then no longer require the insertion of the word 'or unsentenced offenders' in section 5 of the Bill).

Appeal procedure

4. A further point to note is that appeal proceedings are instituted only after the sentence has been imposed. The appeal is not lodged following conviction.

5. Furthermore, an appeal may also be lodged in respect of sentence only. However this appears to be excluded from the definition above. It would seem that this may be an oversight as the last line refers to serving 'such' sentence rather than the word 'a' sentence.

Review process

6. Automatic review of proceedings follow certain sentences imposed by magistrates, dependent upon the number of years they have served as presiding officers in the particular court. This is governed by section 302 of the Criminal Procedure Act, 1977 (Act 51 of 1977). Any sentence of imprisonment imposed by a magistrate's court which exceeds a period of three months, where the judicial officer has not held the substantive rank of magistrate or higher for at least seven years is subject to review by a judge. Where the magistrate has held the rank for a period of seven years or longer, a period of imprisonment exceeding six months is subject to automatic review. Automatic review is suspended where the accused has noted an appeal, unless the accused person abandons the appeal. Where the accused person abandons the appeal the review proceedings will revive.

7. In certain instances convicted persons may also apply for the review of proceedings on certain grounds. This is usually through motion proceedings.

8. As can be seen from the paragraphs above, there are a variety of possible scenarios which may result in detainees falling within the definition of remand detainee. The processes which are pending, whether review or appeal, are not ordinarily communicated to the Head of the facility. In short, the Head of the correctional facility is seldom in a position to determine whether the particular detainee is within *'the period during which the conviction or acquittal are subject to review or appeal'*.

9. The Head of the correctional facility is also not necessarily advised as to the outcome of the review or appeal process, particularly where there is no change as to the judgment and sentence. Thus, they are not in a position to determine whether or not the detainees should be defined as 'remand detainees'.

10. Although in respect of both appeal and review there are particular periods which should be complied with in respect of appeals and reviews, failure to do so may be condoned by the court.

11. There may also be delays in pursuing an appeal or review. Some of these may be outside the control of the accused, but many will be within the control of the accused.

12. A sentenced detainee – who appealed before commencing serving of a sentence – may deliberately delay the finalisation of an appeal and thus remain a remand detainee for a lengthy period of time. The sentenced detainee may lodge further appeals, petitions and utilise a variety of processes that may result in a number of years passing between the time the sentence was imposed and the final outcome of the appeal.

13. The accused can thus effectively determine whether he or she be detained as a 'remand detainee' and the length of such detention. As the person does not attend court (except in the case of an appeal conducted in person) the detainee is able to become a long terms resident of the detention facility.

14. The distinction between persons who have commenced serving their prison sentences and only then lodge an appeal and persons who lodged an appeal before they commenced serving their sentences is artificial. Often time is needed to prepare a proper application for leave to appeal. The proviso of a person not having commenced serving such sentence will result in applications for leave to appeal being automatically brought immediately after finalisation of the sentence proceedings. In many instances these will not have been adequately thought through. This would not be in the best interest of the detainee, nor in the interests of justice.

15. Further implications are that there may be a large number of appeals where there are no prospects of success. This will result in further delays in the finalisation of appeals and more persons falling within the definition of remand detainee.

16. Should persons who have been convicted, but have commenced appeal or review proceedings, be housed with other remand detainees the percentage overcrowding within remand detention would be dramatically increased.

17. Furthermore, after conviction and sentence the incentive for escape is greater than prior to conviction and sentence. Facilities for sentenced persons have greater security than facilities dedicated to the dealing with remand detainees. There is significantly less movement in and out of prison and greater control can be exercised over sentenced persons.

18. As the privileges with respect to remand detainees are greater than for sentenced inmates there will be an incentive to appeal, irrespective of whether there will be a possibility of success or not.

19. The detainee would also be excluded from rehabilitation programmes whilst in remand detention and could conceivably serve his or her entire sentence as a remand detainee.

20. Currently, a person who is convicted and sentenced to a period of incarceration would normally, commence serving the sentence upon arrival at the Correctional Facility. All the current procedures relating to determining the effective date of sentence, length of incarceration etc, would be applied.

21. A concern is noted at the inclusion of reference to appeal against acquittal. In such an instance the person would ordinarily not be in detention. If the situation is envisioned where the person is convicted of some offences, but not others, it would not make sense to prevent the detainee serving the sentence in respect of those offences of which he or she has been convicted because of the possibility of being convicted of further offences on appeal.

22. Finally, if a person is serving a prior sentence, such accused is not housed with remand detainees. The definition supports this.

23. It is proposed that remand detainee be defined as follows:

(a) means a person detained in a remand detention facility awaiting the finalisation of his or her trial, whether by acquittal or conviction and sentence, excluding any subsequent appeal or review process;

B. The insertion by clause 9 of the Bill of section 48 into the Act

48. Every remand detainee must wear a prescribed uniform which distinguishes him or her from a sentenced offender for the maintenance of security and good order in the remand detention facility.

24. The practical implications of this may not have been adequately considered. The word 'must' is of particular concern. If this provision be retained, it is suggested that the word 'must' be replaced with 'may be required to'.

25. Apart from the cost of providing such uniforms, having sufficient sizes available and the burden born by the Department of Correctional Services in washing the uniforms, the actual process of issuing, receiving, storing and securing uniforms and personal clothing will represent a huge challenge.

26. Detainees will arrive in civilian clothes, have to be issued with a uniform, change, and then hand in their private clothes for safe custody. When departing for court their private clothes will have to be returned to them, they will change and then have to hand the uniform back.

27. The process of booking detainees into facilities and booking persons out to go to court would require significantly more staff and more time. Similarly, the process of receiving persons from court would also face further delays. A visit to any of the Correctional Facilities housing large numbers of remand detainees will reveal the challenges they currently face in processing of persons, without the additional burden of issuing uniforms.

28. Currently, most of the larger detention facilities housing awaiting trial detainees face infrastructure challenges with regard to reception and dispatch of detainees. Requiring additional storage space for uniforms and personal clothing, as well as facilities where inmates can change clothes will be a significant additional burden.

29. Within the detention facilities there is already a mechanism to distinguish inmates from personnel. The personnel wear uniforms. To require detainees to be issued with and wear uniforms in addition does not appear to be practical or financially defensible.

30. Other practical issues like whether detainees will be permitted to wash their civilian clothes between court appearances and whether this would not defeat the very purpose of uniforms should also be considered.

31. It is proposed that the provision read as follows:

48. *Every remand detainee may be required to wear a prescribed uniform which distinguishes him or her from a sentenced offender for the maintenance of security and good order in the remand detention facility.*

C. The insertion by clause 9 of the Bill of section 49E into the Act

Referral of terminally ill or severely incapacitated remand detainee to court

49E. *(1) If the Head of a remand detention facility or correctional centre, as the case may be, is of the opinion that—*

(a) a remand detainee is, based on the written advice of the medical practitioner treating that person, suffering from a terminal disease or condition or if such detainee is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the remand detention facility or correctional centre in question cannot provide adequate care for such detainee; and

(c) there are appropriate arrangements for the remand detainee's supervision, care and treatment within the community to which the inmate is to be released,

that Head may apply to the court concerned, in the manner set out in this section, for the release of such detainee.

(2) (a) An application contemplated in subsection (1) must be lodged in writing with the clerk of the court, and must—

(i) contain an sworn statement or affirmation by the Head of the remand detention facility or correctional centre concerned to the effect that he or she is satisfied that the conditions stipulated in subsection (1) have been met; and

(ii) contain a written certificate by the Director of Public Prosecutions concerned, or a prosecutor authorised thereto by him or her in writing, to the effect that the prosecuting authority does not oppose the application.

(b) The remand detainee and his or her legal representative, if any, must be notified of an application referred to in subsection (1).

(3) The National Commissioner may, in consultation with the National Director of Public Prosecutions, issue directives regarding the procedure to be followed by a Head of a remand detention facility or correctional centre, as the case may be, and a Director of Public Prosecutions whenever it is necessary to bring an application contemplated in subsection (1).

32. This section proposes a mechanism whereby the Head of a remand detention facility may approach the court to have an accused released on the ground of medical reasons, provided that the NPA does not oppose such an application.

33. This provision is unnecessary and should be deleted as such instances are adequately catered for within current legislation dealing with accused and detained persons.

34. Section 35 of the Constitution sets the basic premise relating to the freedom of a person accused of a crime and Chapter 9 of the Criminal Procedure Act, 1977 (Act 51 of 1977),

governs the issue of bail in detail. Essentially, every person arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit.

35. The court plays the role of impartial assessor of what the interests of justice are in a particular case. Where a detainee has become so ill that it is no longer in the interests of justice that the person be detained, the court would normally order the release of such person, subject to such conditions as it deems fit.

36. In such an instance the court would consider the evidence of the medical practitioner and any other evidence relating to the detainee, his health and the arrangements that have been made. It would also determine what the interests of justice are. The attitude of the prosecuting authority to release of a detainee is not decisive – the court is obliged to make an independent assessment as to the interests of justice.

37. The current proviso proposes that the opinion of the Head of the facility is what will be considered by the court – rather than the written report of the medical practitioner. Furthermore, the Head of the prison becomes the sole assessor of whether the requirements in the section have been met and the procedure requiring the Head to apply to the court is foreign to the normal criminal processes in our accusatorial system. The question of bail is something raised by the accused person, the prosecutor or the court, not an external party.

38. The provision is silent as to what process the court must follow and the weight to be accorded to the affidavit and certificate. It does not deal with the situation where the Director of Public Prosecutions disagrees and how this would be resolved.

39. Finally, although section 60(4) of the Criminal Procedure Act, 1977, provides that where certain grounds have been established it will not be in the interests of justice to release an accused person from detention, one of the factors to be considered is the state of health of the accused person (section 60(9)(f)).

40. It is therefore submitted that the section is unnecessary and should be deleted.

D. The insertion by clause 9 of the Bill of section 49G into the Act

Maximum incarceration period

49G. *(1) The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility without such matter having been brought to the attention of the court concerned in the manner set out in this section.*

(2) The Head of the remand detention facility must report to the relevant Director of Public Prosecutions at six-monthly intervals the cases of remand detainees in his or her facility that are being detained for a successive six-month period.

(3) Any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the Head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under conditions appropriate to the case.

(4) If, subsequent to the referral of the remand detainee to court as contemplated in subsection (3), the finalisation of his or her case is further delayed, the Head of the remand facility or correctional centre, as the case may be, must refer the matter back to the court on a yearly basis to determine the remand detainee's further detention or release under conditions appropriate to the case.

(5) The National Commissioner may, in consultation with the National Director of Public Prosecutions, issue directives regarding the procedure to be followed by a Head of a remand detention facility or correctional centre, as the case may be, and a Director of Public Prosecutions whenever it is necessary to bring an application contemplated in subsection (3) or (4).

41. This section proposes an additional appearance be required where the total period of detention will exceed two years. The appearance would be initiated by the Head of the facility and would be repeated on a yearly basis. In addition a report every 6 months by the Head of a remand detention centre of remand detainees who have been detained for a successive six month period will require to be submitted to the relevant Director of Public Prosecutions.

42. The current strategy with regard to court appearances is to reduce these so that more time is spent on trials rather than ancillary matters such as postponements. This section requires a compulsory appearance of the accused irrespective of whether the court had considered the issue of the further detention of the person at the previous period or not, and irrespective of whether the appearance was the day before the expiry of the two year period.

43. The Criminal Procedure Act requires of presiding officers to consider the further detention of person at each appearance and to issue an order for detention should they deem it fit. At any

point an accused may bring an application to be released. To require an additional appearance would not be of any further purpose.

44. The section is silent on the consequences of a failure of the detainee to appear before the court. There may be sound reasons for this, such as the matter having been dealt with just prior to the expiry of two years or the court going into recess. The possibility of detained persons using this legislation simply as a mechanism for release should be avoided.

45. It is therefore suggested that subsections (1), (3), (4) and (5) be deleted.

46. Consideration may perhaps be given to an alternative requiring the review of cases where the period of postponement exceeds a certain period, such as 6 months. This will ensure that the issue of further detention is reviewed on a regular basis – and may even happen before the expiry of two years.

47. Section 342A of the Criminal Procedure Act, 1977, already obliges the National Director of Public Prosecutions to report to Parliament, through the Minister of Justice and Constitutional Development, twice a year on accused whose trial has not commenced in respect of the leading of evidence who have been in custody for periods ranging from 6 to 18 months – dependent upon the forum of trial.

48. The National Prosecuting Authority is dependent upon the Department of Correctional Services for information regarding detainees in order to provide such a report. What is proposed in the section above does not correspond to what is required in terms of the Criminal Procedure Act.

49. The provisions above in subsection (2) as to reporting should be amended to be more in line with the existing provision of the Criminal Procedure Act, 1977.

Adv B Smith