

Detention Justice Forum Submission

On the Draft White Paper of the Department of Correctional Services on Remand Detention Management in South Africa

30 November 2012

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A. Introduction

The Detention Justice Forum (DJF) is a civil-society membership organisation comprising NGOs and CBOs which seek to ensure that the rights and well-being of detainees are respected and upheld, as enshrined under the South African Constitution, the country's laws, and international human rights principles.

The undersigned members of the DJF welcome this opportunity to comment on the recently released Draft White Paper on Remand Detention Management in South Africa ("the White Paper"). This paper is an important milestone in South Africa's management of its correctional facilities and in its fulfilment of human rights obligations in that regard.

The Minister's Colloquium, convened by the Minister of Correctional Services and held on 19 and 20 November 2012, dedicated an entire day of discussion to the White Paper. Amongst the high-level participants of the Colloquium were a number of DJF members, who took the opportunity to make first-hand representations and provide input on the White Paper. However, given the complexities and importance of the issues at stake, the DJF takes this opportunity to provide more in-depth feedback on the White Paper herewith, while making an effort to avoid duplicating issues that have already been raised at the Colloquium.

B. Chapter 1: Introduction

a. Summary of Challenges (1.4)

Dissemination and Implementation: The challenge upon which the ultimate success of the White Paper rests is that of dissemination and implementation. Given the entrenched nature of correctional services and the resistance to change amongst staff and members on the ground, merely approving a policy paper will not be sufficient to effect real change. It is clear that creating buy-in will need to be carefully and strategically planned and monitored by senior management. Timeframes for the roll out of the intended changes must also be considered and included.

In addition to monitoring the implementation of the policy, and as important, is the evaluation on whether the objectives of the White Paper are reached by the activities set out in the policy. Failure to do so will render the policy ineffective.

Importantly, the White Paper should outline consequences for those who do not comply with implementation timeframes and disregard policy changes and shifts. And there must be transparent and consistently enforced consequences for those who fail to comply with the new regulations, especially those affecting the human rights of detainees.

Appropriate Budget Allocation: An estimated budget for the implementation of the White Paper was not included in the draft. This is an important oversight, as cost issues might derail the implementation of the White Paper's commendable ambitions.

C. Chapter 2: The Existing Policy – Legal and Operational Framework

a. International Legal Framework (2.2)

United Nations Convention Against Torture: South Africa ratified the United Nations Convention against Torture in 1998. It has not yet been domesticated in law, although the “Prevention and Combating of Torture of Persons Bill” is now finally before Parliament. The White Paper fails to list the Convention or the Bill as guidelines for the treatment of detainees in South Africa, nor does it mention the Robben Island Guidelines¹. This is a crucial omission in a country which still faces an unacceptable number of cases where law enforcement officials are accused of the abuse, torture, and inhumane and degrading treatment of those they are charged to keep safe.

The use of force by correctional officials and their training in the use of restraint equipment is not clearly legislated or regulated. Nor does the legislation define minimum or maximum force. Rather, it permits the use of internationally condemned equipment which, if abused, can be employed to violate inmates’ rights.

The baton, widely accepted as having a legitimate law enforcement function, can be easily used abusively in the absence of clear regulations. There is urgent need for training in appropriate and responsible use of restraint equipment, including batons, as well as in conflict resolution skills to prevent an escalation of violence.

The White Paper, in Chapter 5, section 2.23, covers the unacceptability of the use of excessive force. However, it does not define clearly what this or a “minimum degree of force” is.

The sexual abuse of detainees is not mentioned in the White Paper. The United Nations Committee Against Torture and various Special Rapporteurs on Torture have recognised that rape in detention is a form of torture.² DCS currently does not have a comprehensive policy to address sexual abuse of sentenced inmates or remand detainees. While such a policy should be adopted with urgency, the White Paper should also aim to address specifically the sexual abuse that occurs in remand detention facilities.

In Chapter 7, section 1.1, the White Paper lists the United Nations Convention Against Torture and its Optional Protocol as guiding safety and security in detention. It is important to ensure that they are consistently referred to throughout the document.

D. Chapter 4: Governance

a. South African Police Services (SAPS) (4.3.2)

Remand for Further Investigation: The adverse effects of being held in remand detention, for even short periods of time, are well documented.³ This includes exposure to communicable diseases and to institutional violence,

¹ ACHPR Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2008

² See CAT decisions, C.T. and K.M. v. Sweden, CAT/C/37/D/279/2005, and V.L. v. Switzerland, Communication No. 262/2005, 20 November 2006, UN Doc. CAT/C/37/D/262/2005 (2007).

³ Schönteich, M. (2008), “The Scale and Consequences of Pretrial Detention Around the World”. In Open Society Justice Initiative, Spring 2008 Justice Initiatives. Available at http://blogs.worldbank.org/files/publicsphere/file/Foreword_by_Mar%5B1%5D.pdf

as well as having to deal with social stigma, loss of employment and employability, and a host of knock-on effects on families and communities.

It is therefore important to make remand detention an option of last resort, not the default. Arrests must be carried out with due consideration and understanding of their often profound effects on individuals.

Arbitrary arrests – the practice of holding people while the police conduct an investigation – must therefore be reduced in number. When the police do make an arrest, they must have enough evidence to present at the first hearing. In addition, police often arrest individuals for petty crimes for which arrest is wholly inappropriate. Rather, SAPS should ensure that police use other sanctions available to them in such cases. This will reduce the number of arrests and appearances and help to set earlier trial dates.

The White Paper should therefore advocate for a decrease in the number of people kept in remand during police investigations, as well as for the police to be able to issue formal cautions for petty offences.

b. Cluster Management (4.5)

Handing over of Remand Detainees to SAPS: The White Paper outlines situations where remand detainees are handed over to SAPS for further investigation. It also includes a recommendation for the development of a protocol for surrendering remand detainees to SAPS. Given the unacceptable number of reported cases of abuse and torture by SAPS officials, of remand detainees who have been “booked out” by SAPS from correctional facilities, this is clearly a vital need. A comprehensive and stringent protocol must be developed and disseminated to ensure that spurious and non-legitimate use of this practice is prevented.

In addition, other forms of abuse occur in facilities, such as the sexual abuse of remand detainees. This form of abuse can be committed either by inmates or by staff and can take place in remand detention centres, court holding cells, and police holding cells and vans. It is vital for cluster management of detainees to include proactive measures to address sexual abuse. Thus, it is suggested in the White Paper outline that this be addressed by DCS, SAPS, and DSD for their respective facilities.

c. The Role of Non-Governmental Organisations (NGOs) (4.6)

It is heartening to see that the role that NGOs can play, both in maintaining high standards in correctional facilities and in improving the criminal justice system as whole, was acknowledged in the White Paper. However, the White Paper does not cover the full range of issues related to this important stakeholder group. Such issues include:

Access to Data: In order to be able to render effective service, NGOs should have access to data and information on remand detainees and facilities. It is through expert analysis of such data – data which can only be provided by DCS – that NGOs can provide evidence-based solutions and implement effective interventions.

Access to Remand Detainees and Facilities: It has been the collective experience of the DJF that permission to access detainees and correctional facilities is extremely difficult to obtain, with the work of NGOs often being viewed with suspicion by DCS members and staff. Such access is sought only to provide services to one of the country's most vulnerable groups – detainees, both sentenced and in remand – and the aim is to assist the Department in safeguarding their human rights and dignity.

Service Provision: There is a range of services which NGOs can, and do, render to detainee populations in South Africa. These services should be listed in the White Paper to give an accurate picture of the range of NGO interactions and responsibilities. These could include:

- Training of DCS personnel: in human rights obligations, Constitutional law, mediation and negotiation, conflict avoidance and resolution, gender and sexual violence etc.
- Training of detainees: in the basics of the law and the Constitution, for preparing for court, in life-skills (such as basic literacy skills, road rules, primary health, sexual and reproductive health), primary education, conflict avoidance and resolution, entrepreneurship, creative outlets (drawing, writing), journalism etc.
- Research: analysis and evaluation of remand detention policies, programmes, and facilities

In addition, a transparent and independent system of evaluating the services rendered by NGOs should be put into place, to ensure services are rendered according to best practice minimum standards.

Funding: Given the expectations and responsibilities shouldered by NGOs in providing services to and for detainees, the White Paper should make explicit recommendations on funding for such organisations. Many of these organisations are dependent on outside funding and international donors, and the State should bear some responsibility for ensuring the survival of this important sector.

E. Chapter 5: Rights and Privileges of Remand Detainees

a. Specific Rights for Remand Detainees (5.2)

Separation of Remand Detainees: In order to minimise the impact of incarceration on a remand detainee – especially negative psychological and social impacts – it is important to ensure that those who already have a criminal record and are repeat offenders are kept separate from those who are in conflict with the law for the first time.

A risk assessment tool must be developed, therefore, to help DCS correctly categorise remand detainees. This tool should be flexible, so that it can be applied to different forms of violence that take place in prison, both between detainees and between officials and detainees, such as sexual abuse. It is vital that the risk assessment tool be integrated with the gang management strategy to be employed in remand detention facilities.

Access and Proximity to Families and Communities: Given the long periods in which detainees are typically kept in remand, it is crucial for their effective rehabilitation and reintegration that they are able to keep in contact with their families. Every effort should therefore be made, in accordance with existing regulations and

requirements⁴, to ensure that detainees are placed in remand facilities that are in geographical proximity to their families.

Use of Appropriate Languages: The White Paper's recommendation that there be provision, upon admission, of crucial information to detainees, including regulations, their rights and responsibilities, and the channels of complaint, is extremely important. Such information must be made available in all 11 official languages, as well as common non-national languages (such as Shona, French etc.). This will ensure that no detainee is disadvantaged due to unfamiliarity with one particular language. One possible solution is the use of an "orientation" video (available in all languages) and the requirement that all admitted detainees view it.

Quantifiable Definitions: The White Paper outlines the rights of detainees to "clean drinking water", "adequate diet to promote good health", "adequate medical treatment", and "clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions". Although Sections 3 – 6 of the Correctional Services Act (CSA) Regulations deal with these issues comprehensively, these rights need to be better defined and given quantifiable parameters in the White Paper, in order that their implementation may be easily monitored and evaluated. These rights are conferred by the Constitution, and must be safeguarded.

Preparation for Defence: In section 5.2.15, the White Paper states that remand detainees must be provided with the opportunities and the tools to prepare for their defence. This is an especially important aspect for remand detainees, and the White Paper should expound on it in more detail. For instance, such preparation could include consultation with experts or NGOs. Access to electronic resources should also be considered. Special consideration should be given to legislating improved telephone access for detainees to consult with their legal representatives.

Freedom from Torture and Degrading Treatment: As discussed above, the White Paper must use the definition of torture and degrading treatment, included in both the "Prevention and Combating of Torture of Persons Bill" and the United Nations Convention Against Torture, as well as recommended preventative measures. At present, section 5.2.18 of the White Paper falls short of doing so.

Medical Treatment: The White Paper does not adequately outline measures⁵ by which those with chronic health conditions – including HIV and AIDS, diabetes, high or low blood pressure – or those with communicable diseases – such as tuberculosis – receive medication and treatment. Access to medicine and medical care is a right which must never be violated, and treatment must not be interrupted when custody is transferred from one government department to another. This is especially important with diseases like HIV and TB, where non-compliance in treatment can lead to serious consequences for the entire country through mutation of virus or the spreading of drug resistance. Furthermore, it is important that the White Paper include linkages to existing national strategies for dealing with these diseases: including the *National Strategic Plan on HIV, STIs and TB, 2012-2016*.

⁴ There is a requirement that remand detainees be detained within the court district in which they are being tried. In addition, section 8 of the Correctional Services Act (CSA) Regulations deal with community contact in a fairly detailed way.

⁵ Section 12 of the CSA, and section 7 of its regulations deal with the provision of health care in correctional facilities.

b. Obligations of Remand Detainees (5.4)

Health Status Examination: In order to maintain and protect the health of detainees in a remand facility, it is crucial that new arrivals be examined by a health professional upon admission. Section 6(5) of the CSA and 2(3)(a) of the regulations deal with this. The latter requires that all prisons must, within 24 hours of admission, undergo a medical examination before being allowed to mix with the general prison population. As it stands, section 5.4.3 of the White Paper requires only that this take place “as soon as possible after admission”, providing a loophole through which a potentially sick and infectious detainee may be allowed to interact with the general population. The fact that tuberculosis has been listed as the leading cause of death for inmates in South Africa⁶ supports the need for such strict controls.

F. Chapter 7: Orderly, Safe and Secure Remand Detention

Risk Assessment and Detainee Information: The ability to assess the risk a detainee will pose to others, or be exposed to him/herself, is crucial to the orderly management of remand facilities. Such an assessment relies on excellent information and data for each inmate. The use of electronic databases and the keeping of one record for each individual – from the time of arrest to arraignment, from bail hearing to remand, and for the trial itself – is key.

Gang Management: Given that one of the most serious challenges to a well-functioning correctional service is the prevalence of gangs, it is surprising that the White Paper does not devote more space to its management. The 2011-2012 DCS Annual Report indicated that the Department’s Gang Management Strategy is being rolled out. It is suggested that this document be made public as well as integrated with the White Paper. It is also suggested that global and South African experts be consulted to devise strategies to prevent violence and other illegal gang activity in remand detention facilities.

G. Chapter 8: The Use of Integrated Systems

Links to Existing Government Databases: The measures mentioned in Chapter 8 of the White Paper regarding the use of information technology are important and play a crucial role in the effective management of remand detention in South Africa. However, in order to be effective the National Criminal Justice System IT database must be linked to existing government databases. This includes those of the departments of Home Affairs, SARS, and Social Development. This is especially important in creating profiles for each individual in the criminal justice system, facilitating the verification of IDs and addresses, and conducting assessments of employment history, among other background data, for bail applicants.

Infrastructure and Training: As a first step in implementing such a wide-ranging system throughout the criminal justice system, as explained in Chapter 8, an evaluation of the current IT infrastructure must be undertaken. This includes reliable access to the internet as well as uninterrupted electricity supplies. In addition, a further

⁶ Judicial Inspectorate for Correctional Services Annual Report 2011-2012

consideration is ensuring the training of personnel to be able to input data effectively into the system. Many such IT systems have failed entirely or fallen short of their goals due to poor data capturing and inputting techniques.

H. Chapter 9: Overcrowding

Application of Bail: It is clear the correct application of bail regulations has a direct and substantive effect on the number of people remanded. In Chapter 9 of the White Paper, this point is made several times. It is important, therefore, to work with relevant stakeholders – including the Department of Justice and Constitutional Affairs, Legal Aid South Africa, the legal fraternity, academics, and civil society – to consult on ways to improve the situation and to implement sustainable solutions.

Alternatives to Remand: it is important to research and evaluate appropriate alternative practices that South Africa could adopt in order to reduce its remand detainee population. This could include the use of community paralegals, and measures which look to divert cases from the formal criminal justice system.

I. Chapter 10: Oversight and Control

Judicial Inspectorate for Correctional Services (JICS) and Independent Correctional Centre Visitors (ICCVs): The role of the Judicial Inspectorate of Correctional Services and of Independent Correctional Centre Visitors is vital in ensuring that the highest standards are maintained in remand facilities, especially in the upholding of human rights and dignities. It is important, therefore, to include a more comprehensive section on the policies, protocols, and work of the JICS and the ICCVs. Of particular pertinence will be the mechanisms to ensure that remand detainees are informed of the work of JICS and of the channels through which they can communicate and lay complaints.

Department of Social Development (DSD) and Secure Care Facilities: While there are clear accountability mechanisms for DCS pertaining to the treatment of remand detainees, the same is not true for youth being held in DSD Secure Care Facilities. It is recommended that this issue be clarified, with an independent accountability mechanism for Secure Care Facilities outlined within the White Paper.

SAPS and the Independent Police Investigative Directorate (IPID): The IPID is mandated to conduct investigations of criminal offences allegedly committed by members of SAPS and various Metro Police, and is thus an important mechanism for holding SAPS accountable for the treatment of remand detainees in their custody. The role of the IPID should be included within the White Paper.

J. Conclusion

The Detention Justice Forum takes this opportunity to thank the Department of Correctional Services for the open consultative process which it has undertaken to advance this White Paper. We especially commend the

work of the Remand Directorate for clearly undertaking to manage remand detention to the highest standards and with full compliance with international human rights and the Constitution.

Respectfully submitted:

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