SUBMISSIONS BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE
CORRECTIONAL MATTERS AMENDMENT BILL – B41 2010.

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This submission addresses the Department of Correctional Services' responses to the comments made by stakeholders on the Correctional Matters Amendment Bill during the public hearings of 25 January 2011.

Clause 1

Section 1(b)

1. Despite the Department's response to the inquiries regarding the inclusion of sections 115 and 117 of the Correctional Services Act ("the Act"), the need for their inclusion into the definition of "remand detention facility" remains unclear.

2. Sections 115 and 117 of the Act create the respective offences of "aiding escapes" and "escaping and absconding." However, a remand detainee in police custody is liable to be charged with the common law crimes of escaping from lawful custody and/or conspiracy to escape, should he or she escape or attempt to do so.

3. The effect of including sections 115 and 117 into the definition of "remand detention facility" serves only to create a mechanism through which a prisoner may be punished twice. This double punishment is achieved through the requirement in the B-Orders that an offender who has been convicted of escape must serve four-fifths of the sentence imposed for that escape, as well as any other sentences that the offender is serving.[1] It is constitutionally impermissible to charge or punish a person twice for the isolated commission of a certain crime.

[1] B-Order 1 Chapter 26 para 29.2.1 (b) The minimum period of detention for possible placement automatically shifts to four fifths (4/5) eighty percent (80%) of the total effective sentence(s) in other words, the initial sentence(s) imposed plus any additional sentence(s) imposed for the escape or sentences for crime(s) committed whilst at large;

Furthermore, the bill proposes, which is supported by CSPRI, that the four-fifths requirement of sentences imposed under the so-called minimum sentences legislation be repealed. The four fifths requirement with regard to escapes then comes in, so to speak, through the back door, by being in the B Orders, which is not a generally accessible document to both the public and the courts. Moreover, it then stands at odds with the attempts to simplify the parole regime through the repeal of the four-fifths requirement in respect of minimum sentences. It remains CSPRI's position that minimum non-parole periods must be regulated in the principal act and not be hidden away in departmental orders. The inclusion of sections 115 and 117 therefore serves no justifiable purpose and should be excluded.

Clause 2

Section 3(2)

4. The Department's response to submissions raised regarding the meaning of "manage remand detainees" does not adequately explain its inclusion in the Act. If the administration of the remand detention system is "amongst the founding principles underlying the Department's work…aimed at acknowledging the fact that remand detention is a distinct function from corrections," then it should be reflected as such.

5. The CSPRI therefore proposes the following arrangement of the section:

   "3(2)(a) The Department must fulfill the purpose of the correctional system <u>and the remand detention system</u>."

6. It is then necessary to determine and list the purposes of the remand detention system. It is suggested that these be included in section 2 of the Act, which describes the purpose of the correctional system generally. The CSPRI submits that at least the following should be included:

   i) ensure the safe custody of remand detainees;

ii) facilitate the remand detainee's right to prepare his or her legal defense; and

iii) take all steps available to the Department to ensure that remand detainees are detained for a period no longer than is necessary;

Clause 3

Section 5(b)

7. In response to the CSPRI's concerns regarding this amendment, the Department submits that the regulation of incarceration in police cells has only been amended to include remand detainees, suggesting that the substance of the provision has not been altered and is thus not open to criticism.

8. CSPRI submits that whether the 'substance' of the provision has been altered or not, is irrelevant. Moreover, the amendment bill proposes the addition of a new category of inmate to a potentially hazardous situation and thus invites a response from those concerned. The CSPRI draws the Portfolio Committee's attention to the fact that, in general, police cells are not suitable for detention beyond the period of a few days and are thus ill equipped to deal with, for example, separation prescripts.[2] This is of particular concern regarding children and women.[3]

9. The CSPRI appreciates the fact that there are various logistical concerns regarding the availability of correctional facilities in certain areas. However, these are best dealt with by regulating further the problems associated with transport and available accommodation, and not by simply transferring inmates to SAPS

[2] The United Nations Standard Minimum Rules for the Treatment of Prisoners, article 8, requires untried prisoners shall be kept separate from convicted prisoners. This prescript is echoed in the Correctional Services Act 111 of 1998, section 7(2)(a):

"sentenced offenders must be kept separate from persons awaiting trial or sentence."

[3] Section 33(2) of the Child Justice Act states:

"(a) A child held in a police cell or lock-up while awaiting to appear at a preliminary inquiry or child justice court must be kept separately from adults and be treated in a manner and kept in conditions which take account of his or her age."

facilities. In its response the DCS cites the situation in the Free State as motivation for remand detention in police facilities. It then appears that the Department is well aware of the areas where there is a problem with remand detention capacity. It therefore follows that the capacity requirements in these areas can be identified and the necessary capacity developed based on the required need.

10. Once removed from the jurisdiction of Correctional Services, an inmate, whether sentenced or awaiting trial, no longer enjoys the detailed legislative protection of the Correctional Services Act. Arguably, the only remaining applicable domestic standard is section 35(2)(e) of the Constitution which requires that conditions of detention be consistent with "human dignity." There is a risk, therefore, that a detainee in SAPS custody will experience conditions below this standard without any apparent legal recourse other than Independent Complaints Directorate.

11. It is important to mention that in its response to the Inspectorate on this point, the Department misrepresented the role of the Independent Complaints Directorate. The ICD does not have the mandate to simply investigate police conduct. It has the mandate to investigate police misconduct and/or deaths in police custody *upon the receipt of a complaint* in this regard. The ICD performs a reactive function and is therefore not a panacea for the lack of any protective regulation of police custody.

12. The CSPRI proposes that any potential for abuse and the ill treatment of inmates be minimized and recommends, therefore, that, in the absence of any credible information regarding the logistical problems associated with the transport and accommodation of inmates, section 5(2)(b) of the Correction Services Act be repealed.

Clause 5

Section 17(4)

13. In response to the CSPRI's submissions regarding this amendment, the Department, again, argues that the provision has 'merely been amended by the addition of new terminology.' CSPRI nevertheless submits that the proposed amendment invites a response to the section as a whole.

14. While the CSPRI appreciates the Department's undertaking to 'ensure increased access at each Correctional centre,' such an undertaking is not only legally un-enforceable but subject to change at the will of Department and without the opportunity for legal challenge.[4]

15. It is proposed, therefore, that the Department stipulate, via regulation, the types of materials and resources remand detainees and un-sentenced inmates should have access to.
16. It is recommended that regulations stipulate that the following documents be provided to remand detainees and un-sentenced prisoners: The Correctional Services Act, the Criminal Procedure Act, the UN Standard Minimum Rules for the Treatment of Prisoners ,and the UN Convention against Torture.[5]

Clause 9

Section 49A

17. In response to concerns with the wording: "with such changes as may be required by the context," the Department makes the point that the provisions of sections 12 and 20 might not be applicable "as is" to pregnant remand detainees. CSPRI disagrees with this assertion.

18. Section 12 of the Correctional Services Act describes the Department's obligations in respect of health care. Section 12(2)(a) states explicitly that "every

[4] The cases of *S v Sefadi* 1994 (2) BCLR 23 (D) and *Minister of Correctional Services and Another* 3 All SA 242 (A) serve as examples in which courts have emphasized the importance of an inmates' right to information.

[5] The CSPRI again draws the Portfolio Committee's attention to the United Nations Committee against Torture's response to South Africa's initial report: "The state party should widely disseminate the Convention [against Torture] and information about it, in all appropriate languages, including the mechanism established under its article 22."

inmate has the right to adequate medical treatment…". It is unclear, therefore, the circumstances in which a pregnant remand detainee would not be entitled to "adequate medical treatment" should she so require and why the experience of a pregnant remand detainee would be any different from a pregnant sentenced inmate in relation to accessing health services.

19. Importantly, the provision of health services to all citizens, including remand detainees, is limited by "available resources". This renders the phrase "with such changes as may be required" particularly ambiguous given that, according legal interpretive principles it cannot mean the same thing as "within available resources." Moreover, the phrase must be interpreted in light of other applicable provisions in our law, namely:

    i) at the very least, the state cannot negatively affect the implementation of a socio-economic right;[6] and
    ii) any reasonable measure aimed at the achievement of a socio-economic right "cannot leave out….those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril…"[7] It is at least plausible that certain pregnant remand detainees would be considered a vulnerable sector of the population and thus have a justifiable claim to access adequate health care from the state.

20. Given the interpretive constraints on the right to health services, "with such changes as may be required," without further clarification from the Department, lacks any real meaning. The CSPRI therefore recommends its repeal.

21. Regarding the application of section 20 of the Correctional Services Act, it is unclear how a pregnant remand detainee would be in a position any different to

[6] Section 7(2) of the Constitution states:
"The state must respect, protect, promote and fulfill the rights in the Bill of Rights."
[7] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703.

pregnant sentenced inmate. Moreover, there is nothing in section 20 which suggests that the Department of Social Development "is not involved until the child is 2 years of age…" as stated by the Department. On the contrary, section 20(1A) states:

> "Upon admission of such a female inmate the Department must immediately, in conjunction with the Department of Social Development, take the necessary steps to facilitate the process for the proper placement of such a child."

22. The CSPRI therefore recommends that the phrase "with such changes…." be removed from the proposed amendment.

Clause 9

Section 49B

23. The CSPRI initially suggested the following re-wording of these sections:

> "(2) The Department must provide health care services, based on the principles of primary health care, and other supportive services in order to allow the remand detainee to lead a healthy and fulfilling life.
>
> (3) The Department must provide additional psychological services, if recommended by a medical practitioner."

24. DSC expressed concern that "compulsory" supportive services, without definition, would "put the Department in an untenable position." It is unclear why this would be the case, given that the implementation of the right to health will always be subject to the state's available resources. It is therefore also unclear, why, in the event that there *are* available resources, the provision of services is still subject to the Department's discretion (evident in the word "may"). This is anomalous given the following subsection's mandatory language: "the Department *must* provide…within available resources, additional psychological services…".

25. The varying degrees of obligation assigned to “health care services” and “additional psychological services” seems arbitrary. It is recommended therefore that both subsections read “must” in relation to the Department’s obligation.

Clause 9

Section 49D

26. Subsection three, like 49B(2), uses the word “may” when describing the Department’s obligation to provide “social and psychological services in order to support mentally ill remand detainees…” Again, it unclear why “may” is used when the previous subsection renders it mandatory for the Department to provide “adequate health care services.” The varying degrees of obligation assigned to “adequate health care services” and “social and psychological services” seems arbitrary. It is recommended therefore that both subsections read “must” in relation to the Department’s obligation.

27. The CSPRI draws the Committee’s attention to the Department’s response regarding subsection one, namely, that “mentally ill’ should be understood in the broadest sense possible.” This categorization is unhelpful. According to the proposed interpretation of the section, an inmate who exhibits any one of a vast range of “symptoms” could be detained in a single cell based on the observations of a correctional official. In the absence of a detailed categorization of “mental illness” and a prescribed level of expertise with which to determine such illness, the proposed subsection lends itself to abuse.

28. By contrast, “mental illness” as defined in the Mental Health Care Act 17 of 2002 means (MHCA):

> “a positive diagnosis of a mental health care related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnosis.”

29. Moreover, section 50 of the MHCA[8] states:

"(1) if it appears to the head of prison through personal observation or from information provided that a prisoner may be mentally ill, the head of prison must cause the mental health status of the prisoner to be enquired into by-

(a) a psychiatrist; or

(b) where a psychiatrist is not readily available, by-

(i) a medical practitioner; and

(ii) a mental health care practitioner."

30. In light of section 50 of the MHCA, it is unclear how the proposed amendment will co-exist effectively with the requirements outlined above and the procedures linked thereto in chapter 7 of the MHCA.

31. Section 50 of the MHCA requires a higher standard of expertise than that of a head of prison to enquire into the mental status of a prisoner. Given the differences between the MHCA and the proposed amendments, the CSPRI recommends that subsection 1 be repealed (thereby allowing the issue of mentally ill inmates to be regulated entirely by the Mental Health Care Act) or change the amendment to reflect the standards of observation and care already established by the MHCA.

Section 49F

32. Although the CSPRI appreciates that police investigations must not be impeded unnecessarily, it is unclear (based on the Department's response) why 7 days is needed for holding an inmate who "is a witness in another case," "must attend an identification parade" or "attend an inspection in loco." It seems unlikely that it would take that long to complete these relatively quick processes.

[8] Chapter 7 of the Mental Health Care Act is dedicated to 'Mentally Ill Prisoners' and is attached to these submissions for ease of reference.

33. The concerns outlined in paragraphs 9 and 10 of this document are repeated here. In addition, the CSPRI would like to draw the Committee's attention to the following statistics published in the 2009/10 Independent Complaints Directorate (ICD) annual report :

- There were 860 deaths as a result of SAPS action, of which 294 occurred whilst in SAPS custody;
- Causes of death included assault, suicide and torture;
- 33% of deaths were caused by injuries sustained whilst in custody; and
- 57 victims died during the course of an investigation.

34. The CSPRI maintains that the remand detainee's interests are best protected if transfers to and continuances of SAPS custody are authorized by a court. This does not pose a separation of powers issue, contrary to the Department's assertion. Moreover, there is no evidence presented by DCS to suggest that this procedure would "clog up the court roles."

35. In the alternative, and given the fact that upon transfer to SAPS custody a remand detainee's rights are at risk,[9] the CSPRI recommends that the proposed guidelines be incorporated into the amendment:
    a) Prior to the Commissioner's authorization to release the detainee into SAPS custody, he or she must be satisfied that the conditions in which the detainee will be accommodated will not infringe constitutionally mandated standards. Accordingly, the Commissioner must be satisfied that the SAPS facility will allow the detainee a space in which to exercise, reading material, adequate nutrition and access to medical treatment should the need arise;

[9] The rights referred to here are those described in section 35(2)(e) of the Constitution: "Everyone who is detained…has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

b) The Commissioner must be informed of the reason(s) for the detainee's transfer and the estimated time period necessary to complete such investigative procedures;[10]

c) All transfers must be reported to the Office of the Inspecting Judge and the ICD, noting the name of the person as well as the officials from SAPS where the person will be detained;

d) All returned inmates must be interviewed by the independent visitor prior to being handed over and immediately upon return to DCS;

e) The Commissioner may only authorize a requested continuance of a detainee's custody on good cause shown (which cannot be a simple repetition of the original reason given for the detainee's transfer) and afford the detainee not only notice that a continuance has been requested, but the opportunity to be heard on whether he should be detained in SAPS custody further and written reasons for the decision the Commissioner makes in the event that a continuance is authorized.[11]

36. The Department argues that certain safeguards are taken in the current administrative process in the form of "form 127." Again, the CSPRI emphasizes that unless a certain administrative practice is detailed in legislation, such practices are liable to change without being challenged by those interested or affected.

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[10] The Constitutional Court case of *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at paragraph 46 stated the following regarding the nature of administrative decisions involving discretionary power:

"There is. . . a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, **in the absence of direct guidance**, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the state they bear a constitutional obligation to seek to promote the Bill of Rights as well. But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government which is different from that played by judicial officers."

[11] The Promotion of Administrative Justice Act (2000) requires that administrative action "which materially and adversely affects the rights…of any person must be fair.

Section 49G

37. It is recommended that section 49G(2) require that the Head of a remand detention facility report any lengthy detainments to the *presiding officer* of the relevant court in addition to the Director of Public Prosecutions. Although the prosecution is ultimately responsible for bringing the matter to court, the power to "investigate any delays in the completion of proceedings…"[12] rests with the court.

38. The CSPRI also recommends that the Department liaise with the Department of Justice and Constitutional Development regarding appropriate time frames in which detainments are reported. Six months is unnecessarily long, which is of particular concern in the case of children. Rather, the reported requirement should depend on the status of the court seized with a certain matter, for example every 30 days for a district court matter and every three months for a High Court case.

39. We remind the Committee that every accused has the right to have their trial begin and conclude without unreasonable delay.[13] Although the Department is not responsible for the trial process, there are steps it can take to help achieve the implementation of this right.

Clause 14

Section 79(1)

40. The CSPRI reiterates the submission that the proposed amendments to section 79 of the Act do not adequately take into account an inmate's inherent right to dignity and his or her right to "conditions of detention that are consistent with human dignity."[14]

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[12] Section 342A of The Criminal Procedure Act states:

> "(1) a court before which 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 prosecution, the accused or his or her legal adviser….."

[13] Section 35(3)(d) of the Constitution.

[14] Section 10 and 35(2)(e) of the Constitution.

41. The decision in *Stanfield v Minister for Correctional Services*[15] is instructive in this regard. In reviewing the *Department's refusal to grant Mr Stanfield medical parole, Judge Van Zyl state*d:

> "*To insist that he remain incarcerated until he has become debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity…..To insist that he remains imprisoned until it is physically impossible for him to commit any crimes is….inhuman, degrading and thoroughly undignified. When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to dignity*."[16]

42. These particular findings of the High Court were *not* based on an interpretation of the text of section 69 of the Correction Services Act of 1959. They were based on an interpretation of the right to dignity. Thus, the Department's suggestion that these findings are irrelevant because the case as a whole concerned the question of medical parole in the 1959 Correctional Services Act, is simply incorrect.

43. The CSPRI submits that the proposed section 79(1) is unworkable. Section 79(1)(a) does not prescribe the precise phase of the "terminal disease or condition" an inmate must have reached before he or she can be considered a candidate for parole. Coupled with the requirement of section 79(1)(b) ("the risk of re-offending is low") there is a very real potential that an inmate must be literally physically incapable of re-offending, and thus "bedridden and debilitated" before he or she is considered eligible for medical parole. As was found in the *Stanfield* decision, this is not commensurate with the right to dignity or the right to be detained in "conditions consistent with human dignity. And importantly, section 2(b) of the Correctional Services Act describes one the purposes of the correctional system as "detaining all inmates in safe custody *whilst ensuring their human dignity*."

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[15] 2004 (4) SA 43 (c).
[16] *Stanfield* judgment paragraph 126.

44. It is also worth noting that there is very little South African based sociological and psychological research documenting the predictive factors associated with re-offenders.[17] International research in well-resourced countries has shown that even sophisticated risk-for-reoffending assessment tools have a 48% false positive rate.[18] In short, they are wrong half the time. The Department has not presented any evidence indicating how it will achieve a more accurate risk for re-offending assessment. In the absence of an accurate and proven risk assessment tool, the offender will be subject to the subjectivity of the Department's officials and the parole board. This renders the enquiry in the proposed section 79(1)(b) unhelpful in assessing whether a potential medical parolee continues to pose a danger to society.

45. The CSPRI recommends that the following version of section 79(1) should be adopted:

    ""Any person serving any sentence in a correctional centre and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the National Commissioner……to die a dignified and consolatory, provided there are appropriate arrangements for the inmate's supervision, care, and treatment within the community to which the inmate is to be released."

Cost

46. In the table of costs, the Department states that on the 31 December 2010, "there was an average of 180 terminally ill patients in Correctional health facilities." If indeed this number is an "average," the period with which this amount was calculated is not given. Moreover, given the number of inmates on antiretroviral treatment (7640 as reported in the Department's 2009/2010 Annual Report) and

[17] See Muntingh L and Gould C (2010) *Towards an understanding of repeat violent offending* (2010). ISS Paper 213, Pretoria: Institute for Security Studies. .

[18] K Auerhahn, Conceptual and methodological issues in the prediction of dangerous behaviour, *Criminology and Public Policy* 5(4) (2006), 774.

the number of prisoners who have tested HIV positive (10730) this number seems unlikely.

Section 79(4)

47. The Department's response to the concerns regarding this provision was that it "did not aim to address" scenarios such as the acquisition of HIV by voluntarily having had unprotected sex or having eaten too much junk food). Rather, it was meant to include those who voluntarily refused to take their medication "to thereby worsen their condition".

48. This response does not adequately address the CSPRI's concerns. Firstly, the provision is not drafted so as to accurately reflect the Department's intention. Second, if an inmate is refusing to take his or her medication (to cite the Department's example), it is perhaps indicative of a medical condition (mental, psychological or otherwise) that requires the Department's attention. It is therefore recommended that this provision be repealed. Thirdly, the DCS should through medical tests, as part of the treatment, establish if the inmate is indeed following the treatment regimen.

49. Furthermore, the example presented by the DCS of an inmate refusing to take his or her medication is surely a possibility. However, the Department did not present any evidence that this is a common or even documented problem - it is merely raised as a theoretical possibility. Even if such cases do exist, caution should be exercised to prevent that isolated incidents dictate policy and law reform.

Section 79(3)

50. The CSPRI maintains that the establishment of a Medical Advisory Board is unnecessary and draws the Committee's attention to the Department's collaborative efforts with the South African Medical Association to develop a set

of “guidelines”. We recommend that the proposed section be maintained, but only until such guidelines have come into regulation form, which the section must take into account and provide a time frame.