Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África

DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

ACJR SUBMISSION ON "POSITION PAPER: A REVISED PAROLE SYSTEM FOR SOUTH AFRICA"

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Contents

Introduction

1. Africa Criminal Justice Reform (ACJR), formerly known as the Civil Society Prison Reform Initiative (CSPRI), was established in 2003 and is a project of the Dullah Omar Institute at the University of the Western Cape. We engage in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.
2. Key aspects of our work include:

    - Our explicit human rights focus. International and regional human rights law informs and guides all of our work and we partner with organisations with similar approaches. This distinguishes us from security-focused organisations.
    - Our partnerships with local organisations. Partnerships ensure mutual learning and growth. Wherever possible we seek to support reform processes in partnership with government and civil society stakeholders across the continent, to ensure local ownership of reform processes and the transfer of skills.
    - Our expertise in both social science research and legal research. We carry out empirical social science research to inform policy and processes, in addition to legal analysis and research.
    - Our ability to engage in multiple languages. We have researchers fluent in English, Portuguese and Afrikaans, ensuring that we are able to engage with most countries in Africa.
    - Our ability to translate law and research into plain language and multi-media. Where appropriate, our work is transformed for particular audiences.
    - Our academic rigour. We are based at the Dullah Omar Institute which is in turn part of the University of the Western Cape. We regularly publish in academic journals.

3. We thank the Department of Correctional Services (DCS) for the opportunity to comment on the position paper. It is submitted that the paper is lengthy and this submission will only deal with overarching issues and those that are of critical importance.

General comments

4. The Position Paper makes a number of proposals for change relating to the structure of parole administration, services to be rendered, a funding model with civil society and other government departments and services to released offenders, to name but a few. However, the Position Paper is almost void of any quantitative data that would at least contextualize if not assess and project the feasibility of the proposed changes. It is extremely difficult, if not futile, to assess the validity of the proposed changes in the absence of data such as the sentence profile of admissions and releases; the sentence profile of sentenced offenders in custody; the workload of Correctional Supervision and Parole Boards (CSPB); the proportion of profile reports to CSPB being returned to the Case Management Committees (CMC) for inadequate information and so forth. In the absence of such basic data we submit that the risk for error in policy and practice reform is too high.
5. Twenty four years into democracy it is a cynical refrain that "South Africa has good policies, but struggles with implementation". The simple truth is that just because something is written in a policy, does not mean that it happens in reality. Claims about policy implementation must be verifiable against objective measures, meaning that such measures must not be designed to favour a particular result flattering of the Department. In the absence of quantitative data it is difficult to assess the veracity of claims made in the Position Paper, for example about the Offender Rehabilitation Path on p. 15. It is not so much in dispute that such a document exists, but rather whether it is implemented and what the impact is.
6. Also on p. 15 reference is made to the White Paper on Corrections and some reflection is required here as its status seems uncertain to the outsider. It was written elsewhere as follows:

> Eight years later, in April 2013, the DCS informed the parliamentary Portfolio Committee on Correctional Services that a review of the White Paper would be undertaken and that it would be completed by the end of that year. By August 2015 nothing had been delivered.

From the available literature it is not clear why the White Paper review project seems to have been abandoned, especially as the DCS, the Portfolio Committee and civil society institutions acknowledged the need for it. The 2005 draft and final White Paper brought a sense of purpose to the department, despite criticism that it was too ambitious and at odds with the realities of South Africa's prisons. With the White Paper having thus suffered a further serious blow to its credibility, the question arises as to what directs policy development in the DCS. It is clear from departmental communications that the White Paper no longer enjoys the same prominence it once did. The need for a review remains, because, as will be discussed below, some problems have remained persistently familiar.[1]

7. The question thus remains what the position of the White Paper is and why the review was apparently abandoned, since it still seems to the basis for the Position Paper to a large extent.
8. In principle it is agreed that law reform may indeed solve some of the problems raised in the Position Paper, but problems in the legislation are not the only problems facing the DCS and more specifically the parole system. Changing the law must therefore be seen and recognized for its potential, but limited, impact on problem-solving. It is indeed the case that many of the problems in the parole system were not the result of inadequate legislation, but rather poor planning and even worse execution. The problems in the DCS and the parole system relate to, amongst others, poor planning, inadequate training, poor management and supervision and a lack of accountability. Changing the legislation will have little impact unless training, supervision and management are not addressed in advance. In other words, there must be an existing receptive environment when the law changes.

Life imprisonment

9. In 1995 there were approximately 400 prisoners serving life imprisonment in South Africa and by 2016 there were in excess of 18 000 according to a spokesperson of the Department of Correctional Services (DCS). This is an increase of 4400 per cent and fast approaching a situation where one out of every five sentenced prisoners are serving life. This is globally the most rapid increase of lifers as a proportion of the total national sentenced population according to international prisons expert Dirk Van Zyl Smit (University of Nottingham).[2]

[1] Muntingh, L. (2016) 'Ten years after the Jali Commission: Assessing the state of South Africa's prisons' *SA Crime Quarterly*, Nr. 58, p. 36. http://www.scielo.org.za/pdf/sacq/n58/04.pdf References omitted.
[2] Muntingh, L. (2017) Re-thinking life imprisonment, *Daily Maverick*, 2 March 2017, https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/#.WurHjtSFOM8

10. Whilst the initial motivation was to establish a replacement for the death penalty, the fact is that life imprisonment is now imposed for offences that would not have attracted the death penalty, except in the rarest of circumstances. Offences now attracting mandatory life imprisonment are (with particular requirements) murder, rape, compelled rape, terrorism, trafficking in persons for sexual purposes and certain offences covered by the Implementation of Rome Statute of the International Criminal Court Act. [3]
11. How Parliament decided in 1997, when debating the mandatory minimum sentences bill, that 25 years would be the minimum non-parole period is not clear and it was certainly not based on fact. It must therefore be accepted that it was rather arbitrary. There is no evidence from South Africa, or elsewhere, that long sentences, including life imprisonment, act as a deterrent to would-be offenders. Indeed, several US states that had mandatory minimum sentences legislation have repealed it because it was found to make the situation worse. [4]
12. The chances are good that by May 2018 the total number of people serving life imprisonment has increased to above 20 000, meaning that close to one in five sentenced prisoners are serving life. To date no evidence has been presented that life imprisonment at such a rate has had any impact on the crime rate and given the low number of prosecutions and even lower conviction rate for serious violent crimes,[5] it is unlikely that it will ever have.
13. The Position Paper (pp. 109-110) deals almost in passing with the proverbial elephant in the room. As the situation now stands prisoners serving life, if released on parole, will remain on parole for the rest of their lives and thus represents a particular responsibility and duty of care on the department. Further, it is only the Minister that can authorise the release on parole of a person serving life imprisonment and it is then foreseeable that in the not too distant future that the Minister will (given the number of people serving life) do little else than review parole applications from people serving life imprisonment.
14. The current situation is untenable and unsustainable, but there is time to bring about some remedies if the legislature is willing to review the current legislative framework for the imposition of life imprisonment. One must, however, haste to add that since statistics on the offence profile of people serving life imprisonment is not known, at least not to the public, it would be unwise to jump to recommendations as to what the legislature could possibly do.

[3] Muntingh, L. (2017) Re-thinking life imprisonment, *Daily Maverick*, 2 March 2017, https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/#.WurHjtSFOM8
[4] Muntingh, L. (2017) Re-thinking life imprisonment, *Daily Maverick*, 2 March 2017, https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/#.WurHjtSFOM8
[5] Muntingh, L., Redpath J, and Petersen K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, ACJR Research Paper, pp. 31-35.

Measuring performance and measuring what matters

15. In the Department's strategic plan, as reflected in the most recent annual report, community corrections (parole and correctional supervision) resorts under the programme Social Reintegration and five performance indicators are listed, being:
    - Percentage of parolees without violations per year
    - Percentage of probationers without violations per year
    - Number of persons (parolees, probationers and awaiting trial persons) placed under the Electronic Monitoring System
    - Number of victims / offended, offenders, parolees and probationers who participate in Restorative Justice processes (VOM / VOD)
    - Number of parolees and probationers reintegrated back into communities through Halfway House partnerships
    - Number of service points established in Community Corrections
16. The programme purpose is defined as "Provide services focused on offenders' preparation for release, the effective supervision of offenders placed under the system of Community Corrections, and the facilitation of their social reintegration into their communities."[6] It is our submission that the indicators and the programme purpose are not aimed at an outcome that would be reflective of the overall purpose to see probationers and parolees be integrated and lead a crime-free life. It rather measures the number of violations - which does not appear to be a problem with 99% compliance; the number of people under electronic monitoring – a system currently under investigation by the SIU due to allegations of fraud and corruption; the extent of victim and offender participation in restorative justice processes, but not their satisfaction or re-offending rates; the extent of halfway house partnerships established – a reintegration measure with unproven results and only 127 beneficiaries in the past financial year; number of service points established – the target was an increase of 24 but 204 was established, indicating it was a paper exercise.
17. It is our submission that for parole to be effective, it needs to measure what matters and not only that which casts the Department in a favourable light. It matters to parolees how they deal with their life risks upon release and where they can go for support and the quality of services they receive. Meeting basic needs, finding employment, accessing health care and

[6] DCS (2017) *Annual Report 2016/17*, pp. 69-74.

psycho-social support services are the issues that matter and that is what must be measured if parole is going to make a difference to peoples' lives. As long as they are on parole, they are the responsibility of the DCS and attempts to pass this responsibility to other agencies within and outside of government must be resisted. While DCS can play a coordinating and/or facilitative role, parolees and probationers remain its responsibility.

Relapse and Risk Probability Report

18. It is our submission that risk predictive tools are notoriously inaccurate and can achieve a false positive rate as high as 48%.[7] Even with the caveats acknowledged on p. 132 (para 10.4.2.3) caution must be exercised in how risks are weighted.
19. It is our recommendation that Parole Board decision-making should by and large be based on the individual's behaviour whilst serving the sentence since this is what the Department collects information on. Whether a person committed a violent crime prior to imprisonment or had a substance abuse and addiction problem should carry less weight than the person's behaviour in prison. For example, did he/she abide by the rules and cooperate, or were there frequent disciplinary infractions, insubordinate behaviour and gang activity? It is for this purpose that the inmate disciplinary system is key to the decision-making of the Parole Boards as this will present clear evidence supporting the decision to refuse or grant parole. It must be accepted that the trial court has already expressed itself about the seriousness of the crime committed and it is not for the CSPB to second guess the trial court's decision, but rather to assess how the inmate behaved while serving the sentence.
20. However, on p. 75 (para 5.3.7) it is acknowledge that "The disciplinary committees are not functioning at most correctional centres thus resulting in offenders transgressions going unpunished and changes in their behaviour not being reported". The Correctional Services Act requires that inmates must be disciplined for infractions and crimes committed inside prison and there must be compliance with this requirement as it has consequences further down the road for the CSPB.

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

Tiered structure of Parole Boards

21. A tiered system of CSPB is proposed ranging from centre to national level. In principle there is no objection to such a system as it will on paper resolve the review mechanism problem. However, in the absence of quantitative information on how the work load will be spread across the different tiers and cost implications, it is not possible to make a more thorough and informed assessment. There may indeed be significant advantaged but these are unstated at the moment.

Separate legislation

22. In para 4.5.1.2 (p. 58) it is proposed that there needs to be a separate act dealing with parole but this is not motivated. Indeed the point is made that even if separate there remains sections in the Correctional Services Act that will need to be streamlined with the proposed new act. It is our submission that dealing with all matters correctional in one piece of legislation is the more streamlined approach to follow, unless the Department can motivate more strongly why separate legislation is indeed required.

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