CSPRI SUBMISSION TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES STRATEGIC PLANNING SEPTEMBER 2015

Contents

1. Introduction 3
2. Arrests 3
3. Long periods of pre-trial detention 4
4. Low prosecution rates 6
5. Preventing and investigation human rights abuses 6
   (a) Independence of JICS 6
   (b) Relationship between JICS and DCS 7
   (c) Human rights violations and the complaints system & DCS involvement in investigations 8
   (d) Preventing torture and other ill treatment 9
6. Sentencing reform 10
7. Effective oversight 11

1. Introduction

We thank the Portfolio Committee on Justice and Correctional Services (the Committee) for the opportunity to submissions which deals with current research conducted by CSPRI on the challenges that undermine the effective functioning of the criminal justice system. The submission deals with the following:

- high volumes of non-productive arrests
- long periods of pre-trial detention
- low prosecution rates
- preventing and investigating human rights abuses, and
- sentencing reform.

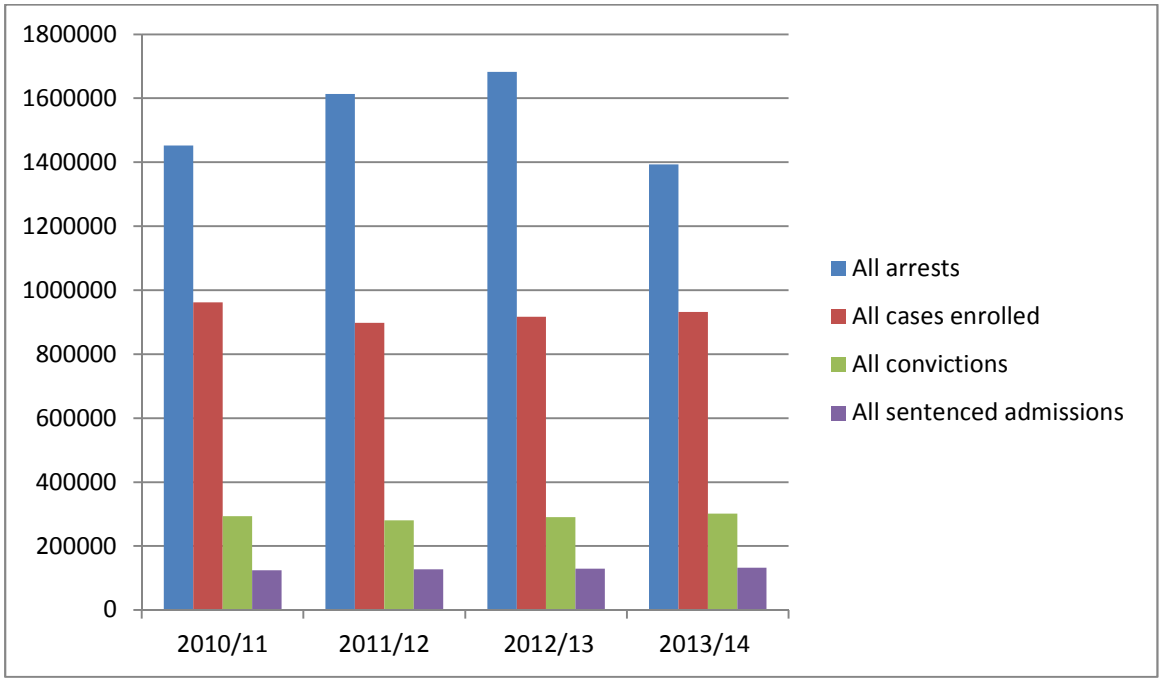
2. Arrests

Many remand detention facilities face levels of overcrowding that are much higher than national averages. Admittedly it is not the fault of DCS that cases drag on for months and even years in the courts – it is to some extent the victim of inefficiencies of the criminal justice process. The purpose of arrest and subsequent detention (first police detention and then pre-trial detention in a prison) of a suspect is essentially to ensure the attendance of the person in court or for another just cause. Nonetheless, there is good reason to conclude that a substantial number of suspects are, after arrest, detained by the police for anything from a few hours to several days, and even longer, without ever being charged or appearing in court.[1]

Statistical data year on year indicates the high number of arrests for non-priority crimes. In 2013/4 the South African Police Services (SAPS) arrested and charged 1 392 856 of which 818 322 (59%) was for serious crimes and 574 534 (41%) was for other crimes (less serious than shoplifting). 22% of serious crimes arrests were drug related. Research by CSPRI found that between one out of every

[1] South African Human Rights Commission (1999) *Report into the Arrest and Detention of Suspected Undocumented Migrants*, Johannesburg: SAHRC, p. 31 http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf ; *Ndaba and Others v Minister of Police* (48208/2012, 48209/2012, 49490/2012) [2014] ZAGPPHC 180 (2 April 2014); Redpath, J. (2011) 'Case flow management research' in Muntingh, L. and Redpath J. (eds) *Pre-trial detention in Malawi*, Johannesburg: OSISA. Baradaran, S. (2010) The presumption of innocence and pretrial detention in Malawi, *Malawi Law Journal*, Vol. 4 Issue 1. Lorizzo, T. (2012) Prison reforms in Mozambique fail to touch the ground, *SA Crime Quarterly*, no. 42. United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention: Mission to Angola, Addendum, A/HRC/7/4/Add.3, 29 February 2008, p.3, Auerbach, J.N. (undated) *What's a Constitution Worth?: Bringing an Illegal Detention to Light* , http://www.humanrightsinitiative.org/artres/What%27s%20a%20Constitution%20Worth.03.pdf , 'Months in prison without a bail hearing' *Groundup*, 28 November 2012, http://groundup.org.za/article/months-prison-without-bail-hearing_591

eight (only the urban adult male population) to one out of every 13 adult men (the total adult male population) aged between 18 to 65 years are arrested annually in South Africa. At such rates, this is tantamount to police harassment.



As shown in Figure 1 above, during the period 2010/11 to 2013/14 22% or less of arrests resulted in convictions, indicating that the police are arresting either unnecessarily or investigating poorly in a very large proportion of cases, yet these cases place a significant burden on the court system. The overall impression is that SAPS engages in a range of activities that do not make society safer, nor does it assist in improving investigations. Moreover, of all persons arrested in 2013/2014, in only 67% of these cases charges were formally brought against the accused. It is therefore recommended that there is a need to engage SAPS on the following: (1) moving away from arrest as the mode of policing; (2) improving investigations for successful prosecutions; and (3) decriminalise possession of drugs for personal use.

3. Long periods of pre-trial detention

DCS reported in 2013/2014 that nearly 28% of the prison population were remand detainees (RD) and the average duration of pre-trial detention is six months.[2] Furthermore, on average, 15% of RD's

[2] DCS Annual Report 2013/2014, p11

(approximately 8,700 inmates) are in custody despite having been granted bail.[3] It is a consistent pattern that unsentenced prisoners are worse off in respect of their treatment and conditions of detention than their sentenced counterparts. It is also the case that unsentenced prisoners are concentrated in large urban areas where they spend significant periods of time in severely overcrowded prisoners (i.e. more than 175% occupied). The worst overcrowding is in remand centres in urban areas e.g. Pollsmoor, Durban Westville, Sun City/Johannesburg prison. Earlier research found that the charges against roughly half of remand detainees will be withdrawn – their detention served no purpose.[4]

In 2013/2014 DCS indicated that the average duration of custody of remand detainees had been reduced by 13 days and attributed this reduction to the 'co-operation within the cluster department on specific interventions and the implementation of section 49G of the Correctional Services Act contributed to the decrease of those detained for longer than 2 years.'[5] Section 49G of the Correctional Services Act provides a mechanism whereby the Head of Centre submit applications in respect of RDs to court for consideration of their detention initially, before completion of a period of two years and if the court decides that they should continue with detention, applications are submitted annually.

It remains CSPRI's position that as well-intentioned as section 49G may be, it will not have the desired effect as it does not regulate the criminal justice process. Indeed judicial review should be mandatory at a much earlier stage than after two years. It should furthermore not be assumed that if a Head of Centre brings the case of an unsentenced prisoner to court in terms of section 49G of the Correctional Services Act that the court will indeed undertake an investigation in terms of section 342A of the Criminal Procedure Act[6] (CPA). Plainly put, the Correctional Services Act does not tell the court what to do with a section 49G case. It is our submission that a period of two years before a delayed matter is brought to the attention of the court renders the constitutional right to a speedy trial meaningless.[7] In view of this, it is submitted that section 342A of the Criminal Procedure Act dealing with unreasonable delays in trials be reviewed with the aim to establish an obligatory mechanism for courts to investigate delayed trials. Section 342A of the Criminal Procedure Act provides clear guidance to the courts on the factors to be considered to establish if a trial has been delayed[8] and further more present clear options to the courts on the action to take if it is established that there had been an unreasonable delay. Recommendations for preventing long periods in detention include the

[3] DCS Annual Report 2013/2014, p11
[4] Karth, V, O'Donovan, M, Redpath J, (2008)'Between A Rock And A Hard Place: Bail decisions in three South African courts, ' (OSF-SA). Available at: http://osf.org.za/wp/wp-content/uploads/2012/09/Between-a-Rock-and-a-Hard-Place-Bail-decisions-in-three-South-African-Courts1.pdf.
[5] DCS Annual Report 2013/2014, p11
[6] Criminal Procedure Act 51 of 1997
[7] Section 35(3)(d) of Act 108 of 1998
[8] 342A (2) of the Criminal Procedure Act 51 of 1997

following: (1) more rigorous review of the merits of the case at an early stage; (2) adjust performance measurements to incentivise speedy trials; (3) amend section 342A of the Criminal Procedure Act to bring about mandatory review in delays; (4) prescribe time limits for trials to commence; and (5) make plea bargaining easier.

4. Low prosecution rates

Statistical data on arrests and prosecution for 2013/2014 indicates that of the 67% cases enrolled against the accused/ prosecuted; only 32% of the cases prosecuted results in a conviction. Furthermore, only 44 % of the convictions results in an admission of a person to a prison. Moreover, only 9% of arrests resulted in admissions of a person to prison. See Figure 1 above. By comparison in relation to prosecution productivity, each prosecutor in London yielded around 270 convictions per year, compared to South Africa's 110.[9] Moreover, the large number of withdrawals of cases against accused persons is disconcerting. There were approximately 290 000 withdrawals per year compared to 263 000 finalisations. The data indicates a worrying trend of low productivity of prosecution service. It also provides a clear indication of the broader criminal justice problems across the criminal justice sector. There is a clear linkage between the style of policing (high volumes of arrest) and poor investigations by the police which contributes to low productivity of the prosecution service. It is therefore recommended that the Portfolio Committee (1) investigate the reasons for high withdrawals and low convictions, and (2) determine the prospects for oversight over the National Prosecution Authority.

5. Preventing and investigation human rights abuses

(a) Independence of JICS

The Judicial Inspectorate for Correctional Services (JICS) is the designated oversight institution for the DCS and is an important part of the prison oversight architecture is South Africa. The problem however, remains the fact that JICS is not sufficiently independent from the DCS and further that its mandate is too limited, primarily because it does not have the same investigative powers as, for example, the Independent Police Investigate Directorate (IPID). The JICS mandate is essentially to inspect and report on the conditions of detention and treatment of prisoners. It is thus not focused on investigations and it does not prepare a court-ready docket for the NPA as IPID.

[9] Redpath, J. (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*, Pretoria: ISS.

Institutional independence has two facets, namely financial and administrative independence, and the need to 'be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government'.[10] In *Glenister v President of the Republic of South Africa and Others*, the Constitutional Court held "a vitally important aspect of any oversight mechanism is its independence from the institution or organization it intends to assess and freedom form "undue political interference."[11] Furthermore, the Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa* stated that independence (in respect of the Independent Electoral Commission) required both financial and administrative independence.[12]

JICS forms administratively part of the DCS, the same department it is mandated to report on and receives its budget from the DCS.[13] JICS has over the years reported that its financial dependence on the DCS hampers their operational efficiency.[14] It is our submission that the budget of JICS should not be linked to the Department, but should come directly from Parliament to ensure the independent and effective functioning of the JICS. This change would require an amendment to sections 91 and 88A (1) (b) of the Correctional Services Act. We recommend, therefore, that this be proposed to the Department.

(b) Relationship between JICS and DCS

The large number of complaints recorded by the Independent Visitors, particularly those in relation to assaults, indicates that there is reason for concern about the treatment of prisoners. Moreover, the range of persistent problems within DCS relating to human rights violation and governance problems further affirm the position that this Department finds it difficult to take instructions and advice or assistance from external institutions. Whether the powers of JICS remain by and large restricted to making recommendations or are expanded to make more binding decisions will largely determine how rapidly or not the human rights situation in our prisons improves. It is CSPRI's position that JICS must promote transparency and accountability in the prison system by dealing with complaints promptly and effectively and that the DCS be held accountable when it fails to take measures against frequently reported problems. It is therefore recommended that (1) the Correctional Services Act be amended to compel the National Commissioner to respond to recommendations from JICS and report this to Parliament as well (2) the National must explain in his response whether such recommendations were accepted or not, and the reasons thereto.

---

[10] H Corder, S Jagwanth and F Soltau Report on Parliamentary Oversight and Accountability (June 1999), 56. Available on the web at: http://www.pmg.org.za/bills/oversight&account.htm See also JagwanthS. (2004) A Review of the Judicial Inspectorate of Prisons in South Africa, CSPRI Research Paper, Bellville: Community Law Centre.

[11] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 188.

[12] 121 1996 (6) BCLR 489 (CC).

[13] S 91 Correctional Services Act.

[14] Judicial Inspectorate for Correctional Services Annual Report, 2012/2013.

(c) Human rights violations and the complaints system & DCS involvement in investigations

The Inspecting Judge has expressed on more than one occasion his concern about the lack of prosecutions in cases where DCS officials are implicated in the deaths of prisoners.[15] Research conducted by CSPRI has found that a general culture of impunity exists in DCS and that it is indeed a rare event that DCS officials are prosecuted for assault and torture of prisoners, even when the assault was fatal.[16]

The lack of transparency is also problematic in respect of investigations purportedly undertaken by the Department and SAPS into unnatural deaths in custody. Indeed, the lack of prosecutions indicates that such investigations are not particularly thorough or sufficiently independent. Given the clear duty to detain all inmates in "safe custody whilst ensuring their human dignity…"[17], internal Departmental investigations into deaths and serious assaults (implicating officials) for disciplinary purposes should not take precedence over investigations for determining criminal liability. Moreover, any direct involvement of the Department in criminal investigations (where it would interview witnesses, alleged perpetrators and assess physical evidence) goes against the internationally accepted requirement that such investigations must be conducted by impartial and independent authorities.[18] By virtue of the fact that the alleged perpetrator is an employee of the Department, the Department is implicated because the death in question indicates a material failing or neglect on the part of the Department to provide safe custody and uphold the right to life. Given the lack of successful prosecutions described above, there is reason to believe that problems persist with the manner in which SAPS investigates such cases, whether this is the result of interference by DCS officials or collusion between SAPS and DCS officials is open to speculation.

The current situation with regard to the investigation of deaths in custody is unsatisfactory and requires urgent attention. Unless drastic changes are made to the current investigation regime it is unlikely that more successful investigations and prosecutions will take place. Importantly, it is ultimately in the interests of the Department that deaths and assaults are properly investigated and the perpetrators held criminally responsible. JICS has a limited role when it comes to the investigation of deaths and assaults in prison. The Act states that "any death prison must be reported forthwith to the Inspecting Judge who may carry out or instruct the Commissioner to conduct any enquiry." Although the Inspecting Judge may hold an inquiry for the purpose of conducting an investigation, he or she

[15] Judicial Inspectorate for Correctional Services Annual Report 2009/10, p30; Judicial Inspectorate for Correctional Services Annual Report Annual Report 2010/11, pp26-27.
[16] Muntingh, L. and Dereymaeker, G. (2013) Understanding impunity in South African Law Enforcement Agencies, CSPRI Research Paper.
[17] Section 2(b) of the Correctional Services Act 111 of 1998.
[18] UNCAT art 13 and 14. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

may only deal with complaints referred by the National Commissioner, the Visitors Committee, the Minister and, if urgent, an ICCV.[19]

We recommend, accordingly: (1) The Committee conduct its own investigation into the problem and call on the NPA, SAPS, the Department and the JICS to provide clarity on how investigations are being conducted, the problems in investigations, how decisions to prosecute or not are made, and the current lack of criminal prosecutions implicating DCS officials in the deaths of prisoners. (2) The Committee builds on the work of the previous Committee and prioritises a process of law reform that will see JICS functioning independently from the DCS and with the necessary powers to be an effective investigative mechanism (3) That upon receipt of reports on deaths, incidences of serious assault and torture, the JICS conduct its own investigation into the incident and report its finding to the SAPS directly along with its recommendation as to whether the matter should be criminally investigated by the SAPS; (4) The Department be prohibited from tampering with a crime scene of any unnatural death until independent forensic pathologists and JICS have accessed the scene; that the Department be prohibited from conducting any internal investigations into deaths and assaults until the JICS and SAPS have completed their own investigations; (5) JICS be given the authority to provisionally suspend DCS officials or has the authority to instruct the Commissioner to suspend officials implicated in an on-going investigation; (6) JICS publish the findings and recommendations of all its investigations into deaths, serious assaults and torture; (7) The results of investigations and prosecutions be published annually by JICS, including the reasons why the DPP has declined to prosecute where such a decision was made.

(d) Preventing torture and other ill treatment

The statutory obligation in section 9 of the Prevention of Combatting and Torture of Persons Act places an obligation on the State to prevent torture and other ill treatment by training and education of officials on the prohibition of torture and to provide assistance and advice to any persons who wants to lodge a complaint of torture.[20]

It is therefore recommended that (1) the DCS prioritise the prevention of torture and other ill treatment as one of their planned policy initiatives; (2) DCS informs the Committee of the mechanisms in place to prevent torture; the extent to which education and training on the prohibition against torture has been provided to officials.

[19]Section 90(2) and (5) of the Correctional Services Act 111 of 1998.
[20] Section 9 Prevention of Combatting and Torture of Persons Act 13 of 2013

6. Sentencing reform

The Criminal Law Amendment Act (105 of 1997) which initially ought to have been a temporary measure came into force in May 1998, and provided for mandatory minimum sentencing legislation (MMS) for specific offences such as murder, rape, aggressive offences, and selected serious economic and narcotics offences. The objective of the MMS legislation is to ensure that people committing serious offenders, are sent to prison for longer periods of time. JICS in 2003/2004 raised concern's regarding MMS legislation and called for its repeal as it contributes to the overcrowding in correctional facilities.[21]

In 2013/14 JICS reported that the prisoner population statistics indicated that year on year less people are being sentenced to prison but the proportion of prisoners serving longer sentences has increased substantially since the enactment of the minimum legislative parole provisions.[22] JICS noted that 'it appears that our minimum sentencing legislative framework will continue to result in offenders serving lengthy periods in incarceration, requiring the Department to create and maintain the infrastructure and serve the needs of these inmates.'[23]

In 2013/14, 63 % of the offender population consisted of offenders sentenced in excess of 7 years to life, of which 11 percent were prisoners sentenced to life imprisonment.[24] This constitutes approximately 12 145 in comparison to 445 lifers in 1995. The rapid increase of prisoners sentenced to life imprisonment is cause for concern, as this will have a substantial impact on offender rehabilitation and overcrowding. Research indicates that long-term offenders display many more problems, both psychological and social, than short-term offenders and negative reactions to the prison structure actually increase as an offender's sentence progresses and harsher penalties have never been shown to have a deterrent effect on behavior or a positive outcome in respect of public safety. Moreover, higher recidivism rates are associated with longer prison terms.[25] In short, this means that imprisonment per se increases the recidivism rate and the longer the term, the worse the impact. [26]

There is a broader need for sentencing reform in South Africa. A direct prison sentence results in a person losing his or her employment, in being stigmatised, broken relationships with family and friends and has devastating effects on children. Furthermore, there is a risk of the prisoner being coerced into joining a prison gang. Punishment for certain offences need not involve imprisonment

[21] Judicial Inspectorate for Correctional Services Annual Report, 2003/2004.
[22] Judicial Inspectorate for Correctional Services Annual Report, 2013/2014,p38.
[23] Judicial Inspectorate for Correctional Services Annual Report, 2013/2014,p40.
[24] Judicial Inspectorate for Correctional Services Annual Report, 2013/2014,p41.
[25] Muntingh, L. (2008) '*Punishment and deterrence: Don't expect prisons to reduce crime.*' SA Crime Quarterly no 26. Available at: https://www.issafrica.org/uploads/CQ26_Muntingh.pdf [Accessed 4 September 2015
[26]Muntingh, L. (2008) '*Punishment and deterrence: Don't expect prisons to reduce crime.*' SA Crime Quarterly no 26. Available at: https://www.issafrica.org/uploads/CQ26_Muntingh.pdf [Accessed 4 September 2015]

and there is a range of non-custodial sentences that can be handed down particularly for first offenders and non-violent crimes. The use of non-custodial options needs to be a conscious focus of the state and the Finnish penal system serves as an example as there was a deliberate decision to reduce the prison population and this was achieved without having any notable effect of public safety.[27]

In view of the above it is recommended that (1) sentencing framework research undertaken by the SALRC be revived as a springboard to commence with a review of current sentencing legislation, (2) the Criminal Procedure Act be amended to compel presiding officers to consider non-custodial options if a prison sentence of less than two years is being contemplated and that the reasons for not imposing a non-custodial sentence be placed on record.

7. Effective oversight

CSPRI will continue to engage with the Portfolio Committee as it is founded on the belief that Parliament has a critical role to play in strengthening governance and human rights. There is a need to conduct more research on the broader criminal justice issues raised in this presentation, and we suggest that the participation of civil society involvement in this regard is important. Civil society is thus a key partner to provide assistance and support to organisations working in service delivery.

Although the merger of Justice and Correctional Services Portfolio Committees aims to improve and accelerate service delivery, it must be accepted that the Justice portfolio on its own is extremely demanding. We therefore recommend (1) that the two portfolios be separated as it was prior to 2014 as this will ensure better oversight, accountability and meaningful engagement with departmental officials.

Prepared by:

Prof. LM Muntingh & Ms K Petersen
CSPRI
Dullah Omar Institute
University of the Western Cape
021-959 2950

[27] See Tapio Lappi-Seppälä, '*Techniques In Enhancing Community-Based Alternatives To Incarceration — A European Perspective*' RESOURCE MATERIAL SERIES No. 61. Available at: http://www.unafei.or.jp/english/pdf/RS_No61/No61_10VE_Seppala2.pdf; SP Paper 320 Session 2 (2005): *Justice 1 Committee A Comparative Review Of Alternatives To Custody: Lessons From Finland, Sweden And Western Australia*. P. 34 Available at: http://www.dldocs.stir.ac.uk/documents/report220305_km2.pdf; Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland,* Scandinavian Studies In Law © 1999-2012, Available at: http://www.scandinavianlaw.se/pdf/54-17.pdf