SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE ON THE CORRECTIONAL MATTERS AMENDMENT BILL – B41 OF 2010.

Introduction

CSPRI wishes to thank the Portfolio Committee on Correctional services to make a submission on the Correctional Matters Amendment Bill (41 of 2010) (hereafter, the Bill). The submission is made on a clause-by-clause basis and indicated as such.

Clause 1

1. The proposed definition of "inmate" cross refers to a number of sections in the Correctional Services Act, being 2, 4, 11, 12, 13, 14, 15, 18, 19, 26-35, 85, 90, 93, 99, 101 and 115-123. The purpose of identifying these sections is not clear. Moreover, the listed sections omit a number of critically important sections relating to conditions of detention and protection of human rights, being:
    - Section 6 - admission
    - Section 7 - accommodation
    - Section 8 - nutrition
    - Section 9 - hygiene
    - Section 10 - clothing and bedding
    - Section 16 - development and support services
    - Section 17 - access to legal advise
    - Section 20 - mothers of young children
    - Section 21 - complaints and requests
    - Section 22 - general discipline
    - Section 23 – disciplinary infringements
    - Section 24 – disciplinary procedures and penalties, including segregation
2. The consequence of the selected sections will be that the excluded section will not apply to remand detainees. If the intention is that these issues will be covered by regulations, as provided for in clause 17 of the Bill, this is not acceptable. The rights and protective measures outlined in the sections listed in paragraph 1 above are fundamental to the rights of all inmates and do not have selective applicability. Moreover, placing these rights and measures in subordinate legislation detracts from their status and places them, as regulations, beyond public scrutiny.
3. It is CSPRI's submission that the definition of 'inmate' will be sufficient without listing the referred-to-sections in the Act.

Clause 2

4. The Bill proposes the insertion of section 3(d) referring to "manage remand detainees". The meaning of this is not clear. The Department of Correctional Services (DCS) has to date been responsible for awaiting trial prisoners based on the current legislation. In order to make this insertion meaningful, clarity needs to be sought on exactly what the meaning is of "manage remand detainees".

Clause 3

5. The proposed amendment to section 5(2)(b) draws attention to the provision that a suspect may await trial in a police cell for a period of one month which may be extended by the National Commissioner. Police cells are in general not suitable for detention beyond a few days and even then many police holding facilities are not suitable for even short term detention.
6. Police cells can frequently not handle the volume of detainees and do not comply with the prescripts of the Correctional Services Act, such as the separation of different categories. It is therefore submitted that section 5(2)(b) be repealed in its entirety.

Clause 5

7. The proposed amendment highlights issues around the substance of the sub-section, namely the "opportunities and facilities to prepare their defence". While it may be clear what this means on a theoretical level, the requirements in practice need clarification.
8. Presumably this would firstly mean access to legal advice, but it would also mean access to the necessary legislation, sub-ordinate legislation and case law as may be required. In particular, all inmates should have access to the Correctional Services Act (and its sub-ordinate legislation), the Criminal Procedure Act, and relevant international instruments (i.e. the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Convention against Torture). It should be noted that the UN Committee against Torture made the following remark in respect of South Africa's Initial Report: "*The State party should widely disseminate the Convention and information about it, in all appropriate languages, including the mechanism established under its article 22*."
9. It is therefore submitted that the minimum requirements be described in the regulations within one year of the amendments coming into force.

Clause 7 &12

10. The proposed deletion of the reference to the Extradition Act (67 of 1962) is not clear. As it reads in the Bill it would mean that if a person is extradited while serving a sentence, the sentence will technically not be interrupted.
11. It is submitted that the Committee seeks clarification from the DCS on this.

Clause 9 and 17

12. The proposed amendment to section 46(3) refers to sections 6-24 of the Act and that these apply "with changes as may be required by the context" to the management, safe custody and well-being of remand detainees. The selective applicability of sections of the Act has already been partially addressed in paragraphs 1-3 above. The proposed amendment further excludes sections 26-28 from applicability to remand detainees. These sections deal with safe custody, searches and identification.
13. CSPRI reiterates its earlier comments that these provisions are fundamental to the rights of prisoners and should not be regulated by subordinate legislation as proposed in clause 17 of the Bill.
14. Of more concern is the phrasing "with changes as may be required by the context". This is a most unsatisfactory notion and opens the door for any possible interpretation as to what the context may require to be changed. The changes that may be required, in the eye of the beholder, may in fact be contrary to the law, such as placing more people in a cell than the specified capacity of the cell. Different heads of remand detention facilities may also have different interpretations of what the context requires.
15. It is therefore CSPRI's submission that the rights of and services to remand detainees be regulated in the principal legislation and not in the regulations. Moreover, that the legislation be drafted in such a manner that the phrasing "with changes as may be required by the context" not be used.
16. It appears from the Bill that sections 47 and 48 were swopped when compared to the order followed in the Act.
17. The proposed amendment to section 47 (48 in the Bill) proposes that remand detainees wear a uniform. While there may be objections raised to this proposal from some quarters CSPRI will not, but submits that remained detainees should then be issued with sufficient clothing and such other amenities consistent with the prevailing climate and to maintain an acceptable level of personal hygiene. At a minimum this includes two pairs of trousers, two shirts, one pair of shoes, three pairs of socks, three pairs of underwear, two towels, two T-shirts, one pair of shorts and a jersey or warm jacket. Furthermore, remand detainees may not be compelled to appear in court in the specified uniforms as this creates the impression that they are already guilty.
18. The amendment proposed to section 49 requires that if a person is requesting information regarding a remand detainee, this should be done according to the Promotion of Access to Information Act (2 of 2000). It is submitted that two rights are in question here, namely the right to freedom and the right to information. The right to freedom is a fundamental human right and PAIA was not designed to regulate this right, but to regulate access to information kept by the state.
19. This proposal is unworkable for a number of reasons. It is well known that the PAIA procedure can take extremely long[1] and this may place remand detainees, their next of

[1] See Open Society Justice Initiative, Transparency & Silence, a survey of access to information laws and practices in 14 countries, 2006, p. 47-48; Open Democracy Advice Centre, Southern Africa Summary Country Report: Open Society Institute Justice Initiative: 2004 Monitoring Study; Global Integrity, 2006 Country Report

kin and legal representatives at a distinct disadvantage. For example, the Bill proposes that a mother who suspects that her child may be in the custody of the DCS will first have to fill out the three-page Form A of the DCS in terms of accessing information. The form is available from the DCS website in English only. In addition she will have to pay the R35.00 requester's fee at a DCS Control Financial Office, although the localities of these offices are not listed on the website. Such an office may be close by, but it may also be far away, especially in rural areas. Furthermore, the Information Officer of DCS is the National Commissioner in terms of part 1 of the Act (PAIA) and the Deputy Information Officers are the Chief Deputy Commissioners and Regional Commissioners appointed by the National Commissioner. Presumably these are the officials who would then make the requested information available. It is evident that this may add significantly to the administrative burden of these officials if they had to personally deal with every request regarding the detention of remand detainees. Moreover, the DCS website notes that the processing of a request may take 30 days and longer: "*The Information Officer or Deputy Information Officer has a period of 30 calendar days within which he/she must respond to your request. Under certain circumstances, the information officer may extend the 30-day period once only, and for a further period of 30 days*."[2] To wait 30 days to establish if a person is in the custody of the DCS is not only unreasonable, it may impact on the rights of the detainee by denying him or her access to next of kin or a legal representative, and thus their right to freedom.

20. Moreover, the Committee's attention is drawn to section 13(6)(d) of the act, which reads: "*If requested by the spouse, partner or next of kin, the National Commissioner must as soon as practicable, with the written consent of the inmate, give particulars of the place where the inmate is detained*." It should furthermore be noted that section 13(6) (d) applies to all inmates; sentenced and unsentenced and is also applicable as per the proposed definition of inmates in clause 1.
21. It is therefore submitted that the reference to PAIA be removed from the Bill.
22. The proposed insertion of section 49A notes in two instances that the legislation will apply to remand detainees "with such changes as the context may require". Concerns with this phrasing have already been noted in the above and need not be repeated here.
23. The proposed section 49B notes in two instances that the Department will provide services to disabled remand detainees "within its available resources". This is a very unfortunate wording as it renders the section meaningless and without any enforceability. Disabled remand detainees are entitled to a certain minimum standard of detention and this is not subject to what they department may want to afford or may have available or may want to actually provide. The particular wording of the

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South Africa, p. 17, available at http://www.globalintegrity.org/reports/2006/pdfs/south%20africa.pdf [accessed 30 November 2010]; and Chantal Kisoon, To spy or not to spy? Intelligence and democracy in South Africa, edited by Lauren Hutton, ISS Monograph No 157, February 2009, available at http://www.iss.org.za/pgcontent.php?UID=2555 [accessed 30 November 2010]

[2] DCS website "Frequently asked questions" http://www.dcs.gov.za/homepage_paia/FAQ.aspx Accessed 28 Nov 2010.

proposed section 49B(2) refers to the rendering of "additional health care services" that may be rendered based on available resources. It is, however, not clear what the services are in addition to, or whether it refers to any additional services that a disabled detainee may require, but which an able bodied detainee does not require. Moreover, many of the services required by disabled persons are of a non-medical nature.

24. It is submitted that the section be rephrased to be more specific as proposed here:
    - *49B(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.*
    - *49B(3) The Department must provide additional psychological services, if recommended by a medical practitioner.*
25. The proposed section 49D also uses the phrasing "within its available resources" in respect of mentally ill remand detainees. CSPRI proposes similar wording in the Bill as what was proposed in paragraph 25 above.
26. Moreover, the Committee's attention is drawn to Rules 82 and 83 of the UN Standard Minimum Rules for the Treatment of Prisoners which requires that mentally ill persons should not be detained in prisons but in suitable medical facilities.[3]
27. The proposed section 49F provides that the DCS may surrender a remand detainee to the police for the purpose of further investigation for a period of seven days and that this may be extended.
28. It is commonly acknowledged that suspects in police custody are at an increased risk of torture and ill treatment.[4] In view of this, additional safeguards need to be built into the legislation to ensure that the DCS does not surrender a person to the SAPS when there are reasonable grounds to believe that the individual may be subjected to torture and ill treatment.
29. To this end the following are proposed:
    - All transfers to police custody must be reported to the Office of the Inspecting Judge and the Independent Complaints Directorate, noting in particular the name of the person concerned as well as the officials from SAPS who is taking responsibility for the remand detainee and where the person will be detained.

[3] 82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible. (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management. (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer. (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social psychiatric after-care.

[4] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/13/39/Add.5, 5 February 2010, Chapter II B, in particular para. 61 in which he states that "[a]s an indication of the prevalence of torture as a means to obtain a confession, in eleven of the fifteen countries I have visited, the police used torture in a widespread or even systematic manner against individuals in their custody." And see also para 88: "(…) detainees are under a particularly high risk of being tortured when held in police custody."

- All individuals surrendered to police custody must undergo a thorough medical examination immediately prior to being handed over to the police and immediately upon his or return to DCS.
- The extension of the period of surrendering a person to SAPS may only be extended for a further seven days if a medial practitioner has assessed the person concerned and confirmed that he or she is in good health.
- The period for which a person may be surrendered to the police may not exceed 14 consecutive calendar days.

30. The aims of the proposed section 49G are laudable and such a measure has been long awaited. It is commonly known that cases are repeatedly postponed for "further investigation" without much grounds being presented on why continued custody is necessary. The seriousness of the charge is also frequently used as a justification for continued detention. It is therefore of extreme concern that nearly half of all awaiting trial prisoners are released without their cases proceeding to trial.[5]
31. In a recent decision of the European Court of Human Rights (ECtHR) the continued detention of an unsentenced prisoner was investigated in depth and the Court made a number of noteworthy conclusions. Importantly it found that the seriousness of the charge is of itself and over time not a sufficient justification for continued detention: "*The Court finds, therefore, that by failing to address concrete relevant facts and by relying solely on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which cannot be regarded as 'sufficient'*."[6] It also appears that the Canadian Supreme Court has delivered a number of judgments on this issue.[7] There is thus an incremental obligation on the prosecution to present evidence why continued detention is required.
32. As much as CSPRI supports the proposed amendment as it does provide the DCS with a mechanism to address unnecessary continued detention, it is regrettably the case that the amendment to the Correctional Services Act alone is not sufficient and an amendment to the Criminal Procedure Act, establishing the appropriate mechanism and guiding principles for presiding officers in dealing with such matters is also required.
33. It is therefore submitted that the Portfolio Committee liaises with its counterpart responsible for Justice and Constitutional Development to address this issue and develop an appropriate mechanism in the Criminal Procedure Act.

Clause 12

34. The amendment to section 73(6)(aA) proposes that offenders sentenced to less than 24 months be considered for parole or day parole after serving one quarter of the sentence. For example, an offender sentenced to 23 months will have to serve five

[5] Karth V (2008) *Between A Rock And A Hard Place - Bail decisions in three South African courts*, Cape Town: Open Society Foundation.
[6] *Bakhmutskiy v. Russia, ECtHR Application no. 36932/02,* 25 June 2009, Para 142.
[7] For example *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, October 10, 2002 and *R. v. Morales*, [1992] 3 S.C.R. 711, November 19, 1992.

months and 22 days. The significant shortening of this period may not be popular with judicial officers and the public. Moreover, if a sentence of two years is in effect reduced to less than six months, it raises questions about whether imprisonment was in fact the appropriate sentence to start off with. To this should be added that offenders serving sentences of less than 24 months are not required to have sentence plans and will thus not have access to the services arising from such a plan which should reduce their chances of re-offending. Their imprisonment therefore serves little purpose.

35. It remains CSPRI's position that imprisonment is over-utilised in South Africa, especially in respect of short sentences. The only way to address this is to make available community-based sentences that the courts have faith in. The DCS has on numerous occasions stated it they plans to overhaul community corrections, but to date little has been delivered in this regard.
36. CSPRI wholeheartedly supports the repeal of section 73(6)(b)(vi) requiring that offenders sentenced in terms of Act 105 of 1997 are required to serve four fifths of their sentence before being considered for parole.

Clause 14

37. It is proposed that the criteria for medical parole be expanded to also refer to the risk for re-offending. In August 2008 CSPRI made a submission to the Portfolio Committee in respect of medical parole and a summary is presented here as the facts remain relevant to the proposed amendments.
38. The case of *Stanfield v Minister of Correctional Services and Others* was placed before the Cape High Court in 2003.[8] The matter was, incidentally, heard by the current Inspecting Judge, Judge D Van Zyl. Mr. Stanfield was serving a six-year prison sentence for tax evasion and was during his imprisonment diagnosed with an aggressive and terminal form of lung cancer. He had already commenced with chemotherapy and according to two medical experts had no chance of recovery and the effect of the chemotherapy would only be palliative. In view of this, he applied to the DCS to be released on medical parole, a request denied by the DCS and thus the application to the Cape High Court. A driving, but as it would turn out irrelevant, set of factors in the Parole Board's decision-making was that Mr. Stanfield was not visibly ill, although hospitalised, and that he continued to smoke.[9] It also appears that many of the motivating factors in the Department's decision-making in this case were indeed perceptions without factual base and opinions without legal merit. Some of the reasons forwarded for denying his application for medical parole were:
    - he does not appear to be ill;
    - he is able to dress and feed himself;
    - his life expectancy is between 6 and 12 months;
    - he is a high profile prisoner;

[8] 2003 JDR 0871 (C)
[9] Para 12 and 79

- the objectives of punishment had not been brought home and he had not yet served one third of his sentence, and
- he was still smoking.[10]

39. An important matter that emerged from the case was the ability of the DCS to provide the care that Mr. Stanfield required. In its response the DCS attempted to persuade the Court that the Department had the capacity to provide the Applicant with adequate care. However, based on expert evidence the Court rejected this and found:

> *The third respondent's failure to recognise and accept the obvious inadequacy of the medical facilities at the Drakenstein prison or, for that matter, at any other prison under the jurisdiction of the Department, is a second instance of his failure to respect the applicant's inherent right of dignity. Although such facilities may be adequate for the treatment of ordinary, run-of-the-mill illnesses and medical problems, it is abundantly clear that they are totally inadequate for the treatment of terminally ill patients such as the applicant. To insist that he remain incarcerated while being housed in the said facilities constitutes a blatant denial of his most basic right to be treated with dignity and respect, regardless of the crime he has committed and the period of his sentence that he has actually served.* [11]

40. The Court also made reference to life expectancy and was not pleased with the views of the Department's official when motivating the denial of the application:

> *The suggestion by the third respondent that the applicant's life expectancy was "not so short" that further incarceration would not serve a purpose and that there was no assurance that he would abstain from committing a crime cannot, in my view, constitute a requirement in terms of section 69 of the Act. There is no indication of what a "short", as opposed to a "not so short", life expectancy may be. Nor can it be determined when a prisoner is so ill that it would be physically impossible for him to commit a crime. I should imagine that the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly when he knows that he has only a few months to live*.[12]

41. In the course of the judgment, Van Zyl J repeatedly returns to the Constitutional requirement of respecting the dignity of Mr. Stanfield and regarded the reluctance of

[10] "Hy geniet tans goeie gesondheid, op die oog af lyk hy nie siek nie. Hy help homself deur self te eet, aan te trek en te was. Sy lewensverwagting is tans 6 maande tot 1 jaar en kan daar gekyk word na, of die behandeling waarop hy tans is, enige uitwerking het. Die gevangene is 'n hoë profiel geval en het hy nog nie eers 1/3 van sy vonnis gedoen nie. Die strafoogmerke moet tuisgebring word en as 'n voorbeeld vir ander misdadigers dien. Die minimum vereistes, soos gestel deur Dr. Eedes, kan deur die departement nagekom word en is dit onnodig dat hy op eie koste in 'n hospitaal (privaat) moet bly. Hy sal heel menswaardig in 'n gevangenis aangehou kan word. Wat my die ergste van die aansoek ontstel, is dat al die dokters mediese ontslag aanbeveel en bekommerd is oor kieme in die gevangenis, maar nie een praat enigsins van die feit dat Stanfield nog rook nie. Hy sal eers drasties iets moet doen aan sy rookgewoontes." Para 12

[11] Para 125
[12] Para 110

the Department to allow the application for release on medical parole as an attack on his dignity:

> *To insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity. On the contrary, the overriding impression gained from the third respondent's attitude in this regard is that the applicant must lose his dignity before it is recognised and respected.*[13]

42. From the above it is concluded that the test for what is 'final' rests on the promotion and protection of the prisoner's dignity. Under the circumstances of a poor prognosis and imminent death, concerns regarding the administration of criminal justice and punishment become subservient to the right to dignity. The duty to promote and protect the right to dignity should, however, be assessed on a case-by-case-basis looking at the factors directly relevant to this.
43. The Committee's attention is also drawn to the fact that the first version of the Correctional Services Amendment Act (75 of 2008) contained a similar provision which was removed from the final version.
44. It is therefore submitted that the risk of re-offending remains irrelevant, as per the *Stanfield* case, and that the decision to release a person on medical parole is a medical decision. The requirement that there should be sufficient support and supervision in place is accepted.
45. The amended section 79(3)(a) proposes that the Minister may establish medical advisory boards for each province to provide independent medial opinions to the Correctional Supervision and Parole Boards (CSPB).
46. It is submitted that this is an unnecessary route to follow and that the DCS should rather call upon the medical profession to develop guidelines for medical practitioners on assessing applications for medical parole in accordance with the Act. To this end the DCS should request the Health Professions Council of South Africa (HPCSA) to develop clear guidelines for medical practitioners on assessing the health status of inmates diagnosed with any of the leading causes of death amongst inmates.
47. The amended section 79(4) states that medical parole may not be granted if the causes underlying the illness or incapacitation were self-induced. It is submitted that this is not only impractical but also irrelevant. If an inmate has been diagnosed with AIDS and is the final stages of the disease, will the CSPB hold it against him or her that they had unprotected sex at some point in the past? Or, will the CSPB hold it against the diabetic patient who ate too much junk food and did too little exercise? It is irrelevant what caused the disease or incapacitation. What matters is the dignity of the inmate.
48. It is submitted that section 79(4) be removed from the Bill.

[13] Para 124

Other

49. The Committee's attention is drawn to the fact that several regulations required by the act have not yet been developed. The Bill proposes the development of further regulations. It is submitted that timelines are attached to the development of any further regulations.