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JOINT AIDS LAW PROJECT & TREATMENT ACTION CAMPAIGN SUBMISSION: CORRECTIONAL SERVICES AMENDMENT BILL [B 32—2007]

Introduction

A week after Cabinet adopted the *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* ("the Operational Plan") in November 2003, MM – an inmate at Westville Correctional Centre and the seventh applicant in the case of *N v Government of Republic of South Africa (No 1)*[1] – was diagnosed with oesophageal candidiasis, an AIDS-defining illness.[2] According to the Operational Plan, people with HIV/AIDS are medically eligible for antiretroviral ("ARV") treatment when their CD4 count – a measure of the strength of the immune system – is below 200 and/or when they present with AIDS. In other words, MM was medically eligible for ARV treatment in late 2003.

However, MM only began ARV treatment on 12 July 2006 – more than two-and-a-half years after he was medically eligible and just three-and-a-half weeks before his death on 6 August 2006. This is evident in a complaint submitted by the Treatment Action Campaign ("TAC") – entitled "Request for investigation into culpability for the death of 'MM' – and other inmates at Westville Corrections Centre of AIDS-related illnesses" – to the Inspecting Judge of Prisons ("the Inspecting Judge")[3] on 29 August 2006. As the complaint details, ARV treatment came too late to save MM's life and only after he had suffered numerous HIV-related illnesses – including a third bout of pulmonary tuberculosis – in the 32 months following the oesophageal candidiasis diagnosis.[4]

In terms of section 90(2) of the Correctional Services Act, 1998 ("the Act"), "[t]he Inspecting Judge may only receive and deal with the complaints submitted by the

[1] 2006 (6) SA 543 (D)
[2] World Health Organization (WHO) Stage 4 illness
[3] At the time, Justice Nathan Erasmus was the acting Inspecting Judge
[4] A copy of the complaint, which includes an expert assessment of MM's medical records and was also sent to the chairperson of the South African Human Rights Commission, will be made available to the Portfolio Committee on Correctional Services upon request.

National Council, the Minister, the Commissioner, a Visitors' Committee and, in cases of urgency, an Independent Prison Visitor". In addition, he or she "may of his or her own volition deal with any complaint", such as the one submitted by the TAC in respect of MM. Of concern, however, is that the Act provides no guidance regarding the process once the Inspecting Judge decides "of his or her own volition" to deal with a matter – section 90(3) merely states that "[t]he Inspecting Judge must submit a report on each inspection to the Minister." It says nothing more – it is simply silent on what happens once a report into an investigation dealt with by the Inspecting Judge "of his or her own volition" has been submitted to the Minister.[5]

To date, the Inspecting Judge has acted in accordance with the view that only the Minister has the power publicly to release a report submitted to him or her in terms of section 90(3). Yet despite our numerous written requests for the Minister to release the report, we have yet to receive any indication of the outcome of the Inspecting Judge's investigation. At a meeting held in Parliament on 21 February 2007 and chaired by the Deputy Minister of Correctional Services, the TAC and AIDS Law Project ("ALP") were advised that the report of the Inspecting Judge had indeed been handed over to the Minister. The minutes of that meeting indicate that the TAC had "requested a copy of the report without any success" and that it was "still awaiting [the] results of this investigation". This is still the case some six months later.

Our experience in trying to get a copy of the Inspecting Judge's report on the investigation into MM's death supports our position that the Judicial Inspectorate of Prisons ("the Judicial Inspectorate") should be further strengthened, with the powers of the Inspecting Judge being expanded to enable him or her to discharge his or her public interest mandate appropriately. For example, instead of simply submitting a report, the Inspecting Judge should expressly be empowered to publish the report once the Minister has been given a reasonable period to respond to any adverse findings potentially contained in such a report.

But instead of strengthening the Judicial Inspectorate, the Correctional Services Amendment Bill [B 32—2007] ("the Bill") seeks to achieve the very opposite. In this submission, therefore, we focus our attention on those provisions of the Bill that – if promulgated into law – would have this undesirable and constitutionally suspect outcome.

[5] In contrast, the rules manual states that when a complaint is referred to the Inspecting Judge by an independent prison visitor (IPV), he or she – after an investigation – *must* submit the ruling in writing to the IPV, the head of the correctional centre and the inmate.

In addition, we address certain provisions dealing with three issues of concern: the rights of inmates; the rights of members; and the unjustifiable expansion of the Minister's authority. In respect of each area of focus, we make specific recommendations.

Undermining the Judicial Inspectorate

Perhaps the most troubling of all the amendments proposed in the Bill are sections 68 through 76, which collectively deal with the "transformation" of the Judicial Inspectorate into the office of the Inspector-General for Correctional Services ("the IG"). Whilst nominally retaining its "independence", the IG's office will in fact bear little resemblance to the Judicial Inspectorate. As this submission has already argued, the existing Judicial Inspectorate needs to be strengthened and better resourced if it is to be able to discharge its statutory function. Instead, the Bill proposes a series of amendments to the Act which – if passed in their current form – would severely undermine the ability of the IG's office to do the work currently assigned to the Judicial Inspectorate.

In particular, we are concerned about the following proposals:

- The IG may – but is not required to – be a judge in active service. But instead of the Act's alternative option of a retired judge, section 70 of the Bill provides that the position may be held by "a legal practitioner of not less than 10 years' experience in legal practice, on recommendation of the Minister";
- Unlike the Inspecting Judge, the IG will have no power to –
  - appoint assistants;
  - determine his or her staffing requirements;
  - hold his or her staff accountable, given that they will be seconded directly from the Department of Correctional Services ("DCS") and will be accountable – in terms of the Act and the Public Service Act – to DCS;
  - investigate corrupt or dishonest practices in correctional centres;
  - exercise authority over independent prison visitors (referred to as independent correctional centre visitors ("ICCVs") by the Bill), who are to fall under the authority of a new chief executive officer ("CEO") who is himself or herself a public servant seconded from DCS;
  - delegate functions to assistants; and
  - appoint external specialists to assist in doing the job properly; and
- Payment for ICCVs who are not DCS employees is to be discontinued, meaning that the services of independent ICCVs will effectively not be used.

These issues are now addressed in more detail.

Dispensing with the requirement of a judge to head the office of the IG

The Bill provides no reason for its proposal that instead of the IG's office being headed by a judge (whether in active service or retired), it may be headed by a legal practitioner with at least ten years' experience in legal practice.[6] Such an appointment is to be made by the President on the Minister's recommendation. Unlike the case with judges, who are appointed by the President on the advice of the Judicial Service Commission following a public nomination and interview process, the Bill contemplates the IG being appointed in the absence of any public nomination or interview process.

Public processes – in particular an interview processes – are important for at least two reasons. First, they provide an open and accountable way in which the appropriateness of the person to be appointed is established. Second, they ensure that there is public confidence – both in the manner in which the appointment is made and the candidate him- or herself. In and of themselves, these are important objectives in a constitutional democracy based on the foundational values of "accountability, responsiveness and openness".[7] They become even more important in relation to the appointment of a critical oversight position such as that currently held by the Inspecting Judge.

In addition, judicial experience appears to be an essential prerequisite for the position. Because of their training and experience, judges are well placed to interpret and apply the law without fear, favour or prejudice, and to do so in a way that commands public confidence. In the absence of such training and/or experience, a legal practitioner may be ill-equipped to do the job. In addition, he or she may find it difficult to gain and secure public confidence, particularly when the position has been filled by a judge since Chapter IX of the Act came into force in early 1999.

Staffing issues

Collectively, the provisions dealing with staffing effectively render the IG's office as an internal departmental structure that is nominally headed by a person from outside of DCS but wholly reliant on departmental officials for its operations. While the Bill still refers to the office as an independent structure, the manner in which staff will be appointed and

[6] The Act defines a legal practitioner as "any person admitted to practice as an advocate or an attorney in the Republic".
[7] Section 1(d) of the Constitution

expected to account makes it plain that whatever independence currently resides in the Judicial Inspectorate will largely – if not wholly – be lost if and when the Bill becomes law.

In particular, the IG – unlike the Inspecting Judge – will have no legal authority to –

- Appoint and delegate functions to assistants and/or specialists from outside of DCS to assist him or her in doing his or her job properly;
- Determine the office's staffing requirements; and
- Hold staff – including a new CEO – to account, who will be seconded from DCS by the National Commissioner[8] and whose conditions of service will be regulated by the Public Service Act.

In addition, the Bill proposes removing authority over ICCVs from the Inspecting Judge and giving these powers to the new CEO, a departmental employee who is accountable to DCS and not the new IG. Further, the Bill proposes that payments to ICCVs who are not departmental employees cease, meaning that the current practice of making use of independent ICCVs – on a part-time basis – will cease.

Narrowed mandate

Section 90(1) of the Act currently authorises the Inspecting Judge to inspect or arrange for the inspection of correctional centres so that he or she is able to report on the following three issues:

- The treatment of inmates in correctional centres;
- Conditions in correctional centres; and
- Any correct or dishonest practices in correctional centres.

Section 74(a) of the Bill effectively removes the power to investigate corrupt or dishonest practices. In terms of section 79 of the Bill, this power is handed over to an internal "Departmental Investigation Unit" to be established by the National Commissioner. There is no explanation in the memorandum on the objects of the Bill for this move, nor is any guidance provided regarding the proposed structure and/or mandate of the unit other than a requirement that it be established by the National Commissioner "to investigate theft, fraud, corruption and maladministration by correctional officials."

[8] The Bill actually refers to a Director-General, which is not defined either in the Bill or the Act. In this submission, we assume that this person is in fact the National Commissioner of Correctional Services.

Recommendations regarding the Judicial Inspectorate

As already argued, the TAC and ALP recommend that the Judicial Inspectorate be strengthened – both by expanding the powers of the Inspecting Judge and by ensuring that it is adequately resourced to do its job. We strongly recommend that it continue to be headed by a judge, that the Inspecting Judge continue to appoint staff in accordance with the relevant provisions in the Act and that the Judicial Inspectorate be retained as an independent institution outside of DCS.

Rights of inmates

The Bill limits inmates' rights in respect of two key areas: solitary confinement (now euphemistically termed "detention in a single cell") and the provision of health care services. Interestingly, albeit disturbingly, section 25 of the Bill limits rights in both areas simultaneously, by amending section 25(4) of the Act in such a way that medical officers who are not departmental employees seemingly do not have authority to determine whether solitary confinement poses a threat to an inmate's physical or mental health.

Regarding the first key area, section 24(d) of the Bill seems unreasonably and unjustifiably to expand the grounds for solitary confinement. At the moment, the Act only permits such detention "in the case of serious or repeated [disciplinary] infringements". The Bill proposes removing this restriction, failing to provide any guidance on when it is appropriate to detain an inmate in a single cell. Section 24(f) of the Bill, on the other hand, permits segregation of inmates who seriously or repeatedly infringe the disciplinary code. Of concern, however, is that segregation is permitted only to allow for programmes to correct the offensive behaviour and seemingly not to protect other inmates. In addition, the detail of the provisions regarding segregation seems to suggest unacceptably broad powers of disciplinary officials in relation to detention in a single cell.

Regarding the provision of health care services, three provisions raise concerns:

- Section 41 of the Bill guarantees continuity of care if and when an inmate is transferred from one correctional centre to another. It is, however, silent on continuity of care following release, as is the rest of the Bill and the Act. Release in the absence of securing continuity of care – such as may be the case when an inmate is accessing ARV treatment within a correctional centre and is released into a community with limited to no access – may be

tantamount to a negative infringement of the right to have access to health care services. In our view, the Bill needs to address this potential problem.

- In amending section 45 of the Act, section 43 of the Bill retains a provision that permits the carrying out of a health status examination before release if this is deemed necessary by a correctional medical officer. Of concern is that the correctional medical officer is not provided with any guidance regarding the exercise of such a determination, testing for non-infectious diseases – without consent – is clearly permitted, and a reference is made to a statute – the 1977 Health Act – that no longer exists.
- Section 63 of the Bill seeks to make it more difficult for an inmate to get medical parole. In addition to medical eligibility, an inmate – or someone acting on his or her behalf – must also convince the parole board (or the Minister in the case of inmates sentenced to life) that the inmate is not capable of committing a crime in the future. Not only does this undermine the rationale behind medical parole – allowing an inmate to die with some level of dignity – but it has the potential to result in delays in decision-making. In our view, this provision will most likely serve to render the "right" to medical parole illusory, its exercise being almost impossible before an inmate actually dies.

In summary, the Bill needs to provide guidance on when it is appropriate to detain an inmate in a single cell, as well as to permit segregation when this is necessary to protect inmates from harm caused by serious infringements of the disciplinary code. In addition, it needs to address the three health-related issues outlined above by –

- Ensuring continuity of medical care upon release;
- Limiting the grounds for compulsory medical examinations upon release on the basis of sound public health principles, as well as providing guidance regarding the exercise of powers to those ordering such examinations; and
- Retaining the medical parole provisions in the Act and not introducing any further requirements for such parole.

Rights of members

In our view, there are three provisions in the Bill that raise significant constitutional concerns regarding the rights of DCS members:

- Section 80 of the Bill adds a new subsection (2)(b) to section 96 of the Act to allow for the summary dismissal of essential service workers who strike under circumstances where the strike "constitutes a threat to the safety of inmates, officials or the public". The proposed provision expressly excludes any procedural fairness considerations, arguably in contravention of section 23 of the Constitution.
- The manner in which section 81 of the Bill proposes that section 98 of the Act be amended seems to suggest that it could potentially be used to compel professionals in the employ of DCS – such as health care workers – first to consider "prescripts … applicable to correctional officials" before their professional and/or ethical responsibilities. This has implications not only for the rights of DCS members but also their patients inside correctional centres.
- Section 93 of the Bill proposes that DCS members should no longer be permitted to refer decisions of the National Commissioner regarding the publication of accounts of life or conditions within a correctional centre to the Inspecting Judge, but directs that they should instead approach the Minister. This has significant implications for the right to freedom of expression, which – in our view – would be unreasonably and unjustifiably limited if such a provision were to become law.

In our view, none of these three proposals is constitutionally defensible. We therefore recommend that they be abandoned completely.

Inexplicable expansion of the Minister's authority

The Bill inexplicably expands the Minister's powers – either at the expense of courts or at the expense of Parliament:

- Section 47 of the Bill proposes that courts no longer have the power to order community corrections;
- Collectively, sections 59, 62 and 97(c) of the Bill propose that the Minister – and no longer a court – determines in any particular case whether an inmate sentenced to life is granted parole; and
- Sections 56 and 64 of the Bill remove statutory minimums regarding when parole can be granted, replacing them instead with undefined periods of time that are still to be determined by the Minister in consultation with the National Council for Correctional Services.

There is nothing in the memorandum on the objects of the Bill to suggest why such powers should be removed from courts or Parliament and given instead to the Minister. In our view, before these proposals should even be considered by the Portfolio Committee on Correctional Services, DCS and/or the Minister should be asked publicly to provide the rationale underpinning them.

Conclusion

We take this opportunity to thank the Portfolio Committee on Correctional Services for the opportunity to make these submissions and trust that they will be given serious consideration. We have made arrangements to be in Cape Town on 7 and 11 September 2007 and would appreciate the opportunity to participate in the public hearings on the Bill to be held on those two days. For further information, please do not hesitate to contact Jonathan Berger at bergerj@alp.org.za, 083 419 5779, 011 356 4100 (t) or 011 339 4311 (f).