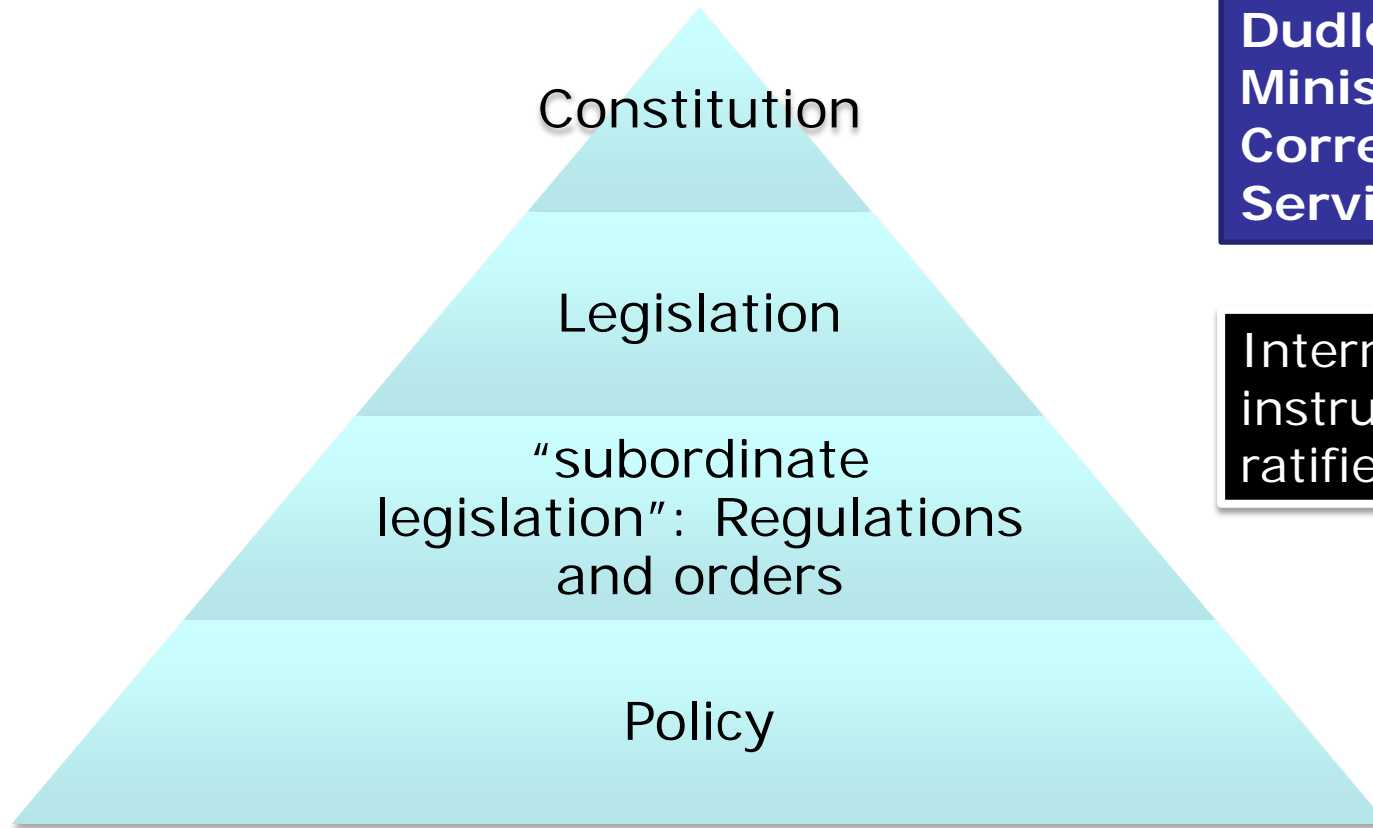




TB in prisons roundtable: legal framework

28 May 2013

Sources of law



Case law: (eg
Dudley Lee v
Minister of
Correctional
Services)

International
instruments
ratified by SA

Constitution

- + Section 12(1): “Everyone has the right to freedom and security of the person, which includes the right—
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) **not to be treated or punished in a cruel, inhuman or degrading way.”**

Constitution

+ Section 27:

1. Everyone has the right to have access to – a. health care services, including reproductive health care; b. sufficient food and water; and c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

Constitution

+ Section 35(2)(e):

“Everyone who is detained including every sentenced prisoner, 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**”.

*See also section 10.

Legislation

- + Correctional Services Act 11 of 1998
 - + CHAPTER 3: Custody of all inmates under conditions of human dignity
 - + Section 6 Admission
 - + Section 7 Accommodation
 - + Section 8 Nutrition
 - + Section 9 Hygiene
 - + Section 12 Healthcare

Correctional Services Act: Section 6, Admission

- + **Section 6(5)(b)** "As soon as possible after admission, every inmate must undergo a health status examination, which must include testing for contagious and communicable diseases as defined in the Health Act ... if in the opinion of the correctional medical practitioner it is necessary to protect or maintain the health of the inmates or other persons."

Correctional Services Act: Section 7, Accommodation

- + **Section 7(1)** "Inmates must be held in cells which meet the requirements *prescribed by regulation* in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be adequate for detention under conditions of human dignity."

Correctional Services Act: Section 8, Nutrition

- + **Section 8(1,2,4)** "Each inmate must be provided with an adequate diet to promote good health, as prescribed in the regulations. Such diet **must** make provision for the nutritional requirements of ... inmates whose physical condition requires a special diet. The correctional **medical practitioner** may order a variation in the prescribed diet for an inmate and the intervals at which food is served, when such a variation is required for **medical reasons**."

Correctional Services Act: Section 12, Health care

- + Section 12(1, 2(b)): The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to **lead a healthy life**. ... Medical treatment **must** be provided by a correctional medical practitioner, medical practitioners or by a specialist or health care institution **or person** or institution identified by such correctional medical practitioner ...

Correctional Services Act: Section 134(1), Regulations

- + Section 134(1)(A-LL) – Regulations – By the MINISTER
 - + 134(1)(c) procedure to be followed on admission for medical examination
 - + 134(1)(f) Accommodation: floor space, cubic capacity ... ventilation, general health
 - + 134(1)(g) Classification of inmates based on health
 - + 134(1)(k) Standard of hygiene in reference to exercise and healthcare
 - + 134(1)(r) Manner and procedure for inmate complaints

Correctional Services Act: Section 134(2), Orders

- + Section 134(2)(A-PP) – Orders – by the NATIONAL COMMISSIONER
 - + (d) Provision of special diet
 - + (h) Supply of medical assistance devices
 - + (i) Reports on problems re environmental health conditions and health related issues
 - + (k) Recreational activities to be provided for the benefit of mental and physical health
 - + (pp) Generally, all matters necessary or expedient for the application of this Act or the regulations

Correctional Services Regulations

- + 2 – Admission
- + 3 – Accommodation
- + 4 – Nutrition
- + 6 - Exercise
- + 7 – Healthcare

Correctional Services Regulations

- + 2(3)(a) – Every inmate **must**, within **24 hours** after admission and **before** being allowed to mix with the general inmate population, undergo a health status examination by either a correctional medical practitioner or registered nurse, who **must record** the health status of such inmate and confirm such person's medical history if necessary

Correctional Services Regulations

- + 2(3)(b) If a registered nurse has conducted such a medical examination, he or she must refer the case to the Correctional Medical Practitioner as soon as reasonably possible if: ... e.g. the inmate is using prescribed medication or receives medical treatment ...

Correctional Services Regulations

- + 2(3)(c) The Correctional Medical Practitioner or registered nurse **must** screen **all** inmates admitted to the Correctional Centre for communicable diseases .. And **record** the presence thereof as prescribed by the Order.

Correctional Services Regulations

+ 2(4)(a - b) the registered nurse must upon admission record any medical assistance device in possession of inmate. Such device may not be removed without written instruction of the attending medical practitioner.

Correctional Services Regulations

- + 2(7) An inmate may only mix with the general inmate population after being medically assessed

Correctional Services Regulations

- + 3(2)(a – b) All cell accommodation must have sufficient floor and cubic capacity space to enable the inmate to move freely and sleep comfortably within the confines of the cell. All accommodation must be ventilated in accordance with the National Building Regulations.

Correctional Services Regulations

- + 3(2)(i) Inmates suffering mental or chronic illness or whose health will be affected detrimentally or whose health poses a threat to other inmates if detained in a communal cell, **must** be detained separately on request of the Correctional Medical Practitioner or registered nurse.

Correctional Services Regulations

- + 7(1)(a) Primary health care must be available at least on the same level as that rendered by the state to members of the community

Correctional Services Regulations

- + 7(2) The services of a Correctional Medical Practitioner and a dental practitioner must be available at every correctional center

Correctional Services Regulations

- + 7(11) The Correctional Medical Practitioner, environmental health officer or registered nurse must inspect the Correctional Centre at least once a month and report as prescribed by the Order to the National Commissioner on problems concerning environmental health conditions and health related issues.

Standing Orders – see handout

- + Floor space
- + Ventilation
- + Opening and closing of windows
- + Weekly/daily inspections
- + Isolation
- + 24 hour services
- + Facility specific order on infection control to be reviewed annually
- + Screening upon admission by registered nurse. Medical examination within 24 hours.
- + Weekly health education sessions

Policy

- + Guidelines for the management of Tuberculosis, Human Immunodeficiency Virus and Sexually-Transmitted Infections in Correctional Centres, 2013

Dudley Lee v Minister of Correctional Services



Dudley Lee v Minister of Correctional Services



Dudley Lee v Minister of Correctional Services

- + It is indeed so that “[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations”, and that “a civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation . . . inherent in the right . . . to ‘conditions of detention that are consistent with human dignity’.”.

Dudley Lee v Minister of Correctional Services

- + That there is a duty on Correctional Services authorities to provide adequate health care services, as part of the constitutional right of all prisoners to “conditions of detention that are consistent with human dignity”, is beyond dispute. It is not in dispute that in relation to Pollsmoor the responsible authorities were aware that there was an appreciable risk of infection and contagion of TB in crowded living circumstances. **Being aware of that risk they had a duty to take reasonable measures to reduce the risk of contagion.**

- + "...where a state, as represented by the persons who perform functions on its behalf, acts in conflict with its constitutional duty to protect those who are "delivered into [its] absolute power", the norm of accountability must of necessity assume an important role in determining whether a legal duty ought to be recognised in any particular case. I cannot agree more with these sentiments." – Judgment para 64

Dudley Lee v Minister of Correctional Services

+ WHAT DOES THE JUDGEMENT MEAN?

+ Easier for detainees to win delictual claims. Exposure to lawsuits.

Dudley Lee v Minister of Correctional Services

- + “It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures. In postulating the hypothetical non-negligent conduct needed for the substitution exercise, the SCOs provide helpful guidance. ... It does not require much imagination to postulate that adherence to the SCOs may constitute the non-negligent conduct necessary for the substitution exercise. ” Judgment – para 60 - 61

Dudley Lee v Minister of Correctional Services

WHAT DOES THE JUDGEMENT MEAN?

- + Affirmation of the duty on DCS and consequence for failure to comply
- + Implementation of an effective and comprehensive TB prevention, diagnosis, treatment, care and support programme



In closing:

- + “The rule of law requires that all those who exercise public power must do so in accordance with the law and the Constitution. This, including the requirements of accountability and responsiveness, provides ‘additional’ reasons for finding in favour of the applicant and imposing delictual liability. This would enhance the responsible authorities’ accountability, efficiency and respect for the rule of law.” – judgment para 70