

BRIEFING BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON CORRECTIONAL SERVICES

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Honourable Chairperson, Mr. DV Bloem, distinguished Members of the Parliament and Members of the Portfolio Committee on Correctional Services, the South African Human Rights Commission welcomes this opportunity to brief you on some of our views and findings on the situation of children and youth in prison.

South Africa embraced democracy in 1994 with a Bill of Rights entrenching everyone's fundamental rights and freedoms. Cognizant of a past where children were deprived of their basic rights such as food, education, healthcare, water and sanitation, and were often detained without trial, tortured, and even killed, the drafters of the Constitution many who may be in this room today, ensured the inclusion of a children's rights article in the Bill of Rights. An article that guarantees protection and prioritises children in the new democratic dispensation.

At an international level as a member of the international community South Africa has legal obligations to protect children in trouble with the law. The United Nations has been particularly concerned about the treatment of children in conflict with the law in the past years and has since 1985 recognized and accepted three major instruments dealing with the rights of children in trouble with the law. In many countries in the world, young persons accused of committing criminal offences are mistreated and processed through a criminal justice system that does little to protect their special needs. Young offenders are frequently treated in the same manner as adult offenders with no attention to, or provision for, a child's right to survival, protection, development and participation.

With your indulgence, Mr. Chairperson allow me to preface my comments with some historical facts that I think are necessary for contextualising the issue before us this morning. The issue of Children in Prisons has a history going back before 1994. Before 1994, children in the criminal justice system were often brutalized. The apartheid regime did not have a uniform system to protect children in trouble with the law and certainly a disproportionate number of black children were subject to arbitrary arrests, torture, abuse in the hands of the law enforcer; and, in some cases, even died in custody. This dramatic inequality experienced within the criminal justice system was inherited by the new democratic state after it came into being in 1994. It is fair to say that much has been done to address some of the injustices - but clearly not enough. As a nation in transition that has, by even the most conservative accounts, achieved democracy, we remain with huge challenges.

In October 1993, the Community Law Centre, under the leadership of the late Minister Dullah Omar, held the 1st International Conference in Cape Town on "Children in trouble with the law". The objective of this conference was to identify the legal issues around the best interest of the child, taking into account the United Nations Convention on the Rights of the Child, the Organization of African Unity's Charter on Children, the Riyadh Rules and the non-binding South African Children's Charter. More specifically, the conference was convened with the view of identifying the key role players; setting up a consultative draft legislative group; and, looking at alternatives to the antiquated child-related laws that existed in 1993 in South Africa.

The distinguished delegates of this Conference, who came from as far afield as Sweden, Canada, Swaziland, Zimbabwe and the United States, were practitioners experienced with working with children in trouble with the law. There were also renowned legal scholars who

emphasized the dangers of overcrowding and mixing children with adults in facilities. There was a firm consensus that we could not just tinker with the existing laws as many of them were fundamentally flawed, but that what we had to do was make laws that were premised on the best interest of the child.

Another recommendation that came out of this Conference was that an integrated and holistic system was needed to address children in trouble with the law. The slogan "no child shall be caged" was adopted to raise awareness around the plight of children in trouble with the law.

In 1993 when, former President Nelson R Mandela received the Nobel Peace Prize jointly with the then Deputy-President F W De Klerk, he mentioned in one of his acceptance speeches that it was a matter of shame and serious concern for our country that so many children were incarcerated in our prisons and police cells. During his first address to Parliament in May 1994, State President Nelson Mandela called for "the emptying of children from prisons in South Africa".

Today, almost 11 years later, this shame and concern is still with us. Today, we still have too many children awaiting trial and if we are truly reflective of our actions we have in many ways failed to implement the principles entrenched in the various international treaties, particularly the Convention on the Rights of the Child and the United Nations Riyadh Rules, and the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty. And we have also failed in regard to our own constitutional imperatives, particularly Section 28 (1) (g) that states:

Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 (which refers to freedom and of the person) and 35 (which refers to arrested, detained and accused persons) the child may be detained only for the shortest appropriate period of time and has the right to be-

- i) Kept separately from detained persons over the age of 18 years; and
- ii) Treated in a manner, and kept in conditions, that take account of the child's age;
- h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings the child, if substantial injustice would otherwise result; ...

And finally, section 28(2) which states that:

A child's best interest are of paramount importance in every matter concerning the child.

Honourable Members of Parliament, despite these constitutional safeguards we have failed dismally on too many counts in protecting children in trouble with the law. In a recent article written by Judge JJ Fagan, the Inspecting Judge of Prisons, he notes the following:

1 746 children are held in 32 places of safety that are run by the Department of Social Development.

402 sentenced children are held in reformatories (youth care centers) run by the Department of Education.

Most of the approximately 4 000 children awaiting trial and having been sentenced are held in prisons including 13 youth development centers all over the country.

Research indicates that South Africa is currently ranked number four in the world in terms of imprisonment rates, after the US, Russia and Belarus. As of 31 July 2003 there were a total of 185 217 people in South African prisons, of whom 4 032 (2.2%) were children. Children also constitute 7.8% of all prisoners awaiting trial in South Africa.

Mr. Chairperson I am sure you will agree with me that these figures are daunting and, as the former President Mandela said in 1993, a shame and serious concern to our country.

Allow me Mr. Chair to introduce at this stage some of the work of the South African Human Rights Commission. Since its inception the Commission has undertaken to respect, protect and promote the rights of all children. This is evident in many of our annual reports that we have presented to Parliament annually. Last year during our report to the Justice Portfolio Committee the then Chair Adv. Johnny de Lange challenged the Commission to monitor the situation of children in prisons. This challenge was taken seriously and the Commission designed a programme to monitor the rights of children in prisons. This programme design has been subsequently submitted to donors with a request for a full time project officer to collate research and monitor the situation of children in prisons and children in other difficult circumstances and to ensure that article 28 of the Constitution is not transgressed and that the best interest of the child is made real.

However, I will be the first to recognise that the Commission can do more and perhaps work more strategically with partners working in the field; particularly, in relation to children in rural prisons and police cells.

The Commission has made numerous interventions. After an incident in Claremont, Cape Town, the Commission intervened after a young street child had been raped and sodomised by older prisoners with whom he had been commingled. The Commission was able to achieve impact by getting the station commander and indeed the Provincial Commissioner to change their policy and practices in regard to child offenders. This certainly was one of the successful interventions by the Commission; but clearly, we need to see how we can have an impact on a larger and greater scale.

I would like to take this opportunity to share with you some of the first-hand experiences I have witnessed during our inspections.

Overcrowding – In some prisons the capacity has reached 200%. Research shows that Pollsmoor is one such facility. But, we do not recommend trying to address the problem of overcrowding by building more prisons, by incarcerating more people or even handing down harsher sentences. We need to adopt an approach that recognizes that overcrowding and overburdened facilities cannot effectively rehabilitate child offenders.

Facilities that are very poorly kept - In many cases, they are characterized by a stench of urine, and dirty and lice infested blankets.

Inadequate medical care facilities – In Gauteng the only State psychiatric assessment for adolescent observation has been closed down due to staff cuts.

Young offenders mixed in the same cell as adult offenders - This is particularly an issue when children are transferred long distances to courts and are made to share holding cells with adult offenders.

Sexual assault and rape - There have been a number of cases reported were young offenders allege rapes while in custody.

Inordinately long periods awaiting trial - Some examples: it has been brought to the attention of the Commission that a 16-year-old girl charged as an accomplice in a car hijacking case has been awaiting trial for almost 4 years. In a rural setting we dealt with a case where 4 boys charged with stealing a sheep had spent almost 3 months awaiting trial, despite the fact that their mothers exhibited a keen interest in their children by bringing food to the police cells on a daily basis. A situation that I think should have been investigated and the boys released into the custody of their parents/care-givers.

Cost implications - Another aspect to consider is the cost of keeping children in prison longer than necessary. It is estimated that it costs the state almost R100,00 per day to keep a child in a facility which is often not much less than the bail required to be posted and certainly more than educational expenditure for many children.

Lack of educational facilities - This is of particular concern in rural areas and of course for children awaiting trial this is compounded.

Transformation - While we explore the challenges of transformation we note that institutional change has been slow. Policies and practices have not in many instances filtered down to those who are responsible for hands-on implementation. And while there is commitment at the cluster level we need to see more education at the grassroots level.

Causes of crime – There is a need to examine and explore the causes of crime and some of the social issues that are so intricately linked to crime.

Fragmentation – This continues to be a serious concern in the criminal justice system and this need to be streamlined.

In preparation for this briefing I requested the coordinators of the SAHRC in their respective provinces to compile a report on the condition of children awaiting trial in prison. It's safe to say their reports were grim. The reports pointed to a range of constitutional rights of hundreds of children that are being violated by the State on a daily basis. Across the board they found that:

Children are being kept in prisons because parents cannot afford bail

Children are in prison and their parents/caregivers many times have NOT been informed.

That many children were in custody as a result of poverty-driven crimes.

Many of the unsentenced children and youth do not have legal representation.

Many children's rights in terms of education, recreation and food are seriously flouted.

We heard many accounts of intimidation and harassment from the authorities – In one prison we heard that white young offenders were treated differently; or, rather received preferential treatment. The Commission is following up on this matter.

We found that children and youth who are particularly vulnerable, for instance who have disabilities, are not catered for at all. In one prison in Mpumalanga, I have been working on a case of a young sentenced disabled offender who for years has been bed-ridden in the most appalling conditions because the prison facility does not cater for her disability. I might just add at this point that Limpopo has undertaken a survey of conditions for prisoners with disabilities.

Diversion Programmes – Not enough children are provided with the opportunity to be diverted out of the system and into the NICRO Diversion Programme.

The issue of HIV/AIDS also poses a great challenge in regard to the prison population and again very little is being done to educate those awaiting trial and sentenced youth.

Honourable Members, at the beginning of my brief I said the South African Human Rights Commission welcomes this initiative by the esteemed Committee and I meant it. I have found that when and where we investigate cases of children in prison the officials are not overtly hostile, but very often do not respond with the necessary information and are often not able to implement the policies. Officials often complain that they are under resourced financially as

well as overburdened and that they have no cooperation from other departments that have specific roles to play in the complex cluster of the criminal justice system. While policies speak about an integrated approach this is not happening in practice.

Finally, I would like to conclude by saying that we desperately need to see the coming into force of the Child Justice Bill, as I believe that it will assist in addressing some of the problems. But in the interim, we cannot afford to sit back. We need to look at holding officials accountable and perhaps we need to start by constituting an interdepartmental committee to champion this, develop a plan of action and ensure the passage of the Child Justice Bill. In addition:

We need to see better intersection between departments.

We must see better resourcing of the criminal justice and social cluster.

We must stamp out corruption and hold officials accountable.

We can't afford to do business as usual because it has not served the best interest of the children.

In closure I would like to leave you with a Nigerian proverb that says:

When one person on the street kills a dog, the whole street is called "the street of dog killers". In the same breath if we do not address the situation of children in prisons we all will be to blame.

Lastly to say there are some "best practices" and these centres should be showcased and shared with other institutions that have been less successful. It can be done. It requires a paradigm shift in relation to how we see and interact with children, how we understand the importance of human rights, the commitment, compassion and the need to invest in children. Thank you.

Postscript

There are initiatives which the commission participates in to address issues of transformation and discrimination within the justice system. Commissioners and staff have been invited to act as resource facilitators by the UCT Law Race and Gender Unit in their Social Context Training courses with magistrates. The training sessions are valuable in that they sensitise magistrates to issues of discrimination around race and gender within the social lived realities of persons who appear before them in court. These training sessions take place regularly throughout the country and the Commission has participated in sessions with magistrates from the Northern Cape, North West, Mpumalanga, Limpopo and Gauteng.