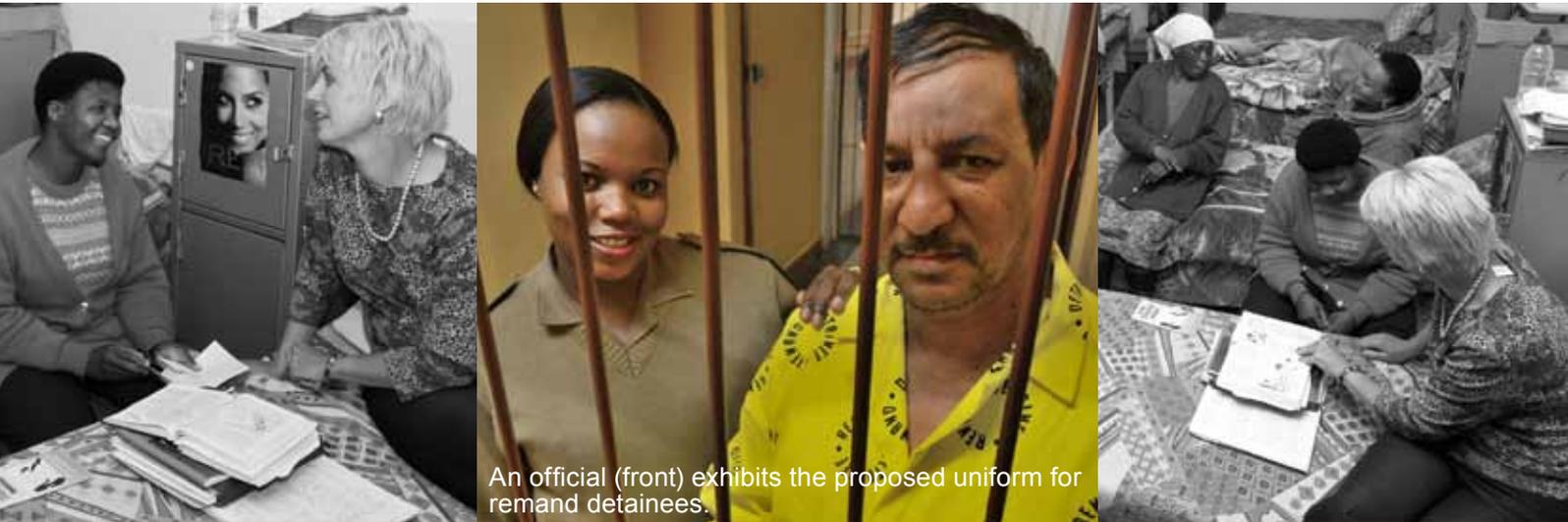


DRAFT White Paper on Remand Detention Management in South Africa



An official (front) exhibits the proposed uniform for remand detainees.



correctional services

Department:
Correctional Services
REPUBLIC OF SOUTH AFRICA

Draft White Paper on Remand Detention Management in South Africa

Executive Summary (*will be done after completing cluster consultation*)

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CHAPTER 1: INTRODUCTION

1.1 Motivation for the White Paper

- 1.1.1. The White Paper on Corrections (2005) heralded in a new strategic direction for the Department of Correctional Services (DCS) with rehabilitation at its centre. As it focussed on rehabilitation, a concept that assumes a guilty verdict, it did not substantially deal with the category of inmates in DCS centres who are not sentenced.
- 1.1.2. Awaiting trial detainees constitute approximately one third of those detained within DCS facilities. Over a period of time, government has prioritised improving the management of awaiting trial detainees. On the one hand, this priority was pursued within the context of improving the functioning and effectiveness of the Criminal Justice System (CJS), while on the other hand, it intended to improve the actual management of awaiting trial detainees within the DCS.
- 1.1.3. Following the outcome of an interdepartmental project led by the DCS which was aimed at re-engineering the way in which awaiting trial detainees are dealt with, the Cabinet *Lekgotla* decided in January 2009 that the DCS must establish a Branch that will be responsible for the management of awaiting trial detainees.
- 1.1.4. This decision necessitated a re-look at the management of awaiting trial detainees and to bring all policies in line with a variety of legislation, policies and guidelines dealing with such inmates.
- 1.1.5. An elaborate, varied policy and legislative framework already exists that governs the management of awaiting trial detainees. This framework is contained in the Constitution of the Republic of South Africa, (Act 108, 1996); the Correctional Services Act (Act 111, 1998); the Criminal Procedure Act (Act 51, 1977); the Extradition Act (Act 67, 1962); the Child Justice Act (Act 75, 2008), the White Paper on Corrections in South Africa (2005) and various regulations and guidelines that are applicable to departments that have responsibilities for managing aspects of awaiting trial detainees.
- 1.1.6. This White Paper deals with the remand detention population as a very distinct entity from the population of sentenced offenders. It recognises the unique challenges associated with persons who are detained although not yet found guilty of any crime. It distinguishes this population from a population focused on rehabilitation and acknowledges the duty to hold such a population for purposes of attending court.
- 1.1.7. Notwithstanding challenges that arose over a period of time, the policy and operational framework, as is elaborated further on, largely remain valid and therefore relevant.

1.2 Background / History

- 1.2.1 In 2006, Cabinet mandated the DCS through the Justice Crime Prevention and Security (JCPS) cluster structures to lead a project of re-engineering the Management of Awaiting-Trial Detention (MATD) system in South Africa. The scope of the project went beyond addressing congestion of facilities and includes ensuring that all provisions of the Constitution, applicable legislation and international protocols applicable to unsentenced inmates are applied.
- 1.2.2 The Chief Directorate Remand Detention Systems and Security which consisted of the MATD project team and security directorate, was established in DCS in 2007 to drive the re-engineering process, including the development and implementation of a synchronised cluster **programme of action** aimed at meeting short- to long-term strategic needs for Managing Awaiting Trial Detainees.
- 1.2.3 The DCS project team operated as a secretariat for the JCPS MATD task team, a sub-task team of the National Development Committee of the JCPS cluster. Cluster institutions represented in the MATD task team were the South African Police Service (SAPS), the Department of Social Development (DSD); Legal Aid South Africa (Legal Aid SA), the Department of Justice and Constitutional Development (DoJCD) including representatives from Inter-sectoral Committee for Child Justice (ISSCJ) and National Prosecuting Authority (NPA); and the Integrated Justice System Transversal. The latter is responsible for integration of systems within the CJS. Representatives from the Technical Assistance Unit of Treasury (TAU), Business Against Crime and the Department of Home Affairs (DHA) were invited on an ad hoc basis.
- 1.2.4 The project team demarcated several focus areas and one of them was the development of policy procedures, protocols and legislation in relation to the management and detention of awaiting trial detainees in police stations, Secure Care Facilities (SCFs) and DCS facilities.
- 1.2.5 Situational analysis and research on international trends were undertaken as deliverables that relate to the above-mentioned focus areas. The objective of the situational analysis was to determine challenges faced by SAPS, DSD, and DCS in the management of awaiting trial detainees in their respective facilities as well as to identify best practices that could be shared within the CJS. The identified challenges and best practices would provide guidance for the development of a White Paper, legislative framework and operational polices for the management of awaiting trial detainees.
- 1.2.6 The findings of the above-mentioned processes were presented in a report which was submitted to the National Development Committee as a working document in

November 2008 with proposals that cut across several areas including legislation, protocols and policy procedures; strategies for reducing levels of awaiting trial detainees; information sharing and management; facilities, safety and security; services and programmes; human resource and governance models.

1.2.7 The document was then submitted to Cabinet *Lekgotla* via such structures as the Forum of South African Director Generals (FOSAD) and Inter-Ministerial Committee respectively in January 2009. Four models as reflected below were proposed and the Cabinet *Lekgotla* approved the Model 3:

- **Model 1:** Establishment of a dedicated agency with focus on ATDs;
- **Model 2:** A separate integrated component managed by a Public Private Partnership such as the private prisons;
- **Model 3:** Establishment of a new branch within DCS; and
- **Model 4:** Transferring ATDs to either DoJCD, NPA or SAPS.

1.2.8 The situational analysis report was extended further into a discussion document which presented challenges as well as policy and legislative proposals for handling such challenges. These were grouped under the following areas: CJS matters; policy matters and legislative framework; services and programmes; facilities and security; systems and tools, foreign nationals and oversight and monitoring.

1.2.9 The discussion document was consulted with the previously mentioned institutions of the JCPS cluster, Non Governmental Organizations (NGOs), organization representing the prisoners and representatives from privately managed SCFs.

1.2.10 It was presented to the National Development Committee on 25 May 2010 with a recommendation that the challenges and proposals be dealt with through the development of a White Paper, Bill and subsequently legislation. The proposals were adopted and escalated to the DGs meeting and a decision was made to effect an amendment for the Correctional Service Act (Act 111, 1998) through the development of the Correctional Matters Amendment Bill.

1.2.11 The objectives of the Bill as presented to the Portfolio Committee of Correctional Services on 10 November 2010 were *to amend the Correctional Services Amendment Act (2008) so as to repeal the provisions for an incarceration framework and to amend the Correctional Services Act (1998) in order to strengthen the parole system in general, to provide for a new medical parole system and to provide for the management and detention of remand detainees.*

1.2.12 Proposed amendments in relation to the management and detention of awaiting trial detainees included the following:

- review of the definition of awaiting trial prisoners;
- wearing of uniform;
- management of terminally ill inmates;
- electronic systems to manage inmates;
- temporary surrendering of detainees to SAPS custody for seven days for further investigations, and
- determination of the maximum period of detention for which a person could remain in remand detention and that extension to this period would subject to strict conditions.

1.2.13 The development of the White Paper and the Bill continued as parallel processes; however the Bill was given priority attention. The Bill was signed into law on 25 May 2011.

1.2.14 Correctional Services Regulations (2004) were amended for alignment with the Correctional Matters Amendment Act (Act 5, 2011).

1.2.15 Following the implementation of the Correctional Matters Amendment Act, the White Paper needed to be aligned to the Act.

1.2.16 This White Paper was reviewed accordingly and consulted within the JCPS cluster. Other policy frameworks such as the blueprint for SCFs developed by DSD were taken into account.

1.3 Premise of the White Paper on remand detention

1.3.1 The White Paper on Remand Detention in South Africa is not intended to replace the White Paper on Corrections, 2005 but should be seen as an addition thereto.

1.3.2 The White Paper is intended to communicate the principles that will drive the detention management of Remand Detainees. These principles are drawn from various prescripts including the Constitution of the RSA, other local and international laws and treaties, protocols as well as the Correctional Matters Amendment Act (Act 5 of 2011). The latter includes a revised Chapter titled "*Management, Safe Custody and Well-Being of Remand Detainees*" and replaced the chapter on unsentenced offenders. There is a constitutional acceptance of international law as a very valuable norm in the South African legal system. Section 39(1)(b) of the Constitution of the Republic of South Africa provides that "when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law." Also in this regard, Section 232 of the Constitution stipulates that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

1.3.3 The principles are summarized as follows:

- Remand detention should never be used to penalise or punish any person or as a punitive centre;
- Remand detention occurs as a result of an order of a court of law;
- Remand detention should be managed in accordance with the highest possible ethical and professional standards;
- Remand Detainees should be informed of their rights, obligations and any censures attending a breach of the code of conduct;
- Remand Detainees should be separated from sentenced inmates; and
- Remand detention requires greater levels of effectiveness and integration in the CJS; and
- Remand detention institutions should be subject to multi-facets of oversight and control, including by the Judiciary, the Executive and the legislature.

1.3.4 This White Paper is based primarily on the constitutional right that a person charged with a crime is innocent until proven guilty and shall be treated as such. The only reason for their detention is to ensure due process in the court of law where they are to be tried. This is in line with international human rights principles. The detention of persons awaiting trial is neither for punishment nor correction.

1.3.5 This principle requires that very limited restriction only may apply. While the right to movement is curtailed by the warrant that empowers their detention, continuity of their basic human rights is obligatory. The only basis on which rights of awaiting trial detainees can be curtailed is a threat to society; and/or the likelihood of escape that the legal process has identified.

1.3.6 Without presuming guilt it is important to acknowledge that there is an opportunity to contribute to the detainees' human development during the period in which they are awaiting trial. These include life skills and social development, including understanding of the legal and justice system in South Africa in which they find themselves.

1.3.7 While the Constitution stipulates that periods of awaiting trial detention should be as short as possible, in practice many are incarcerated for extended periods of time, and involvement in productive activity that promotes recreation and human development is a crucial service that Government must provide. However, the fact that the length of stay of awaiting trial detainees varies considerably might also negatively affect the administering of these programmes.

1.3.8 Government is thus obliged to provide facilities for awaiting trial detainees that allow for the minimal limitation of an individual's rights, while ensuring secure and safe custody. The facilities should be staffed by personnel who are trained in human development, in the rights of persons in the legal / judicial process, in secure and safe

custody and who are responsible for ensuring delivery by government agencies on the rights of awaiting trial detainees.

1.3.9 While this White Paper acknowledges the work that Government has already done in respect of awaiting trial detainees, it should be taken into consideration that this White Paper is broad policy framework that is intended to address challenges experienced with regard to the management of remand detainees. This White Paper further communicates cooperative strategies and processes developed within the CJS for handling issues of common interest as well as those developed by individual departments to improve service delivery to remand detainees.

1.4 Summary of challenges

1.4.1 Definitional challenges

1.4.1.1 The term “awaiting trial detainee” has been utilized to include several categories of detainees who have not been sentenced. The rationale for shifting to “*Remand Detainee*” has been explained in chapter 3.

1.4.2 Criminal Justice System (CJS) matters

1.4.2.1 The challenges highlighted with regard the CJS matters include disjointed coordination of activities within and across relevant CJS departments; lack of joint planning and process optimisation in the CJS pipeline; lack of a single record that contains accurate information on RDs, and time-consuming repeated processes involved in release and re-admission of RDs who are scheduled to appear for remand hearings.

1.4.2.2 The above-mentioned challenges have been addressed through multiple processes and systems which are already in place such as the establishment of the Office of Criminal Justice System Review (OCJSR) and coordination of the planning within the CJS by the National Development Committee of the JCPS cluster. Chapter 4, which deals with Governance further talks to the approaches utilized to handle challenges within the CJS.

1.4.3 Policy matters and legislative frameworks

1.4.3.1 The challenges presented under this area have been addressed in several chapters in this White Paper including the chapter on *Governance*. The challenges are summarized as follows:

- Difficulties at centre level of implementing legislation as it applies to remand detention due to focus on sentenced offenders, including the training of correctional officials, as well as policies and procedures;
- Lack of policy framework for development of operational policies in SCFs and consequent lack of uniformity in policies. This has in part been addressed in a blueprint of the Department of Social Development developed in 2010;
- No policy or legislative framework for SAPS to detain RDs;
- Inadequate provisions for RDs placed in DCS facilities for observations; and
- Lack of policy on RDs managed under the Extradition Act.

1.4.4 Services and programmes

1.4.4.1 Services and programme required for RDs have been addressed in chapter 6 and associated challenges are summarized as follows:

- Inadequate provision of programmes to RDs detained in DCS facilities due to perceived short-term stay of detainees;
- Lack of role clarification with regard to transportation of RDs for forensic assessment and provision of emergency health services to RDs in court cells;
- Lack of uniformity in the provision of guarding services for hospitalized RDs across provinces and DCS regions;
- Inadequate provision for management of RDs who are mentally ill and those RDs who are on chronic medication from arrest to detention in SCFs and DCS;
- Limited access for legal consultation in detention facilities; and
- Inadequate provisions for children detained with their mothers in SAPS cells.

1.4.5 Facilities and security

1.4.5.1 Challenges in relation to facilities and security are presented below and have been addressed in chapters 7 (Orderly, Safe and Secure Management) and 8 (Integrated Security)

- Insufficient remand detention facilities to accommodate RDs in DCS, thus exacerbating the problem of overcrowding in most Correctional Centres with greater security risks;
- The rate of overcrowding creates security risks in that officials are engaged in long drawn out tasks (feeding, sorting for courts, roll-call) while critical tasks (searching, testing of bars, handling complaints & requests) are overlooked;
- Lack of risk assessment tool resulting in all RDs being treated as high risk;
- Lack of adequate information on J7 warrant leading to inability of DCS to judge potential length of stay, potential security risk and appropriate accommodation;

- Inadequate and poorly maintained facilities that make admitting, accommodating and releasing of RDs difficult;
- Wearing of own clothing by RDs thus leading to high risk for escape and creates a risk to health and hygiene of RD's;
- Inadequate facilities in DCS for conversion into Remand Detention Facilities (RDFs) thus leading to the undesired state of a mixed environment where sentenced offenders and RDs are segregated but share the same facility and its services;
- Poorly designed existing facilities in DCS for effective and efficient process flow of RDs which includes drop off and collection of RDs for court appearances, administration during admission and release, including searching of RDs;
- Poorly designed facilities to accommodate visitors of RDs, legal consultations, processing of bail, and provision of programmes in SAPS and DCS facilities;
- Lack of library material for RDs who provide their own legal defence;
- Inadequate recreational facilities for RDs in DCS facilities;
- Inadequate telephone facilities in SAPS and DCS for utilization by RDs to contact families, legal representatives and significant others;
- Insufficient SCFs for detention of children in conflict with the law resulting in long distances travelled by SAPS between courts and SCFs and placement of children in DCS facilities;
- Inadequate security in SCFs thus leading to court opting for detaining some categories of children RDs in DCS facilities; and
- High rate of vandalism in facilities that detain children RDs.

1.4.6 Systems and tools

1.4.6.1 Challenges in relation to systems and tools have been addressed in Chapter 8 and are summarized as follows:

- Inadequate automation of relevant information, identification and tracking systems for RDs;
- Slow progress in the institutionalisation of Audio Visual Remand (AVR) “video postponement” as a mechanism to reduce the massive wastage associated with RDs being released and re-admitted daily for postponement of cases;
- Lack of tools for determination of high risk RDs thus leading to housing high risk RDs together with low risk and first time RDs; and
- The lack of comprehensive information and effective management systems in respect of children in conflict with the law.

1.4.7 Foreign nationals

1.4.7.1 Challenges in respect of foreign nationals are summarized below and verification of identity for all arrested persons has been catered for in the chapter on Governance:

- Foreigners suspected of criminal offences are investigated, prosecuted and detained without investigating their residency or nationality status;
- Application for bail as prescribed in the Criminal Procedure Act (Act 51, 1977) is done without regard to residence status of a foreigners; and
- Detention of foreign nationals awaiting deportation in DCS and DSD facilities especially in regions far from the Deportation Centre in Gauteng, Krugersdorp.

1.4.8 Overcrowding

1.4.8.1 Overcrowding is not a new phenomenon in South African detention facilities and according to White Paper on Corrections it can be traced back to early 1900's when the prison system was regulated mainly by various Provincial Ordinances. This challenge including its management strategies has been covered in chapter 9.

1.4.9 Oversight / Monitoring

1.4.9.1 There are no specific challenges with regard to monitoring of institutions that detain RDs; however chapter 10 of this White Paper will provide an explanation on oversight function provided in such institutions.

CHAPTER 2: THE EXISTING POLICY: LEGAL AND OPERATIONAL FRAMEWORK

2.1 Introduction

- 2.1.1 The legal framework governing the management of Remand Detainees (RDs) in South Africa is a very important aspect of management of RDs and the issues that affect them.
- 2.1.2 These legal regimes are both domestic and international in terms of the norms that they articulate. They are cross-cutting and are found in various branches of the law, ranging from criminal law and criminal procedure, constitutional law, immigration law, international law and the constitutive legal instruments of law enforcement agencies such as the police, the prosecuting authority, correctional officers, immigration and border control. They also include guidelines or standards that are not necessarily promulgated into law but have normative significance in providing direction to actors and stakeholders on how to deal with RDs. Thus, the legal framework within the domain of RD management are summarised in terms of International and Domestic Legal Frameworks.

2.2 International legal framework

The rules and principles that affect detainees have an international foundation. This international acceptance and recognition of ways that detainees are to be treated, created legal norms that are found in international declarations, treaties and guidelines. These instruments have implications for South Africa in the conduct of its domestic affairs relating to RDs. One can summarize the international legal framework as follows:

2.2.1 The Universal Declaration of Human Rights (UDHR), 1948

- 2.2.1.1 The UDHR is the first international legal instrument that articulated the rights that are universal to every individual in the modern concept of rights. It is the first instrument in an International Bill of Rights. Article 9 of the UDHR provides that “*no one shall be subjected to arbitrary arrest, detention or exile.*” In the same vein, Article 11 stipulates that “*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*”

2.2.2 The International Covenant on Civil and Political Rights (ICCPR) (1966)

- 2.2.2.1 Article 9 of the ICCPR makes the following provision for the arrest and detention of persons:

- “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention”. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2.2.2.2 Similarly Articles 10 and 11 of the ICCPR prescribe the standards for the treatment of accused persons including juveniles. These standards include:

- Treatment with humanity and respect for dignity;
- Segregation from convicted persons and treatment which is appropriate to their status; and
- Separation of juveniles from adults and speedy finalization of their processes.

2.2.2.3 Finally, Article 14(c) of the ICCPR underscores the right of an accused person “to be tried without undue delay”.¹

2.2.3 The African Charter on Human and Peoples’ Rights

2.2.3.1 Articles 4, 5, 6, and 7 of the African Charter enshrine the rights to the integrity and

¹ This was further defined in the case of *Fillastre v. Bolivia*, Communication No. 336/1988 UN Human Rights Committee :

“What constitutes ‘reasonable time is a matter of assessment for each particular case. The lack of adequate budgetary appropriations for the administration of criminal justice does not justify unreasonable delays in the adjudication of criminal cases, nor does the fact that investigations into a criminal case are in their essence, carried out by way of written proceedings, justify such delays.”

dignity of the person, freedom from torture, inhumane and degrading treatment, the prohibition of arbitrary arrest and detention as well as the presumption of innocence and the guarantee of fair trial rights.

2.2.4 Other applicable international standards and guidelines

2.2.4.1 The following international standards and guidelines are relevant to the management of RDs in South Africa:

- The United Nations Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules), 1955 and 1977;
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985;
- The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Body of Principles), 1988;
- Resolutions of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990;
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990; and
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), 1990.

2.2.4.2 Other international standards and guidelines that are specifically Africa-grown under the auspices of the African Commission on Human and Peoples' Rights include:

- the Kampala Declaration on Prison Conditions in Africa,
- the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, and
- the Arusha Declaration on Good Prison Practice in Africa.

2.2.4.3 It must be observed that the above international standards and guidelines elaborate on the principles contained in the international legal framework that have already been articulated. Many of them are restatements and emphases of these principles and therefore only serve to buttress the importance of a detention system that respects the rule of law and implements in a practical manner, the principle of the presumption of innocence to the benefit of accused persons or RDs.

2.3 Domestic legal framework

2.3.1 Constitution of the Republic of South Africa (Act 108, 1996)

2.3.1.1 It is appropriate that the first point of reference in determining the legal norms that apply to the management of RDs in South Africa should be the Constitution of the

Republic of South Africa (the Constitution). This is important for two main reasons: firstly, in a democratic state, the constitution is the supreme law and all other laws derive their validity from the Constitution. Secondly, any practice or procedure that is based on a constitutionally invalid or inconsistent law will also be deemed to be invalid. The management of RDs must comply and be consistent with the provisions of the Constitution on the issue. The Bill of Rights (chapter 2 of the Constitution) becomes the general point of reference for the rights of all citizens including RDs.

2.3.1.2 Section 12(1), which deals with the right to “freedom and security of the person”, provides that:

“Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way”.

2.3.1.3 Section 35, makes provision for “*arrested, detained and accused persons*” and in Section 35(2) specifies the constitutional rights of detained persons, “including every sentenced prisoner.” These rights are reflected below:

(2) Everyone who is detained, including every sentenced prisoner, has the right:

- (a) *to be informed promptly of the reason for being detained;*
- (b) *to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;*
- (c) *to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (d) *to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;*
- (e) *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; and*
- (f) *to communicate with, and be visited by, that person’s:*
 - (i) *spouse or partner;*
 - (ii) *next of kin;*
 - (iii) *chosen religious counsellor; and*
 - (iv) *chosen medical practitioner.*

2.3.1.4 Section 35 further sets out that:

(3) Every accused person has a right to a fair trial, which includes the right:

- (a) *to be informed of the charge with sufficient detail to answer it;*
- (b) *to have adequate time and facilities to prepare a defence;*
- (c) *to a public trial before an ordinary court;*
- (d) *to have their trial begin and conclude without unreasonable delay;*
- (e) *to be present when being tried;*
- (f) *to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;*
- (g) *to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (h) *to be presumed innocent, to remain silent, and not to testify during the proceedings;*
- (i) *to adduce and challenge evidence;*
- (j) *not to be compelled to give self-incriminating evidence;*
- (k) *to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;*
- (l) *not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;*
- (m) *not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;*
- (n) *to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
- (o) *of appeal to, or review by, a higher court.*

(4) Whenever this section requires information to be given to a person that information must be given in a language that the person understands.”

2.3.2 Criminal Procedure Act (Act 51, 1977)

2.3.2.1 The Criminal Procedure Act is the law that governs the process of criminal law. The CPA focuses mainly on caseflow issues, such as the responsibility of the prosecuting authority; search warrants, arrests, summons, bail, trial, assistance to accused, mental illness and criminal responsibility, pleas, conduct of proceedings, sentencing and compensation and restitution.

2.3.2.2 Section 50 stipulates procedures on how to deal with persons after they have been arrested. The provision indicates the circumstances under which such a person could be detained subject to a determination by a court of law under whose jurisdiction the arrested person is brought. This demonstrates the cardinal principle of the criminal justice process – **that an accused person (whether detained or on bail) is**

presumed innocent until proved guilty.

- 2.3.2.3 Section 59 refers to the granting of bail before the first appearance in court. Except for the crimes specifically listed in Part II or Part III of Schedule 2, discretion for the bail release of accused persons from custody should be exercised by a police official of or above the rank of non-commissioned officer, in consultation with the investigating officer.
- 2.3.2.4 Section 63A of the Criminal Procedure Act grants the Head of a Correctional Centre, under certain circumstances and with regard to certain crimes, the discretion to either seek the release of a RD or to request amendment of the conditions of such a person's bail where the head of the correctional centre is satisfied that the population of a particular correctional centre is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused where an accused has been granted bail but remains in custody. This allows for the overcrowding of correctional centres to be taken into account in dealing with the management of RDs in South Africa.
- 2.3.2.5 Section 63(1) makes provisions for a court upon the application of the prosecutor or the accused, to amend the amount of bail or amend or supplement any condition imposed. This allows for accused who are unable to pay bail set to approach the court to reduce their bail or amend any conditions to ensure the accused is not held in custody merely on the basis the he or she cannot afford the bail.

2.3.3 South African Police Service Act (Act 68, 1995)

- 2.3.3.1 The role of the SAPS Act as part of the legal framework in the management of RDs is more institutional than substantive. The relevance of the SAPS Act is how members of the SAPS should perform their duties and functions in the overall CJS as prescribed in the CPA and other relevant legislation, regulation, policy documents or guidelines. It is thus important that the SAPS must see its role as critical to the effective management of RDs, as the agency that has primary contact with suspects that eventually become RDs. The ability of the state to effectively manage RDs will to a large extent be determined by the effectiveness of the interaction between the SAPS and other stakeholders in the CJS such as Correctional Services and the prosecuting authorities.

2.3.4 The Correctional Services Act (Act 111, 1998)

- 2.3.4.1 The Correctional Services Act is pivotal in the detention management of RDs. Following the Cabinet Lekgotla decision of 2009 to establish a dedicated branch in DCS dealing with Remand Detainees (RDs) in South Africa, the introduction and implementation of the Correctional Matters Amendment Act, 5 of 2011 brought about

some important amendments to the Correctional Services Act (Act 111, 1998) to provide for the management of remand detainees.

2.3.4.2 The Act was established to provide for amongst others, a correctional system; the establishment, functions and control of the DCS; the custody of all inmates under conditions of human dignity; the rights and obligations of sentenced offenders; the rights and obligations of remand detainees; a system of community corrections; release from the correctional facility and placement under correctional supervision, on day parole and parole and the National Council for Correctional Services.

2.3.4.3 A number of provisions in the Act are more directly relevant, such as chapter III which deals with the custody of all inmates under conditions of Human Dignity. It is important to note that the term "inmate" refers to both remand detainees and sentenced offenders.

2.3.4.4 Chapter III consists of Part A, B and C and is applicable to all inmates. The various sections in part A deal with amongst others, accommodation, nutrition, hygiene, clothing and bedding, exercise, health care, contact with community, religion, programmes and services, access to legal advice, reading material, complaints and requests as well as dealing with children and mothers of young children.

2.3.4.5 Part B deals with matters of discipline including infringements, procedures and penalties. Part C on security and safe custody, deals with amongst others, searches, identification, security classification, segregation, mechanical restraints, use of force, non-lethal incapacitating devices and firearms.

2.3.4.6 Chapter V of the Act was amended by the Correctional Matters Amendment Act, 5 of 2011 and makes provision for the management, safe custody and well-being of remand detainees. The chapter was extended from four to ten sections. The areas that were previously covered in this chapter were general principles, clothing, food and drink as well as visitor and communications. The amended chapter excludes visitors and communication and includes the following provisions:

- Safekeeping of information and records in line with the National Archives and Record Service of South Africa Act, 1996 (Act No. 43 of 1996).
- Services to be provided to pregnant women; mentally ill, disabled and aged RDs;
- Referral of terminally ill or severely incapacitated RDs to court;
- Provision of uniform to RDs;
- Surrendering of RDs for further investigation to SAPS; and
- Referral of RDs to court based on the length of detention.

2.3.5 The Extradition Act (Act 67, 1962)

- 2.3.5.1 The Act creates a special category of persons who may be kept in detention, pending surrender to another country, on the basis of crimes allegedly committed in that foreign country and not in South Africa, where there is an Extradition Agreement between South Africa and that foreign country, or where the President has determined in writing that the person should be surrendered.
- 2.3.5.2 An instruction to arrest a person emanates from the Minister of Justice following an interaction between the two countries. The Minister is empowered to order any person committed to detention under section 10 of the Extradition Act to be surrendered to any person authorised by the foreign State to receive him or her; but may also refuse if the nature of the offence for which the person is to be extradited is of a trivial nature, or is based on discriminatory grounds. Any person who has lodged an appeal may apply to be released on bail.
- 2.3.5.3 The magistrate is empowered with the same powers of further detention, further examination, granting of bail or discharge of the case as the magistrate has in dealing with a domestic case.
- 2.3.5.4 Where the magistrate finds that the person brought before him/her is liable to be surrendered to the foreign State based on a variety of factors, the magistrate issues an order committing such person to incarceration to await the Minister's decision with regard to his or her surrender. Such decision may be appealed within 15 days.
- 2.3.5.5 The Act also deals with the law relating to persons who are being extradited between two other countries, but where the person is held in South Africa and deems that the person is in lawful custody if the warrant or order was issued in an associated State; or the Minister has, at the request of the foreign State in which the warrant or order was issued, authorised such passage in custody.
- 2.3.5.6 The Extradition Act is particularly relevant to remand detention as the amended Correctional Services Act specifically defines a person detained in terms of this Act as a remand detainee.

2.3.6 The Immigration Act (Act 13, 2002)

- 2.3.6.1 The Act administered by the Department of Home Affairs (DHA) is relevant to RDs to the extent that persons arrested for violation of the Act are detained for the purposes of being prosecuted. Foreign nationals who have been declared to be illegal or undesirable in South Africa are also detained awaiting their deportation.

2.3.6.2 The DCS has frequently kept illegal immigrants (i.e. foreigners who are not charged with a crime but are illegally in the country) in its facilities on the basis of an arrangement that exists between it and the DHA.

2.3.6.3 Section 34 of the Act provides that without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director General of DHA provided that the foreigner concerned:

- Shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of the Act;
- May at any time request any officer attending him or her that his or her detention for the purpose of deportation be confirmed by warrant of a court, which if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
- Shall be informed upon arrest or immediately thereafter of his or her rights, in a language that he or she understands, when possible, practicable and available;
- May not be held in detention for longer than 30 calendar days without a warrant of a court which may extend such detention for a period not exceeding 90 calendar days; and
- Shall be held in detention in compliance with the minimum prescribed standards set out to protect his or her dignity and relevant human rights.

2.3.6.4 The classification of such persons as remand detainees is problematic as they are not provided for in the definition of a remand detainee. Persons held pending their deportation (as opposed to an extradition) are not therefore remand detainees. Unless certain provisions kick in they are also not detained on the basis of a court order but rather a DHA warrant.

2.3.7 The Mental Health Act (Act 17, 2002) and Criminal Procedure Act (CPA)

2.3.7.1 The CPA provides for procedures relating to the management of court processes and custody of remand detainees where mental illness impacts on the criminal proceedings.

2.3.7.2 Where it appears to the court on a factual or medical basis, that an accused person who is alleged to have committed an offence was at the time of the commission of the offence not criminally responsible due to a mental illness or mental defect which made him or her incapable of appreciating the wrongfulness of his or her act or omission, or acting in accordance with an appreciation of such wrongfulness, the court is obliged to direct that an enquiry be made into the mental condition of the accused person and report be submitted to the court.

- 2.3.7.4 Where it is alleged that an accused is not criminally responsible for the offence charged for as a result of mental illness or mental defect, the court may direct that an enquiry be made into the mental condition of the accused person and report be submitted to the court, provided the court is satisfied that some medical or factual basis has been laid for the allegation.
- 2.3.7.5 For purposes of the enquiry the court may commit the accused person to a psychiatric hospital or any other place designated by the court for such periods as it may from time to time determine. The period may not exceed thirty (30) days at a time.
- 2.3.7.6 The accused persons may be committed to the Secure Care Facilities or Remand Detention Facilities while waiting for a bed in a designated Mental Health establishment.
- 2.3.7.7 Where accused persons are committed to DCS facilities for purposes of observation, it is preferable that DCS facilities which have a health facility and are in near proximity to the psychiatric hospital are utilised.
- 2.3.7.8 Pending the committal of the person for the enquiry the case may be postponed. Where an accused person is in custody, the person may continue to be detained, but the J7 warrant for detention should be endorsed to reflect that the accused person is being detained pending observation.
- 2.3.7.9 Where an accused who is detained is committed for the enquiry a J138 warrant should be issued. The place where the observation is to be conducted and the type of observation required, i.e. single psychiatrist or panel observation, should be clearly indicated on the J138.
- 2.3.7.10 Should the court find that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may consider such information or evidence as it deems fit to determine whether the accused committed the offence in question or any other offence and whether the offence involved serious violence.
- 2.3.7.11 If an accused person is found incapable to stand trial by reason of mental illness or mental defect, the court is obliged in terms of the section 77(6)(a)(i) of the CPA to declare him or her a state patient and direct that he or she be detained in a psychiatric hospital or correctional centre in all cases of murder, culpable homicide, rape or compelled rape contemplated in sections 3 or 4 of the Sexual Offences Act, charges involving serious violence; or where the court considers it necessary in the public interest.

- 2.3.7.12 In terms of section 77(6)(a)(ii)(aa) of the CPA, where the accused person has committed any other offence, to have him or her admitted to and detained in an institution stated in the order as if an involuntary mental health care user, after which the procedure contemplated in section 37 of the Mental Health Care Act (Act 17 of 2002) applies.
- 2.3.7.13 If the court finds that the accused person is not capable of understanding the proceedings so as to make a proper defence and did not commit the offence or any other offence, it shall direct that the accused person be admitted and detained in an institution as an involuntary mental health care user.
- 2.3.7.14 If the court finds that an accused person committed the act in question and was, at the time of the commission of the act, not criminally responsible due to mental illness or intellectual disability, the court has a discretion in terms of section 78(6)(i)(aa), (bb), (dd) or (ee) of the CPA to declare the accused person a state patient and direct that he or she be detained in a psychiatric hospital or correctional centre, or direct that the accused person be admitted to and detained in a mental health facility as an involuntary mental health care user or release the accused person conditionally or unconditionally in all cases of:
- murder;
 - culpable homicide;
 - rape or compelled rape contemplated in sections 3 or 4 of the Sexual Offences Act;
 - charges involving serious violence; or
 - where the court considers it necessary in the public interest.
- 2.3.7.15 One major challenge faced by the detention institutions with regard to RDs committed pending observation is that there is no statutory requirement placed on the Department of Health with regard to availability of services and therefore some RDs wait for more than two years for a bed.

2.3.8 The White Paper on Corrections in South Africa (2005)

- 2.3.8.1 In paragraph 1.2 of this White Paper reference is made to The White Paper on Corrections and its focus on sentenced offenders. The White Paper on Corrections reiterated the need to deal with issues of corrections from the constitutional imperatives created by the final constitution of 1996. It recognized that while the Constitution provided for a system of detention that has a constitutional basis, the Constitution did not make any provision for an integrated justice system particularly in

view of the challenges of effective criminal justice in the new South Africa.

2.3.9 The Child Justice Act (Act 75, 2008)

2.3.9.1 The Act was established, amongst others, to provide a CJS for children who are in conflict with the law. It makes provision for the minimum age of criminal capacity of children and further talks about processes from arrest to diversion, trial and sentencing of children.

2.3.9.2 The Act provides for securing attendance at court and the release or detention and placement of children. Section 29 provides detailed procedures that govern the placement of children, alleged to have committed an offence, in child and youth care centres, while Section 30 provides detailed procedures that govern the placement of a child in a correctional centre or RDF. Section 30(1) defines the specific conditions that must prevail if a child is to be incarcerated in a correctional centre or RDF.

2.3.9.3 The Act limits the circumstances under which children can be incarcerated considerably, and requires the presiding officer to consider any recommendations relating to alternative placement of the child. This includes evidence in respect of the best interests of the child; the child's state of health; the child's previous record, the risk of any danger to the child or from the child to others; the appropriate level of security required; the risk of absconding and the probable length of detention. The presiding officer must ensure consideration of any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child.

2.3.9.4 The Child Justice Act can be interpreted as case-flow legislation for children in conflict with the law who have been accused of committing offences.

2.3.10 Probation Services Act (Act 116, 1991)

2.3.10.1 The Act makes provision for the establishment and implementation of programmes aimed at the combating of crime and for the rendering of assistance to and treatment of certain persons involved in crime. The Act clearly articulates the powers and functions of the probation officers. Although the Act deals mostly with persons already sentenced and placed on probation it also speaks to certain aspects of the remand detainee, which will be the focus here.

2.3.10.2 The probation officers in terms of the Act are responsible for, amongst others, the following:

- The investigation of the circumstances of an accused with a view to reporting to the court on his/her treatment and committal to an institution and rendering of

assistance to his/her family; and

- The investigation of the circumstances of an accused and the provision of a pre-trial report recommending the desirability or otherwise of prosecution.

2.3.10.3 The probation officer therefore has a role to play in identifying the feasibility of placing a person in a non-custodial setting pending the finalisation of their case.

2.3.11 Blueprint: Norms and standards for Secure Care Facilities (SCFs)

2.3.11.1 The blueprint is a policy framework which was developed by the Department of Social Development for management of SCFs in South Africa. Its objective is to provide standard and uniform services for children in conflict with the law who are detained in SCFs. It communicates ways in which different sectors of the society can work together effectively to uphold the principles of child justice and restorative justice system. The ultimate aim is to promote the best interest of the children in conflict with the law and to prevent offending and re-offending.

2.3.11.2 The blueprint defines “**secure care**” as a **residential facility** and/or **programme of intervention** which ensures the appropriate physical, behavioural and emotional containment of young people who are charged with crimes and who are awaiting trial or sentenced. Such a facility provides an environment, milieu and programme conducive to the care, safety and healthy development of each young person while at the same time ensuring the protection of communities.

2.3.11.3 The concept “secure care” was coined during the transformation process of the child and youth care system. This term was used to distinguish those children who because of coming into conflict with the law would need a programme that would ensure that they take responsibility for their wrong doing, that recidivism is prevented, as well as contain them, restrict their movements and ensure the safety of the community. The intention was to ensure that there is a “place” where these children are contained, as well as an “intervention” during their containment.

2.3.11.4 The blueprint has three distinct sections:

- **Part One:** covers such areas as guiding principles and values, requirements for an ideal facility, design principles and basic building blocks for accommodating all the housing needs of the children including provision of services and programmes.
- **Part Two:** provides amongst others a rationale for the establishment of the blueprint which includes the summary of challenges experienced by the SCFs based on the situational analysis conducted, mandate for DSD as the national department responsible for SCFs, vision, mission, guiding principles, secure

care model with options, legislative framework, child justice processes, inter-sectoral collaboration, services for children, specific roles and responsibilities of service providers, outsourcing and monitoring and evaluation.

- **Part Three:** articulates norms and standards in relation to several areas including applicable policy and legislative framework, infrastructure, security, outsourcing, maintenance, organizational development, occupational health issues, community participation, resources, professional services, management and leadership, information management, services and programmes and children's rights.

2.4 Challenges arising from the legal framework and implications

- 2.4.1 An examination of the legal framework relating to RDs has revealed a plethora of legislation, guidelines, protocols, and policy documents of different shades and provisions dealing with or attempting to deal with RDs under different names and terms that could easily be confused. The possibility exists that the different agencies may see their roles differently as a result of the various legislation and other documents.
- 2.4.2 Every initiative at streamlining and improving a system for the management of RDs must take its cue from Section 35 of the Constitution in arriving at appropriate responses.
- 2.4.3 DSD has developed an elaborate policy framework for SCFs and DCS as an institution that also keeps children in conflict with the law should work cooperatively with DSD to ensure that the needs of children are adequately taken care of.

CHAPTER 3: DEFINITION OF TERMS

3.1 Introduction

3.1.1 The Constitution of the Republic of South Africa (Act 108, 1996), the Criminal Procedure Act (Act 51, 1977) and other laws applicable to Awaiting Trial Detainees including international laws and treaties make references to arrested, detained and accused; while the Correctional Services Act (111, 1998) excluding the Correctional Matters Amendment Act (Act 5, 2011) provides several definitions of unsentenced offenders and inmates.

3.1.2 The White Paper on Corrections (2005) makes reference to the following categories of awaiting trial detainees who are kept in custody of DCS:

- Awaiting trial detainees who have been granted bail that they cannot afford to pay;
- Awaiting trial detainees who have been denied bail; and
- Awaiting trial children.

3.1.3 This chapter will provide clarity on the categories of awaiting trial detainees, rationale for shifting from the Awaiting Trial Detainee to Remand Detainee (RD) and other terms which are critical to our understanding as they have an impact on the broader classification of the clients of the Criminal Justice System (CJS) and development of policies within the DCS environment.

3.2 Awaiting Trial Detainee

3.2.1 The term awaiting trial detainee was used in DCS to refer to an accused person placed in custody before conviction and/or sentencing, prior to the enactment of the Correctional Matters Amendment Act (Act 5, 2011). The literal interpretation of the term would include the following categories of accused:

- Accused persons who have been detained after the first court appearance whose trials have not commenced i.e., those on pre-trial phase;
- Accused persons in detention whose cases were being heard by the courts i.e. those who were on the trial phase;
- Accused persons detained in DCS pending observation at designated Mental Health Establishments;
- All the accused persons who were detained in line with section 9 of the Extradition Act (Act 67, 1962); and
- All the accused persons who were convicted and awaiting sentencing.

3.2.2 The term “awaiting trial” gave a false notion that excluded from its definition very significant sectors of the population not sentenced but in DCS facilities, most obviously those convicted who were neither sentenced nor awaiting trial as their trial had been finalised.

3.2.3 The preferred term “remand” is a legal term which has two related but distinct usages. Its etymology is from Latin *re-* and *mandare*, literally "to order." It evolved to *remandare*, or "to send back word." "Remand (court procedure) refers to an action by an appellate court in which it sends back a case to the trial court or lower appellate court for action. Remand may also mean the “detention of suspects before trial or sentencing”.

3.2.4 The term “Remand Detainee” (RD) was adopted in the Correctional Matters Amendment Act (Act 5, 2011) and is inclusive of all categories of unsentenced persons in DCS facilities, awaiting further action by a court, i.e. persons awaiting trial, awaiting sentencing, awaiting extradition. The definition by its nature excludes sentenced offenders (even when returned from parole break) as well as state patients (where a decision by a court has already been made) and persons awaiting deportation. The term remand detainee is used as such throughout this document.

3.3 Determination of different categories of remand detainees

3.3.1 In line with this new defining of those within DCS, DSD and SAPS detention centres it is important to adapt the warrant to reflect the different categories of remand detainees. The warrant of detention (J7) must therefore be endorsed to reflect the following categories of RDs:

- RDs detained (to include children as SCF) pending observation at a Mental Health Establishment;
- RDs detained in line with section 7 of the Extradition Act; and
- RDs who have been convicted and waiting for sentencing.

3.3.2 This will assist in determining appropriate interventions from any of the detention facilities housing remand detainees. For example, accused person who have been convicted but not sentenced must be considered a higher escape risk than those awaiting conviction. Accommodation should therefore be in accordance with such security assessment.

3.4 Other Terms

3.4.1 Secure Care Facility

3.4.2.1 The term refers to Child and Youth Care Centres established in line with the Children's Act (Act 38, 2005), which cater for the reception, development and secure care of children awaiting trial or sentence. The placement of children in such facilities is in line with the provisions of the Child Justice Act (Act 75, 2008).

3.4.2 Remand Detention Facilities (RDFs)

3.4.2.1 The term was adopted to refer to facilities that detain Remand Detainees (previously referred to as ATDs) to pave the way to a specialised facility, dealing with issues specific to unsentenced inmates as opposed to the sentenced inmates. This process is at its beginning stages and there are no facilities in DCS built for the specific purpose of holding unsentenced inmates. Although some centres have been used almost exclusively for RDs (a minority of sentenced inmates tend to remain as cleaners or in the kitchen as RDs cannot be forced to work nor is it practical to train RDs in work without a guarantee of their length of stay). Many centres in which RDs are detained are "mixed" facilities. The "complete RDFs" detain more than 90% of RDs. The mixed RDFs consist of both sentenced and unsentenced inmates.

3.4.2.2 The term "RDF" was adopted in the Correctional Matters Amendment Act (Act 5, 2011) and refers to complete RDFs and sections, units and cells within the mixed facilities that detain RDs. The term has been defined as follows in the Act:

"remand detention facility" means a place established under this Act as a place for the reception, detention or confinement of a person liable to detention in custody, and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of detention, protection, treatment or otherwise, and all quarters used by correctional officials in connection with any such remand detention facility, and for the purpose of sections 115 and 117 includes every place used as a police cell or lock-up;"

3.4.3 Remand Detention Official

3.4.3.1 The term refers to a DCS official who works at the Remand Detention Facility. The official who works in complete RDFs and sections of mixed facilities where RDs reside will apply mainly legislation and policies applicable to the management of RDs. RD officials need to be specialists in attending to the RD populations. In particular they must be able to liaise efficiently within the cluster and understand fully legislation available to them. The official working in a facility that detains RDs and sentenced offenders is expected to be well versed in legislative provisions and policies applicable to all categories of detainees. The term has been incorporated in the Correctional Matters Amendment Act (Act 5, 2011) and defined as follows:

“Remand detention official” means an employee of the Department appointed under section 3 (4) at a remand detention facility or transferred to a remand detention facility.

3.4.3.2 The DCS must make a resolution on nature of training that such officials receive and whether a dispensation separate from officials attending sentenced offenders may be appropriate.

3.4.4 Accused placed under non-custodial system

3.4.4.1 The following accused persons are placed under non-custodial system and should not be classified as RDs:

- those who have paid bail,
- those placed on warning; and
- those placed under the supervision of a probation officer or a correctional official in line with section 62(f) of the Criminal Procedure Act (Act 51, 1977).

3.4.4.2 The accused persons who are placed under the supervision of probation officer are managed by DSD under the Probation Services Act (Act 116, 1991). Those placed under the supervision of the correctional official are managed by DCS under the system of community corrections.

3.4.5 The inmate

3.4.5.1 According to Correctional Services Act (Act 111, 1998), the term inmate is inclusive of both sentenced and unsentenced categories of detainees. It has been amended in the Correctional Matters Amendment Act and has been defined as follows:

“Inmate” means any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody or is en route from one correctional centre or remand detention facility to another correctional centre or remand detention facility;

3.4.6 State patient and Involuntary mental health care user

3.4.6.1 The State patient and involuntary mental health care user are unsentenced detainees who are generated through a formal court process of referring the accused persons for an inquiry into their mental condition where it appears to the court on a factual or medical basis, that the accused persons who are alleged to have committed offences were at the time of the commission of the offences not criminally responsible due to a mental illness or mental defect which made them her incapable of appreciating the

wrongfulness of their act or omission, or acting in accordance with an appreciation of such wrongfulness.

3.4.7 Sentenced offenders with outstanding cases

3.4.7.1 There are persons who are detained with more than one case. If they are convicted and sentenced to custodial penalty, even if other charges are still pending, they cease to be RDs and should be classified as sentenced offenders with further charges. Responsibility for such persons lies exclusively with the DCS, including responsibility for court appearances.

3.4.7.2 There are sentenced offenders who incur additional charges while serving custodial penalties. If they complete serving the custodial penalty before the finalization of other cases, their classification will change to a Remand Detainee status.

3.4.8 Independent Correctional Centre Visitor (ICCV)

3.4.8.1 The term refers to an official who is appointed by the office of the Inspecting Judge in line with section 92 of the Correctional Services Act (Act 111, 1998). The details on the functions of the ICCV are included in chapter 8 (oversight and Control). It is however worth mentioning that the services of the ICCV are applicable to Correctional Centres as well as Remand Detention Facilities. It is therefore critical for DCS to review the concept because at a face value it would mean that the official provides services only in Correctional Centres.

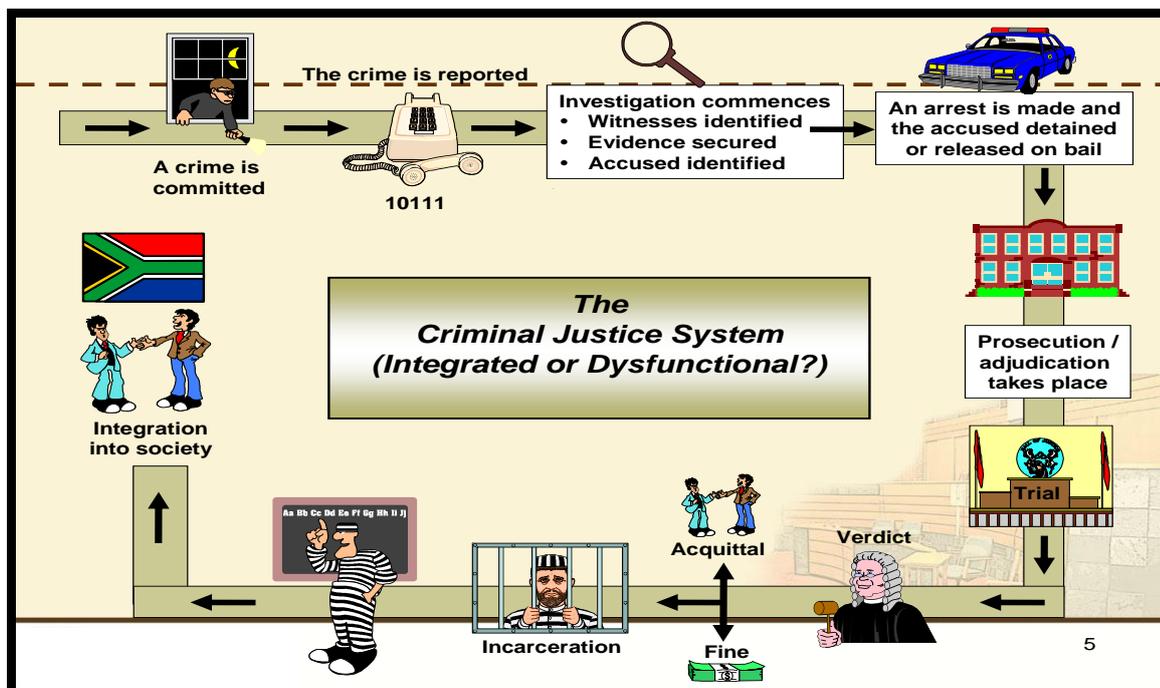
CHAPTER 4: GOVERNANCE

4.1 Introduction

- 4.1.1 The area on governance will cover the role players within the Criminal Justice System (CJS), institutional mandate for management of remand detainees, cooperative governance including the cluster management, the role of Non-Governmental Organizations (NGOs) and training of officials working with remand detainees.

4.2 Role players from arrest to detention

- 4.2.1 Within the South African CJS, there are a number of role-players who are involved in the management of arrested, accused and detained people. The CJS consists of the following four **core** departments or institutions: the South African Police Service (SAPS), the Department of Justice and Constitutional Development (DoJCD), the National Prosecuting Authority (NPA), the Department of Correctional Services (DCS) and the Department of Social Development (DSD). However, the Justice Crime Prevention and Security (JCPS) Cluster established by cabinet includes the Department of Defence (DOD) and Department of Home Affairs (DHA), in addition to a number of other stakeholders such as the Legal Aid South Africa (LASA).
- 4.2.2 SAPS is responsible for arrest and investigation, while the NPA assumes the role of review of evidence provided by the police and decides whether or not the available evidence warrants prosecution of the accused. DoJCD is responsible for court administration (i.e. prosecution and adjudication of cases brought before it by the police). The court (Presiding Officer) decides whether the accused will be detained while awaiting trial or await trial out of custody. DCS and DSD are responsible for carrying out court decisions with regard to the detention of RDs including those awaiting sentencing. The responsibility of detaining RD children is shared between DCS and the DSD. DCS detains the bulk of RDs (approximately 96% of total RD population), while the DSD detains in its Secure Care Facilities (SCFs) only children RDs who constitute about 3 % of the RD population.
- 4.2.3 Each of the JCPS cluster departments, excluding the DOD and the DHA, play a significant role in the CJS from the time a suspect is arrested to the time of sentencing (see figure blow which outlines the processes involved).



Processes involved in the Criminal Justice System

4.3 Institutional management

4.3.1 Overview

4.3.1.1 The two institutions that have been given responsibility for the detention management of RDs are DCS and DSD; however from time to time SAPS keeps a small population of RDs.

4.3.1.2 The legal document that allows the two institutions to keep RDs is the warrant of detention called J7. The time limit for the validity of the warrant is the next court date. Should there be no new warrant of detention (J7) issued on the expiry date of the next court appearance, then this by implication means that the person is “detained unlawfully”; however the detention institutions **must not** release any RD without communicating with the relevant SAPS police station and the court that sent the RD for detention.

4.3.1.3 The release of RDs by the detention institutions must be authorized by the court through the issuing of a warrant of liberation or payment of bail if the RD was detained pending payment of bail.

4.3.1.4 If the RD has more than one charge and has not been given bail in one of the charges, he/she will not qualify for release.

4.3.2 South African Police Services (SAPS)

4.3.2.1 The management of RDs by SAPS is limited to their functional need to continue investigations of cases and their historical responsibility to transport accused persons

including RDs detained in DCS and SCFs, to courts and from courts to detention facilities and Mental Health Establishments.

- 4.3.2.2 SAPS is responsible for the transportation of the RDs from the detention facilities (DCS and DSD) to Mental Health Establishment for forensic evaluation prescribed by the court. However the SAPS officials must produce a J188 form i.e., the form that prescribes the type of evaluation and the name of the health facility where the evaluation will be done, so that the detention institution can register the release as a temporary release.
- 4.3.2.3 In situations where the RDs have been handed over to SAPS officials by DCS and DSD for court appearances and further investigations, DCS and DSD cease to take responsibility for the RDs; therefore SAPS will take financial responsibility for the provision of required health and guarding services as well as meals for all RDs detained, including in court cells while waiting for their appearance before the Presiding Officer.
- 4.3.2.4 Arrival time in courts for the RDs that are collected from the detention facilities is crucial for ensuring appearance in front of the Presiding Officer; therefore it is imperative for SAPS and DCS to enter into a formal agreement for management of RDs that have to be transported over long distances. Longest distance travelled by SAPS between detention facilities and courts can be between 200 and 420 kilometres.
- 4.3.2.5 Prior to the implementation of section 5(2)(b) of Correctional Matters Amendment Act (Act 5, 2011) SAPS kept in their police cells a number of RDs through a bilateral agreement between SAPS and DCS regional offices. The above-mentioned section makes provision for the detention of inmates in a police cell for a period not longer than seven (7) days if there is no Correctional Centre (CC) or Remand Detention Facility (RDF) nearby. All the bilateral agreements for detention of RDs in police cells for longer than seven (7) days ceased to operate on 01 March 2012 as this was the official date set for the implementation of section 5(2)(b).
- 4.3.2.6 SAPS investigators from time to time request for the temporary release of RDs to their custody for further investigation; however the process was not formally regulated. The surrendering of RDs has been formalized by including section 49F in the Correctional Matters Amendment Act (Act 5, 2011). The provision clearly stipulates that no remand detainee may be surrendered to the SAPS for the purpose of further investigation, without authorisation by the National Commissioner of DCS and the National Commissioner may authorise the surrender of a RD for a period not exceeding seven days. The approval for the temporary release of children detained in SCFs will be given by the head of the SCF.

- 4.3.2.7 When the RD has been surrendered by DCS and DSD to SAPS for further investigation, DCS and DSD still remain accountable to the court with regard to honouring the next court appearance. DCS, DSD and SAPS must develop a protocol which should incorporate such critical issues as management of requests and approvals, handing over of RDs to SAPS, DCS and DSD, management of RDs who did not return to DCS and DSD including escape and death that take place while the RD is under SAPS custody.
- 4.3.2.8 When the RDs are temporarily under the custody of SAPS, SAPS is obligated to adhere to the relevant sections of the Bill of Rights which apply to accused, arrested and detained and other relevant prescripts including making provision for such special categories as children, mothers detained with children, pregnant women, mentally ill, sick and the disabled.
- 4.3.2.9 RDs enter into the CJS through arrests made by SAPS and it is imperative that their identities are verified by the arresting officials in consultation with DHA in order to adhere to section 17 of the Identification Act (Act 68, 1977). The verification system utilized by SAPS should include the use of multiple biometrics. This will help in reducing aliases, handling of the risk of treating repeat offenders as first time clients of the CJS and will ultimately contribute to effective measuring of recidivism. Chapter 8 on the use of integrated systems talks to CJS strategies for dealing with identification of accused including RDs.

4.3.3 The Department of Social Development (DSD)

- 4.3.3.1 DSD derives its mandate from the following sections of the Constitution of the Republic of South Africa:
- Section 27(1)(c) provides for the right of access to appropriate social assistance to those unable support themselves and their dependants;
 - Section 28(1) sets out the rights of children with regard to appropriate care (basic nutrition, shelter, health care services and social services) and detention; and
 - Schedule 4 further identifies welfare services, population development and disaster management as functional areas of concurrent national and provincial legislative competence.
- 4.3.3.2 The mandate for detention management of children who are in conflict with the law was assigned through a provision incorporated in the National Crime Prevention Strategy (NCPS) which was approved by Cabinet in 1996. The strategy consists of four pillars, including pillar 1: the criminal justice process.

- 4.3.3.3 The National programmes for Pillar 1 include Diversion Programme for Minor Offenders and Secure Care for Juveniles.
- 4.3.3.4 The National Programme on Diversion for Minor Offenders was aimed at diverting petty offenders and juveniles out of the CJS because it was noted that the CJS was enormously costly and often inappropriate for dealing with petty offenders, particularly juveniles, where stigmatisation can pose an intolerable burden on the normal developmental path to responsible adult citizenship.
- 4.3.3.5 The National Programme in relation to Secure Care for Juveniles argued that youthful offenders suspected of serious offences should not be held in standard detention facility or police cells. It was conceded that they do, however, need to be held securely, in an environment that limits unnecessary trauma and strengthens the likelihood of eventual reintegration into society. This would require the creation of special secure care facilities for young suspects and offenders.
- 4.3.3.6 The lead department was DSD through the inter-ministerial committee on Young People at Risk, which included the DoJCD, SAPS and DCS. The team was assisted by other key departments such as Public Works, NGOs and the private sector. The key actions were to speed up the completion or conversion of necessary buildings for secure care facilities for juveniles and to implement legislative steps and social programmes to discourage the exploitation of juveniles by criminal syndicates. The Child Justice Act (Act 75, 2008) which is a parallel of the Criminal Procedure Act for children makes reference to Child and Youth Care Centres instead of SCFs and provides a legal mandate for the detention of children in conflict with the law by DSD.
- 4.3.3.7 There are two categories of SCFs managed by DSD i.e., those managed under the leadership and guidance of the provinces and those managed through the outsourcing model highlighted in part three of the Blueprint. The latter are managed through an establishment of a formal agreement between the province and the service provider.
- 4.3.3.8 From time to time SCFs receive children who are not easily manageable and the tendency is to request the court to place them in DCS facilities. Instead of transferring this category of RDs to DCS, SCFs should ensure that these children are properly assessed and the capacity for their management is developed and shared among various SCFs, alternatively that more secure facilities are created. The more responsibility a department such as DSD is given with regard to a group of inmates means a department such as DCS will cater less for such groups.
- 4.3.3.9 DSD has an additional mandate for management of accused persons, not only children, placed under the probation officers in terms of section 62(f) of the Criminal

Procedure Act. The role of the probation officers prior to such assignment is to investigate the circumstances of accused persons for reporting to the court and provide pre-trial and pre-sentence reports with recommendations for consideration by courts.

4.3.4 Department of Correctional Services (DCS)

4.3.4.1 DCS has the responsibility for admission and general management of the greater population of RDs. According to the White Paper on Corrections (2005), DCS was given the responsibility of keeping a range of detainees within its facilities, from the time of the Department of Prisons was administered under the Ministry of Justice and was perceived to have a single custodial mandate in relation to the CJS.

4.3.4.2 In DCS, before the introduction of section 3(2)(d) of the Correctional Matters Amendment Act (Act 5, 2011), there was a prevailing notion that RDs were the responsibilities of SAPS and DoJCD although the legislation governing DCS, gazetted on 27 November 1998 had the following objective:

*“To provide for a correctional system; the establishment, functions and control of the Department of Correctional Services; the custody of all prisoners under conditions of human dignity; the rights and obligations of sentenced prisoners; the **rights and obligations of unsentenced prisoners**; a system of community corrections; release from prison and placement under correctional supervision, on day parole and parole; a National Council for Correctional Services; a Judicial Inspectorate; Independent Prison Visitors; an internal service evaluation; officials of the Department; joint venture prisons; penalties for offences; the repeal and amendment of certain laws; and matters connected therewith”.*

4.3.4.3 The Medium Term Strategic Framework of the Government (MTSF, 2009-2014) under the *“Strategic priority 6: Intensify the fight against crime and corruption”* assisted in dealing with the confusion by incorporating the following focus area:

“41.7 Promote the rehabilitation of detainees to reduce recidivism, addressing the challenge of overcrowding in detention facilities through the creation of a branch dealing with Awaiting Trial Detainees (RDs), ensuring effective security in detention facilities”.

4.3.4.4 DCS has fully accepted the responsibility for detention management of RDs by reviewing its legislation through the Correctional Matters Amendment Act (Act 5, 2011). Section 3 on the *establishment, functions and control of the department* has been extended to include the responsibility for management of RDs.

4.3.4.5 The mandate for the provision of services and programme including respect for the

rights of RDs is derived from the Constitution of the Republic of South Africa and the Correctional Services Act, the Criminal Procedure Act (Act 51, 1977), the Child Justice Act (Act 75, 2008) and other relevant laws and prescripts mentioned in the chapter on the legislative framework.

- 4.3.4.6 DCS must ensure that all officials are officially informed about the revised mandate so that they can display full commitment in the delivery of services and programmes to RDs. The revised Correctional Services Act calls for a review of the focus of DCS to reflect the responsibility for detention management of RDs.
- 4.3.4.7 DCS has a small percentage of accused placed under non-custodial system in line with section 62(f) of the Criminal Procedure Act (Act 51, 1977). It is imperative for DCS to develop guidelines for management of this category of accused.
- 4.3.4.8 DCS incorporates within its Correctional Services Act (Act 111, 1998) Chapter XII and Chapter XV. The former focuses on the powers, functions and duties of correctional officials while the latter outlines the offences that may be committed during the process of management of inmates. These provisions apply in the management of remand detainees in all RDFs.

4.4 Cooperative governance

- 4.4.1 The government adopted a plan to revamp and improve the efficiency of the CJS and security system so that public morale, social fabric and legitimacy and credibility of the state is improved; critical in this regard is the involvement of individuals and communities in the fight against crime.
- 4.4.2 In order to deal with, among others, the high levels of RDs within the CJS, the Criminal Justice Strategy and the National Crime Prevention Strategy (NCPS) of 1996 highlighted the need for an Integrated Justice System (IJS) based on improved interdepartmental co-ordination. However, more than a decade later, achieving a fully Integrated Justice System has remained elusive. The recently launched Criminal Justice Review once again highlighted the same problems with respect to the management of RDs as were highlighted in the NCPS.
- 4.4.3 While acknowledging that there has been a lot of work done in order to improve the functioning of the CJS in general e.g. legislative interventions, improving resource allocation, improvements in infrastructure, etc the absence of a fully integrated justice system continues to hamper efforts aimed at dealing with the RD problem.
- 4.4.4 In February 2008, the President's State-of-the-Nation address incorporated the agreement made by Cabinet on a set of changes required for the establishment of **a new modernized, efficient and transformed CJS**. This would entail among other

things, setting up of a new coordinating and management structure for CJS at every level, bringing together all role players such as judiciary and magistracy, the police, prosecutors, correctional services and Legal Aid South Africa.

4.4.5 The Cabinet further approved a seven-point plan which **must** be adopted and implemented in an integrated and holistic manner to achieve a new dynamic and coordinated CJS. The plan incorporates the following:

- Adoption of a single vision and mission leading to a single set of objectives, priorities and performance measurement targets for the CJS by the JCPS cluster;
- Establishment through legislation or by protocol a new and realigned single CJS coordinating and management structure;
- Making substantial changes to the present court processes in criminal matters through practical, short and medium term proposals to improve the performance of the courts, especially and initially the Regional Courts;
- Implementation of key priorities identified for the component parts of the CJS, which are part of or impact upon the new court process, especially as it pertains to improving capacity;
- Establishment of an integrated and seamless national CJS IT database/system containing all information relevant to the CJS and review and harmonise the template for gathering information relating to the CJS;
- Modernization of all aspects of the systems and equipment of the CJS, including the fast tracking of the implementation of the present projects; and
- Involvement of the population at large in the fight against crime by introducing changes to the CPF regime, including expanding the role to deal with all matters in the CJS for example policing and parole boards as well as provision of financial and administrative infrastructure to give it “teeth”.

4.4.6 The Office of the Criminal Justice System Review (OCJSR) was established through protocol to drive the implementation of the seven-point plan, which must include improved management of RDs who are clients of the system from arrest to conviction and sentencing. The office forms part of the cluster management system which operates within the broader framework of the government and within the JCPS cluster.

4.5 Cluster management

4.5.1 The cluster system is the approach utilized by the government to deliver through a formal plan of action on the strategic priorities outlined in the Medium Term Strategic Framework (MTSF). The MTSF is meant to guide planning and resource allocation across all spheres of government. National and provincial departments have to develop their five-year strategic plans and budget requirements, taking into account

the medium-term imperatives of the government.

4.5.2 The MTSF for 2009-14 focuses on 12 outcomes, including outcome 3: ***“All people in South Africa are and feel safe”***. The fight against crime and corruption is firmly embedded in this outcome.

4.5.3 The delivery partners for outcome 3 include several entities and those that play an active role in the detention management of RDs are:

- South African Police Service (SAPS),
- National Prosecuting Authority (NPA),
- Department of Justice and Constitutional Development (DoJCD)
- Department of Correctional Services (DCS),
- Department of Social Development (DSD),
- Department of Home Affairs (DHA),
- Department of Health (DOH),
- The Judiciary,
- Legal Aid SA (LASA), and
- National Treasury (NT).

4.5.4 Outcome 3 has several outputs and the critical one for this White Paper is output 2: “An effective Criminal Justice System”.

4.5.5 The coordinating department for output 2 is the DoJCD. The latter coordinates through the National Development Committee which consists of several sub-structures or task teams including *Case Flow Management Task Team, Criminal Justice System Review Team, Integrated Justice System Board, Integrated Justice System Research Coordination Committee, Inter-Sectoral Committee on Child Justice, Management of Awaiting Trial Detainees Task Team, Restorative Justice Task Team, Victim Empowerment Programme and Human Trafficking task team*. Each sub-structure is led by a JCPS cluster department and is chaired by a senior manager at the level of a Chief Director of the lead department.

4.5.6 The National Development Committee consists of the secretariat, chairpersons of the various sub-structures and the executive managers from the major role player departments such as DoJCD, SAPS and DCS.

4.5.7 The National Development Committee is led by the chairperson from DoJCD who assigns the responsibility for driving the implementation of each indicator and key activities to its sub-task teams. The JCPS departments have a responsibility to include relevant indicators and key activities in their departmental strategic plans and annual performance plan.

- 4.5.8 The sub-structures handle operational and policy challenges that affect the functioning of CJS through the development of protocols. The protocols that have an impact on the flow of the cases of the accused persons including RDs are endorsed by the CJSR committee before submission to the National Development Committee.
- 4.5.9 The chairperson of the National Development Committee reports all developments to the Director Generals (DGs) Committee of the JCPS cluster for approval.
- 4.5.10 Although approval for protocols at this level is essential, for these to be effective each Department must “translate” these into operational procedures communicated in a comprehensible manner to all those implementing such protocols. In DCS this means that each head of an RDF must be familiar with the protocols affecting RDs.
- 4.5.11 This White Paper subscribes to and endorses the current approach utilized for managing the provisions that require cooperation from various partners within the CJS.
- 4.5.12 There are several protocols which have been developed within the cluster, such as:
- Bail Protocol (section 63A of the Criminal Procedure Act),
 - Protocol on Referral of Terminally Ill or Severely Incapacitated Remand Detainees to court (section 49E of the Correctional Services Act)
 - Protocol on Maximum Incarceration Periods of Remand Detainees (section 49G of the Correctional Service Act).
 - Protocol on procedure to be followed in the case of mental enquiries in respect of accused persons; and
 - Consultation Protocol (provision of legal services by Legal Aid SA to accused including RDs in SAPS, DCS and DSD).
- 4.5.13 Other areas that require management through the development of protocols are:
- Management of RDs placed in detention institutions pending observation: some wait for more than two years in a detention facility for a bed in a mental health establishment;
 - Management of the State Patients detained in remand detention facilities and SCFs: This category is detained indefinitely and there is no established process for their management within the remand detention facilities. The processes are only clearly outlined for those detained in mental health facilities managed by the DoH; and
 - Surrendering of RDs to SAPS for further investigation.
- 4.5.14 Other areas that require management through the development of protocols will be

determined and discussed at the relevant substructures of the National Committee. All the protocols will be endorsed and approved through the formal processes that have been established within the CJS.

- 4.5.15 Provision(s) of the protocol that require(s) alignment with particular legislation or several pieces of legislation will be handled during the review of the applicable legislations.

4.6 The role of Non-Governmental Organizations (NGOs)

- 4.6.1 The services of NGOs will be utilized by the institutions responsible for detaining of RDs through formal agreements.
- 4.6.2 NGOs have a crucial role to play in rendering services to RDs. It remains the responsibility of government and in particular Departments which detain RDs to ensure compliance with the rights of RDs. However the work of NGOs is complementary to these obligations.
- 4.6.3 It must be acknowledged that officials of the Departments such as DCS have, simply by wearing a uniform, a different response from inmates and may therefore not in all situations be the most effective implementer of programmes and services.
- 4.6.4 This is particularly so in cases where officials are responsible for security and discipline. The role of NGOs is therefore crucial in providing the services and programmes necessary within a remand detention facility.

4.7 Training and development of officials

- 4.7.1 A cluster training programme will be developed for creating a common understanding among the JCPS cluster departments on what constitutes appropriate training of remand detention officials as defined in the CSA; however all departments responsible for detention of RDs will extend the training further in order to cater for the provisions applicable to their institutions.
- 4.7.2 DCS should review its current model of training for new recruits and develop an integrated approach which will cater for the needs of remand detainees.
- 4.7.3 With the establishment of a branch on remand detention it must be acknowledged that officials working in RDFs or with RDs need specialised knowledge not necessarily required in correctional centres dealing with sentenced offenders.
- 4.7.4 It is imperative that DCS look at the type of training required for RD officials and to implement such training at all levels.

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CHAPTER 5: RIGHTS AND PRIVILEGES OF REMAND DETAINEES

5.1 Origins of rights

- 5.1.1 The rights of detainees can be found in various international as well as domestic instruments, standards, treaties and legislation.
- 5.1.2 The critical source documents which inform the rights for Remand Detainees in South Africa are the UN Standard Minimum Rules for the Treatment of Prisoners to which South Africa is a signatory and the Bill of Rights as enshrined in the Constitution of the Republic of South Africa, as well as sections of the Correctional Services Act, 111 of 1998, as amended.
- 5.1.3 In addition to the rights mentioned in this chapter the rights specified in the DSD blueprint mentioned previously will be applicable to children detained in SCFs.
- 5.1.4 The institutions detaining remand detainees will respect rights applicable to vulnerable categories of RDs, such as the disabled, mentally ill, and aged.
- 5.1.5 The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child will apply to all children who are in conflict with the law detained in police cells, DCS facilities and SCFs.
- 5.1.6 The Constitution being the supreme law in South Africa asserts in Section 35(2) the rights for detained persons. These rights are included in the Correctional Services Act. Where some rights are subject to restriction they are dealt with under amenities.
- 5.1.7 Amenities are on occasion mentioned in the same context as rights. However, generally the rights listed below may not be limited whereas the amenities or privileges may be limited provided that sufficient reasons exist for the limitation thereof.

5.2 Specific rights for remand detainees

The following specific rights apply to remand detainees in South Africa:

- 5.2.1 Remand Detainees shall be presumed innocent and will be treated as such.
- 5.2.2 Remand Detainees must be held in cells which meet the requirements prescribed by regulation or any other policy developed by the detention institution 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.

5.2.3 The following categories must be kept separate especially in respect of sleeping accommodation:

- RDs must be kept separate from sentenced offenders;
- Males separate from females; and
- Children must be kept separate from adults and in accommodation appropriate to their age.

5.2.4 On admission, the Remand Detainees must be informed of their rights to choose and consult with a legal practitioner; or to have a legal practitioner assigned by the State, at state expense.

5.2.5 On admission Remand Detainees must be provided with written information or informed about the rules governing their treatment, the disciplinary requirements, the authorised channels of communication for complaints and requests and all such other matters as are necessary to enable them to understand their rights and obligations.

5.2.6 Remand Detainees must be provided with adequate diet to promote good health.

5.2.7 Clean drinking water must be available to all Remand Detainees.

5.2.8 Remand Detainees must be provided with clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions.

5.2.9 Every Remand Detainee has the right to at least one hour of exercise per day.

5.2.10 Every remand detainee has the right to adequate medical treatment and may, subject to certain conditions be visited, examined and treated by a medical practitioner of his or her choice; however if he/she opts to utilize the medical practitioner of his/her own choice, he/she will be personally liable for the costs of any such consultation, examination, service or treatment.

5.2.11 No remand detainee may be compelled to undergo medical intervention or treatment without informed consent unless failure to submit to such medical intervention or treatment will pose a threat to his/her health or the health of other persons.

5.2.12 All remand detainees must be provided the necessary means to notify their next of kin of their detention.

5.2.13 A remand detainee who is a foreign national must be allowed to communicate with

the appropriate diplomatic or consular representative or, where there is no such representative, with a diplomatic representative of the state or international organisation whose task it is to protect the interests of such detainee.

- 5.2.14 All remand detainees must be allowed freedom of conscience, religion, thought, belief and opinion.
- 5.2.15 Remand detainees must be provided with the opportunities and facilities to prepare for their defence.
- 5.2.16 Every remand detainee who is a child must have access to educational programmes and must be provided with social work services, religious care, recreational programmes and psychological services.
- 5.2.17 Every remand detainee must, on admission and on a daily basis, be given the opportunity of making complaints or requests to the head of the facility or any other delegated official.
- 5.2.18 Every remand detainee must not be tortured or treated with cruelty and degradation.
- 5.2.19 No remand detainee will appear for any court proceeding dressed in a prescribed uniform. If a detainee does not have adequate or proper clothing, he or she must be provided at State expense with appropriate clothing to enable him or her to appear in court.
- 5.2.20 Pregnant women and girls will receive a special diet to promote good health.
- 5.2.21 No remand detainee may be surrendered to the South African Police Service for the purpose of further investigation, without authorisation by the National Commissioner of DCS or a delegated official within the institution that detains RDs in which case the period may not exceed 7 days.
- 5.2.22 The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned.
- 5.2.23 Excessive force may not be used against a remand detainee. The use of force will be restricted to when it is necessary for self-defence; the defence of any other person; preventing a detainee from escaping; or for the protection of property. In any such case only the minimum degree of force must be used and the force must be proportionate to the objective.

5.3 Amenities

- 5.3.1 An important principle which determines the possible restriction of amenities is that it places a responsibility and obligation on the detainee to comply with the requirements set by the regime. "Amenities" as defined in the Correctional Services Act (Act 111, 1998) refers to recreational and other activities including privileges which are granted to inmates in addition to what they are entitled to in terms of rights, and includes but is not restricted to, exercise; contact with the community; reading material; recreation; and incentive schemes.
- 5.3.2 Remand detainees may be subjected only to those restrictions necessary for the maintenance of security and good order in the detention facility.
- 5.3.3 Subject to restrictions which may be prescribed by regulations or any other policy developed by the detention institution, remand detainees may be allowed to have food and drink sent or brought to them in a detention facility.
- 5.3.4 Contact with families and friends must be encouraged and if this amenity is restricted, restriction may not be less than 1 hour per month.
- 5.3.5 Remand Detainees must be allowed access to available reading material of their choice unless it creates a security risk or is not conducive to their development.
- 5.3.6 Following a disciplinary hearing, amenities may only be restricted for a period prescribed by the detention institution.
- 5.3.7 The right of every remand detainee to personal integrity and privacy is subject to the limitations reasonably necessary to ensure the security of the community, the safety of officials and the safe custody of all remand detainees in the facility.

5.4 Obligations of remand detainees

- 5.4.1 Every remand detainee is required to respect the authority of and to obey the lawful instructions of the National Commissioner in cases of DCS and SAPS and the officials delegated to manage the SCFs in DSD.
- 5.4.2 All remand detainees must take note of the information provided to them on admission and must confirm that they understand what was conveyed to them.
- 5.4.3 As soon as possible after admission, every remand detainee must bath or shower, and undergo a health status examination, which must include testing for contagious and communicable diseases
- 5.4.4 Every remand detainee must keep his or her person, clothing, bedding and cell clean

and tidy.

- 5.4.5 A remand detainee must inform his/ her next of kin or friends that he or she is being detained in a specific facility i.e., police station, DCS facility or DSD facility.
- 5.4.6 Every remand detainee who is a child and is subject to compulsory education is expected to attend educational programmes.
- 5.4.7 If a remand detainee commits a disciplinary infringement he/ she will be subjected to a disciplinary process prescribed by the detention institution.
- 5.4.8 Remand detainees must subject themselves to necessary searches as part of the measures taken to ensure the security of the community, safety of officials working in detention facilities and safe custody of other detainees.
- 5.4.9 Remand detainees must participate in measures taken to properly identify them.
- 5.4.10 Every remand detainee must wear a prescribed uniform as determined by the detention facility for the maintenance of security and good order.

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CHAPTER 6: SERVICES AND PROGRAMMES

6.1 Introduction

6.1.1 The provision of services and programmes to remand detainees should be linked to the rights specified in section 35 of Constitution of the RSA (Act of 108, 1996) i.e., the rights of arrested, detained and accused, relevant sections of the Child Justice Act (Act 75, 2008), Correctional Services Act (Act 111, 1998) and other applicable international laws and treaties.

6.1.2 These rights apply from the time of arrest to instituting a charge, prosecution, conviction and sentencing. Since this White Paper focuses on detention management of RDs, it will limit itself to those rights that appear to be relevant to provision of services and programmes to the accused who are placed in detention in DCS, DSD and SAPS facilities.

6.1.3 In the past the provision of programmes to RDs has been somewhat haphazard. Many difficulties exist in providing programmes to such a fluid population. In addition many discussions were held around appropriate programmes to administer to a population which has not been found guilty. Programmes intended to correct offending behaviour are therefore not appropriate. However programmes do not need to focus on offending behaviour but can be programmes designed to improve various skills of inmates, such as life skills. The provision of such programmes should be a priority for all RDFs within the realms of possibility.

6.1.4 The Correctional Services Act (Act 111, 1998) has several provisions that cater for services and programmes for the general population of inmates including special categories. The Correctional Matters Amendment Act (Act 5, 2011) has been extended by making provision for the general population of remand detainees including special categories.

6.1.5 In terms of international laws and treaties and Chapter 5 of the White Paper on Corrections (2005) (paragraph 5.6.11) the following services should be provided to remand detainees:

- continuity in education and training in line with Government policy;
- safety of person;
- access to social welfare services in line with Government policy;
- access to state-provided health care in line with Government policy;
- access to visits;
- communication and correspondence with family and friends;

- access to recreational and reading resources; and
- access to legal representation.

6.1.6 The blueprint on SCFs makes provision for services and programmes that should be provided to children in conflict with the law.

6.2 Alignment with the Constitution

6.2.1 The following table reflects the services and programmes to be provided for RDs in relation to certain rights extracted from section 35 of the Constitution of the Republic of South Africa (Act 108, 1996):

Provision	Services and Programmes
The right to choose and to consult with a legal practitioner including the right to be represented by the legal practitioner;	<ul style="list-style-type: none"> • Legal representative to be given access to facilities that detain RDs • Facilities that detain RDs should have adequate consulting rooms
The right to have adequate time and facilities to prepare a defence;	<ul style="list-style-type: none"> • Library facilities to be established including acquisition of relevant material which can be utilized by RDs to prepare for their cases • RDs to be given access to the library
The right to conditions of detention that are consistent with human dignity including at least exercise and provision of adequate accommodation, nutrition, reading material and medical treatment at the state expense;	<ul style="list-style-type: none"> • Proper maintenance of the facilities • Facilities created and resources or tools made available for RDs to do exercises • The day programme should include time for exercises for RDs
The right to communicate with and be visited by RD's spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.	<ul style="list-style-type: none"> • Facilities for visits to be created • Visiting schedule to be developed and made available to RDs visitors • Facilities to be created to cater for consultation between the RDs and their chosen medical doctor or religious counsellors • In cases where the medical practitioner provides a service to the RD at a cost, the position of the detention facility with regard to payment should be clearly communicated to the RDs
The right to have their trial begin and conclude without unreasonable delay;	<ul style="list-style-type: none"> • Access to remand detention facilities by probation officers to conduct assessments for pre-trial and pre-sentence reports • Establish an effective and efficient transportation service from the detention facility to court • Make provision for longer distances that have to be

	<ul style="list-style-type: none"> travelled to courts To be linked with access of legal representatives to detention facilities for consultation and provision of facilities to prepare for defence
The right to be present when being tried	<ul style="list-style-type: none"> Circumstances that prevents the RD from appearing in court such as hospitalization or sickness and writing examination should be communicated to court To be linked with the provision of transport and accommodation for longer distances

6.3 Alignment with the Correctional Services Act (Act 111, 1998)

6.3.1 The table below reflects the principles espoused in selected provisions of Correctional Services Act (Act 111, 1998) including relevant sections of Correctional Matters Amendment Act (Act 5, 2011):

Provision	Principle	Applicability
Provision of Health services (Section 12)	<ul style="list-style-type: none"> Adequate health services based on Primary health care, Correctional medical practitioner, a specialist or health care institution or person or institution identified by correctional medical practitioner Use of own medical practitioner at own cost No compulsory medical treatment or intervention except when the health of the inmate is at risk Surgery will require consent from the inmate or significant other except in exceptional cases 	Inmates including all categories of Remand Detainees
Contact with community (Section 13)	<ul style="list-style-type: none"> Maintenance of contact Opportunities for visits by spouses or partners, next of kin, chosen religious counsellors, chosen medical practitioners or any significant other 	Inmates including all categories of Remand Detainees
	<ul style="list-style-type: none"> Communication with the appropriate diplomatic or consular representative or international organisation tasked to protect the interests of the inmate 	Inmates who are foreign nationals
	<ul style="list-style-type: none"> Notification of the next of kin or any other relative 	Inmates including all categories of Remand Detainees
	<ul style="list-style-type: none"> Notification of appropriate state authorities with statutory responsibility for the education and welfare of children, parents, legal guardian or relative (notification is compulsory) 	All inmates who are categorized as Children (14 to 17)

	<ul style="list-style-type: none"> • Issuing of particulars to the next of kin or spouse on place of detention (permission to be sought from the inmate) 	All inmates except children
Religion, belief and opinion (Section14)	<ul style="list-style-type: none"> • Allowance for freedom of conscience, religion, thought, belief and opinion • Voluntary and free attendance of religious services and meetings at the detention facility • Keeping of religious literature • Provision of places of worship in all facilities 	Inmates including all categories of Remand Detainees
Death at the detention centre (Section15)	<ul style="list-style-type: none"> • Deaths due to unknown reasons should be managed according to Inquest legislation • Reporting of deaths to the office of the Inspecting Judge • Notification of the next of kin or relative 	Inmates including all categories of Remand Detainees
Corrections, development and care programmes and services (Section16)	<ul style="list-style-type: none"> • Provision of programmes and services which have not been catered for in the Act • Linking up with agencies that provide programmes and services that DCS cannot provide • Catering for the disabled 	Inmates including all categories of Remand Detainees
Access to Legal Advice (Section17)	<ul style="list-style-type: none"> • Right to consult on any legal matter with the practitioner of own choice at own expense 	Inmates including all categories of Remand Detainees
	<ul style="list-style-type: none"> • Provision of opportunities and facilities to prepare for defence 	Remand Detainees
Reading Material (Section18)	<ul style="list-style-type: none"> • Access to reading material • Source for the material can be DCS library or from the external environment • Consideration for security risk 	Inmates including all categories of Remand Detainees
Children (Section19)	<ul style="list-style-type: none"> • Compulsory education • Access to educational programmes • Provision of social work services, religious care services, recreational programmes and psychological services 	All inmates who are categorized as Children (14 to 17)
Mothers of young children (Section20)	<ul style="list-style-type: none"> • Keeping of own children until they reach 2 years of age • Best interest of the child to be taken into consideration • Facilitation of the placement of the child in consultation with Department of Social Development • Provision of the facilities, food, clothing for sound development of the child • Establishment of mother and child unit 	All inmates who are detained with their children
Food and drink (Section47)	<ul style="list-style-type: none"> • Restrictions on bringing of food and drinks in RDFs to be regulated 	Remand Detainees

<p>Clothing (Section48)</p>	<ul style="list-style-type: none"> • Wearing of a prescribed uniform which is distinct from the one worn by sentenced offenders • No wearing of prescribed uniform for court attendances • Provision of court clothes in situations where there is inadequate or improper clothing 	<p>Remand Detainees</p>
<p>Safekeeping of information and records Section49)</p>	<ul style="list-style-type: none"> • Information and records to be kept in RDFs in line with National Archives and Record Service of South Africa Act (Act 43 of 1996) 	<p>All Remand Detention Facilities</p>
<p>Pregnant women (Section49A)</p>	<ul style="list-style-type: none"> • Confirmation of pregnancy on admission through referral to registered medical practitioner • Availability of the separate unit • Provision of adequate diet 	<p>All Remand Detention Facilities</p>
<p>Disabled remand detainees (Section49B)</p>	<ul style="list-style-type: none"> • Provision for separate accommodation in single or communal cells • Provision of additional health care services based on principles of primary health care • Provision of additional psychological services if recommended by a medical practitioner 	<p>All Remand Detention Facilities</p>
<p>Aged remand detainees (Section49C)</p>	<ul style="list-style-type: none"> • Detention of RDs above the age of 65 years in single or communal cells • Accommodation of variation ordered by the medical practitioner on prescribed diet and interval for meals 	<p>All Remand Detention Facilities</p>
<p>Mentally ill remand detainees (Section49D)</p>	<ul style="list-style-type: none"> • Detention of persons suspected to be mentally ill or persons displaying signs of mental illness in single cells or correctional health facility for observation in line with s77(1) of the Criminal Procedure Act (Act 51 of 1977) • Provision of adequate health care and prescribed care and treatment for mentally ill RDs • Provision of social and psychological services 	<p>All Remand Detention Facilities</p>
<p>Protocol on procedure to be followed in the case of mental enquiries in respect of accused persons</p>	<p><i>RDs in custody pending observation</i></p> <ul style="list-style-type: none"> • Detention in separate cells from the general population • Preferably RDs should be detained in centres with a health facility and should be in close proximity to the psychiatric hospital • Endorsement of J7 (by court) to reflect detention pending observation • J7 to be accompanied by J138 warrant which specifies the type of observation and the place where observation is to be conducted • Responsibility for transportation between the court, DCS facility, hospital and mental health facility has been assigned to SAPS 	<p>All Remand Detention Facilities</p>

	<ul style="list-style-type: none"> Reporting to the superintendent of the mental health establishment that conducts panel observation details with regard to treatment, special investigations, prescribed medication administered to the RD 	
	<p><i>RDs appearing to be mentally ill and not placed for mental observation</i></p> <ul style="list-style-type: none"> Provision of required levels of care, treatment and rehabilitation to be ensured by the head of the detention facility Notification of the relevant prosecutor or the investigating officer 	All Remand Detention Facilities
Terminally ill or severely incapacitated remand detainees (Section 49E)	<ul style="list-style-type: none"> Provision for referral to court on written advice of the medical practitioner treating that person Acknowledgement of the inability to provide the required level of care Arrangements for the supervision, care and treatment within the community Obtaining consent for the RD concerned or relative or significant other Legal representative to be informed 	All Remand Detention Facilities
Release of remand detainees under the supervision of SAPS (Section 49F)	<ul style="list-style-type: none"> Surrendering of the RD to SAPS for further investigations must be authorized by the National Commissioner SAPS to keep the RD not longer than seven days 	All Remand Detention Facilities
Maximum incarceration (Section 49G)	<ul style="list-style-type: none"> Provision for referral of RDs to court before completion of two years from the date of admission and annually thereafter If the RD had appeared in court three months prior to the expiry of two years, the referral should be postponed by a period of three months Determination for further detention or release under conditions appropriate to the case will be done by the court (presiding officer) Reporting to the Director of Public Prosecution at six-monthly intervals the RDs detained for a successive six-month period 	All Remand Detention Facilities
(Section 41) principles were excluded because the section focuses on provision of programmes to sentenced offenders only.		

6.4 Alignment with Child Justice Act (Act 75 2008)

6.4.1 The table below reflects the summary of the provisions of the Child Justice Act which are applicable to all institutions responsible for the detention of children remand detainees:

Provision	Principle	Applicability
Guiding principles (Section3)	<ul style="list-style-type: none"> • Children should be addressed in a manner appropriate to their age and intellectual development • Parents, appropriate adults and guardians should be able to assist children in proceedings and, wherever possible, participate in decisions affecting them. • A child lacking in family support or educational or employment opportunities must have equal access to available services 	All detention facilities for children SAPS, DSD and DCS
Protection of children detained in police custody (Section28)	<ul style="list-style-type: none"> • Must be detained separately from adults, and boys must be held separately from girls; • Must be detained in conditions which take into account their particular vulnerability and will reduce the risk of harm to children, including the risk of harm caused by other children; • Must be permitted visits by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit; and • Should be provided with immediate and appropriate health care in the event of any illness, injury or severe psychological trauma; • Station Commissioner must ensure that the child receives immediate and appropriate medical treatment in the following circumstances: <ul style="list-style-type: none"> ○ When there is evidence of physical injury or severe psychological trauma; ○ When the child appears to be in pain as a result of an injury; ○ When there is an allegation that a sexual offence has been committed against the child; or there are other circumstances which warrant medical treatment. 	Arrested children detained in SAPS police cells
Placement in DCS facility (Section30)	<ul style="list-style-type: none"> • The child must be 14 years or older; • The child should be accused of having committed Schedule 3 offences • The detention should be necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention as determined by a court; and • There should be a likelihood that the child, if convicted, could be sentenced to imprisonment 	Children Remand Detainees held in DCS

	<ul style="list-style-type: none"> • Before a decision is made to detain or further detain a child in prison, the presiding officer must consider any recommendations relating to placement in the probation officer's assessment report and the various factors • Court appearance will take place every 14 days. 	
Error regarding placement (Section31)	<ul style="list-style-type: none"> • Adhere to the J7 instruction if one picks up an error in placement in a child and youth care centre, police cell or lock-up or a prison • Refer the child to the relevant Presiding Officer for correcting of errors before the next court date 	All detention facilities that keep children remand detainees (SAPS, DSD and DCS)

6.5 Implications for the institutions that detain remand detainees

6.5.1 The above-mentioned principles together with applicable international prescripts will guide the development of the overarching policies for the provision of services and programmes for RDs. Each department will ensure that it has capacity to deliver on required services and programmes.

6.5.2 Each institution should have generic services and programmes which will be applicable to the general population of remand detainees and those for special categories of RDs such as children; pregnant detainees; mothers detained with children; aged detainees; mentally ill; foreign nationals and those in detention pending observation.

6.5.3 The policies on services provided to RDs should include management of such detention issues as requests for attending family funerals, management of deaths of RDs and celebration of special days. Any provision of a service that will lead to temporal release of the RD from the detention institution should be coordinated with the investigating officer for determination of security risk. The investigating officer and the clerk of court should be informed accordingly if the RDs escapes and the established procedures for management of escapes should be adhered to.

6.5.4 The provision of services and programmes will be guided by the following factors in all facilities that detain RDs:

- The RDs have a right to be presumed innocent as such they will not be provided with programmes based on inferred charges unless prescribed by the courts;
- The RDs are a very unstable population whose length of detention is beyond the control of detention institutions, therefore the programmes delivered should be flexible enough to accommodate the constant change of faces;
- Wherever possible RDs should be detained in accordance with their risk profile as well as potential length of stay (e.g. regional court cases take longer on

average than magistrate court cases and multiple accused tend to lengthen the process) in order to provide programmes;

- Preparation for court should take precedence over the attendance of programmes;
- The RDs should not be compelled to attend developmental programmes which are aimed at self-development;
- Where the provision of programmes is compulsory, the RD should be informed accordingly;
- Services that are provided by other (JCPS) cluster institutions which have a direct impact over the case(s) of RDs should be communicated to RDs in various ways such as pamphlets, posters and orientation manuals; and
- The principles of access to the detention institutions for provision of services to RDs and limitation thereof should be communicated to JCPS cluster institutions, the public and other relevant stakeholders including NGOs who participate in the delivery of services and programmes to RDs.

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CHAPTER 7: ORDERLY, SAFE AND SECURE REMAND DETENTION

7.1 Introduction

7.1.1 The principles presented in this chapter form the basis for ensuring the good order, safety and security of remand detainees. They emanate from several prescripts including the following:

- The Constitution of the Republic of South Africa (Act 108, 1996);
- UN Standard Minimum rules for treatment of prisoners;
- Correctional Services Act (Act 111, 1998);
- White Paper on Corrections (2005);
- Firearms Control Act (Act 60, 2000);
- United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment (10 December, 1984); and
- United Nations Optional Protocol to the Convention Against Torture (OPCAT)

7.1.2 All institutions responsible for custodial management of Remand Detainees (RDs) are obliged to ensure that public safety from detainees who pose a threat is maintained, a safe environment is created and maintained for all detainees and service providers; a culture that respects and observes human rights is prevalent and that remand detainees are available and on time for court appearances.

7.1.3 The Department of Social Development has included security measures for SCFs in the blueprint which is the policy framework for the management of SCFs in South Africa.

7.1.4 DCS has existing operational policies which are informed by the Correctional Services Act and other applicable prescripts; however these policies should be extended to provide for all needs of remand detainees. Although the Act has clearly articulated the disciplinary processes for inmates, the operational policies on discipline only cater for sentenced offenders.

7.2 Legislative responsibility

7.2.1 The Constitution guarantees the freedom and security of the person, which includes the right to be free from all forms of violence, from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way. Although the Constitution allows for a limitation of rights, the responsibility of keeping persons in detention safe remains an obligation of the authority detaining such persons.

7.3 Overarching principles

- 7.3.1 According to the White Paper on Corrections (2005) DCS has committed itself to a culture devoid of militaristic practice which is seen as inappropriate for a rehabilitation-centred Correctional System. As such the DCS has assumed civilian structures with a strong social sector dimension, with a focus on tight security, personnel discipline, and a civilian rank recognition.
- 7.3.2 Remand Detention Management in the DCS forms part of these commitments and operates as an integral part of the organization. Although there is no focus on correcting offending behaviour in Remand Detention, the requirements for safety, security and human dignity within an orderly environment remains equally important.
- 7.3.3 The principle of presumption of innocence should be maintained at all times when dealing with RDs, therefore they may be subjected only to those restrictions necessary for the maintenance of security and good order.
- 7.3.4 The remand detention population consists largely of persons who have allegedly committed serious crimes and who have not been granted bail. They are therefore regarded as possibly posing a significant risk to the community and for that reason they have been refused bail or remanded in custody. Those with bail constitute a smaller part of the remand detention population which ranges from 15-20% of the RD population.
- 7.3.5 The concept of security lies not only in the physical detention of persons, such as high fences, but also in less traditional measures, such as keeping remand detainees constructively occupied. Officials should therefore be properly trained in both security and human rights issues.
- 7.3.6 Detention institutions should apply security measures which are strict yet fair, equitable and transparent.
- 7.3.7 Security measures should be multidimensional as such should cover personnel, physical, information, technology and operational issues as well as management supervision.
- 7.3.8 Security measures should include among others, training of officials on principles of security, use of force and mechanical restraints, risk classification, disciplinary processes, wearing of uniform where appropriate, management of groupings or gangs, classification of facilities and implementation of applicable case management principles including the development and management of a structured day programme.

- 7.3.9 Managers of detention institutions are responsible to ensure that a balance is maintained between security, order and human rights. Security and control must be performed with due diligence and must exclude abuse of power, brutal methods of control, unlawful and undue punishment and any other means that may constitute the torture of inmates.
- 7.3.10 The use of force as a means of restoring order can only be justified in extreme circumstances, when order has broken down and all other interventions have failed. The use of force and the type of force to be used may only be those authorized by the delegated authority. In all instances a full report must be provided to the identified line function in terms of the force used and the outcomes thereof. At all times, the prescribed alternatives to the use of force will be the preferred solution.
- 7.3.11 Instruments of restraint, such as handcuffs, chains, leg-irons and strait-jackets, must only be used as prescribed only and when duly authorised, may not be used as punishment. Their use should be carefully regulated. Mechanical restraints may never be ordered as a form of punishment or disciplinary measure.
- 7.3.12 Remand detainees may not be brought before court whilst in mechanical restraints, unless authorised by the court.

7.4 Critical security dimensions

7.4.1 Risk classifications of detention facilities and detainees

- 7.4.1.1 In principle all facilities that detain RDs are classified as maximum facilities and this is in line with international trends given the current lack of information on the RDs. These facilities have a relatively large turnover of detainees and at the same time they receive minimal information from courts about them. The difficulty of predicting human nature is compounded further by this lack of information.
- 7.4.1.2 RDs should not be treated as a homogenous group therefore the minimal risk classification system utilized should be able to assist the managers in creating separate accommodation for different categories of RDs.
- 7.4.1.3 Remand detainees are a very unstable population that move in and out of the detention facilities for court appearances and in essence only a small percentage stay longer than two years.
- 7.4.1.4 The lack of their classification has led to a situation where they are all managed and treated as a high risk group. This creates difficulties for the detention institutions because high risk detainees have restrictions in terms of movements within the facility and require a greater number of officials to supervise them. It is therefore imperative to conduct risk classification for managing known threats by ensuring that

first time RDs are separated from the repeat categories. RDs with a history of escape and convicted RDs with further charges should be treated as high risk category. The remand detention institutions should work cooperatively with SAPS as the arresting institution to determine the initial risk classification.

7.4.1.5 When conducting risk classification the impact of incarceration on a human being should be taken into consideration. It must be taken into account that this risk is not static and can change for better or worse and therefore risk assessment should become a feature of ongoing case management that allows for reconsideration depending on amongst others the following:

- the length of incarceration;
- the nature of the charges faced, including which court will be hearing the matter
- the number of co-accused in the case;
- the personal circumstances of the inmate;
- the vulnerability of the individual to other inmates;
- the need for protection from other inmates and/or himself or herself;
- the number and type of previous incarcerations;
- the potential threat to the community;
- the potential as an escape risk;
- the potential threat to and by fellow inmates and staff;
- the medical and mental condition of the inmate; and
- whether bail was set and the amount at which bail was set.

7.4.2 Disciplinary regime

7.4.2.1 The disciplinary process supports a safe and secure environment within a remand detention institution. In establishing such order a clear distinction should be drawn in the disciplinary procedures between those breaches which are primarily administrative in nature, and those which are of a criminal nature. The processes that will be followed to deal with the two categories of breaches must be clearly delineated.

7.4.2.2 The type of conduct that constitutes a disciplinary offence, the method of seeking information and making complaints, the disciplinary procedures to be followed, the sanctions that may be entertained on conviction, and the manner in which such sanctions may be applied must all be clearly codified and made available and understandable to all inmates on admission and to all correctional officials during basic training.

7.4.2.3 The disciplinary regime must make it clear that discipline and order must be maintained with firmness but in no greater measure than is necessary for security

purposes and good order in the correctional centre/ remand detention facility and within a human rights context.

7.4.2.4 It must be clear that when an infringement constitutes a criminal offence it will be dealt with as such. It will therefore be reported to SAPS for investigation and possible formal prosecution. If a person is convicted of an offence on such an infringement it will not rule out the taking of disciplinary action against such an individual.

7.4.2.5 RDs may not be involved in the implementation of any disciplinary measures against fellow inmates.

7.4.2.6 The required court appearance of a remand detainee must supersede the appearance before a disciplinary hearing.

7.4.3 Identification

7.4.3.1 Multiple methods of biometrics must be utilized for proper identification of remand detainees and verification of identity should be done before any release is instituted. Challenges related to identification of RDs are discussed in chapter 8.

7.4.4 Guarding of remand detainees

7.4.4.1 Once the RDs are handed over to SAPS for either court appearance or further investigation or for forensic assessment at the designated Mental Health Establishment, the detention institutions cease to take responsibility for the RDs, guarding services will therefore become the responsibility of SAPS.

7.4.4.2 When the RDs are handed to the detention institutions by SAPS, any movement that requires provision of guarding services will be handled by the detention institution.

7.4.5 Wearing of special clothes by remand detainees

7.4.5.1 The wearing of civilian clothes by RDs holds a heightened security risk due to the difficulty of distinguishing between RDs and civilians working inside the facility, including visitors; it also increases the likelihood of escapes.

7.4.5.2 In addition some RDs are admitted with dirty clothes, which make it difficult to uphold hygiene in the facility, especially considering the length of stay of some detainees.

7.4.5.3 Section 48 of the Correctional Matters Amendment Act (Act 5, 2011) makes provision for supplying RDs with uniform which is different from the one prescribed for sentenced offenders.

7.4.5.4 The principle of provision of uniform to RDs will be applicable to DCS and SCFs.

7.4.6 The health of inmates

7.4.6.1 Remand detention institutions must ensure that policies that address the health of detainees take cognisance of communicable diseases and special outbreaks that threaten the safety and security of remand detainees, personnel and other persons that may have contact with the affected RDs. Where the health of the RD is such that he or she is unable to honour his/her court appearance, the court should be informed timeously. Section 49E of the Correctional Matters Amendment Act (Act 5 of 2011) makes provision for the head of the detention facility to refer the severely incapacitated or terminally ill RDs to court.

7.4.7 Prototype for Remand Detention Facilities (RDFs)

7.4.7.1 Minimum standards have been developed for remand detention facilities in DCS and SCFs and these standards should guide the development of the new facilities. In particular a prototype should take account of the specific needs of RDFs as opposed to facilities for sentenced offenders. In other words it must take into account the purpose of RDs attending court on time and the transient nature of its population. Any new facility to house RDs should be designed in an appropriate and efficient manner to allow for the facility to support the objectives of the detention.

7.4.8 Information related to safety and security

7.4.8.1 Procedures for handling information on incidences which impact negatively on the safety and security of RDs and RDFs must be developed. The information must be used to detect areas which need intervention on either operational or policy level and should include but not restricted to: escapes; assaults; hunger strikes; use of force where injuries are sustained; and admission of notorious inmates and deaths.

7.4.9 Management of escape

7.4.9.1 All facilities detaining RDs should have strategies for primary, secondary and tertiary prevention of escapes.

7.4.9.2 *Any disappearance from the SCFs should be regarded as an escape as such it should be managed according to established policies including reporting to the investigating officer and the court.*

7.4.9.3 An escape of the RD who was temporarily surrendered to SAPS for further

investigation should be managed according to processes developed for section 49F of the Correctional Matters Amendment Act (Act 5, 2011).

7.4.10 Gang management

7.4.10.1 The prevalence of gang is high among the institutions that detain inmates; therefore facilities that detain RDs should have a strategy for management of gangs.

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CHAPTER 8: THE USE OF INTEGRATED SYSTEMS

8.1 Introduction

8.1. This chapter will focus on technological systems and operational processes that will be utilized to handle certain challenges in relation to the management of remand detainees. These challenges include the following:

- Use of multiple identities by remand detainees who are clients of the Criminal Justice System (CJS). This leads to creation of aliases within the CJS system and redundant information;
- Slow process of verification of the identity with the Department of Home Affairs (DHA);
- Lack of access to systems of other Departments, e.g. SAPS to inmates in DCS for other cases;
- Inadequate system for identification of accused within the CJS leading to each institution utilizing its own identification from arrest to detention. The situation is compounded by the fact that remand detention institutions are provided with limited information which is presented in the warrant of detention (J7). This leads to difficulties in tracing and tracking remand detainees in general and managing of court appearances for RDs with multiple charges who are required to appear in different courts within and across provinces;
- Regular and repeated administrative processes of admission and release of remand detainees from detention institutions for court appearances and other temporary releases;
- Lack of communication of security risk or threat in relation to certain categories of remand detainees to remand detention institutions thus leading to improper housing and a risk of escape; and
- Failure for some categories of RDs to present themselves for court appearances especially in facilities that detain large number of RDs or presenting themselves late so as to delay the court processes.

8.2 Measures for redress

Corrective measures require cooperation from all the key role players within the CJS. The following pillars of the seven-point plan approved by Cabinet were created to address the previously mentioned challenges:

- Establishment of an integrated and seamless national CJS IT database/system containing all information relevant to the CJS and review and harmonise the template for gathering information relating to the CJS; and
- Modernization of all aspects of the systems and equipment of the CJS through the strategy developed and coordinated by the IJS board.

8.2.1 Use of multiple identities by the accused

- 8.2.1.1 This challenge will be addressed through the development of unique identification system for all the accused who enter the CJS. The identity number given to an accused will be attached to the personal identification information and multiple biometrics.
- 8.2.1.2 This unique identification together with biometrics and identification information will be shared among the key departments within the CJS including the institution that detain RDs. In order to achieve this ideal, all the CJS departments have a responsibility to prioritize the upgrading of the existing systems utilized for capturing the information on accused including the remand detainees. The development should cater for secure sharing of information.
- 8.2.1.3 The remand detention institutions and courts should have electronic systems for verification of the identities of remand detainees and identities will be verified with every release undertaken by the remand detention institutions. These electronic systems should have a level of quality which allows it to be integrated with other systems.
- 8.2.1.4 The remand detention institution where possible will create a single database and this will allow for tracing and tracking of remand detainees within a department or entity responsible for detention of remand detainees. This approach will assist in the management of remand detainees who have multiple cases who are required to appear in different courts within and across provinces.
- 8.2.1.5 The issue of exchanging identities is further addressed by the creation of offences in section 128A of the Correctional Matters Amendment Act (Act 5, 2011), whereby a remand detainee who intimidates or conspires with another remand detainee to exchange identities or to defeat the ends of justice, is guilty of an offence and liable on conviction to a fine or to incarceration for a period not exceeding 10 years or to such incarceration without the option of a fine or to both a fine and such incarceration. A protocol will be developed through the established systems within the CJS to ensure that the provision is realised.

8.2.2 Verification of identity of the accused

- 8.2.2.1 SAPS will continue with the verification of the identities of the accused including RDs in consultation with the DHA.

8.2.3 Regular and repeated administrative processes

- 8.2.3.1 Each time a RD leaves a correctional facility whether for court or hospital or any other reason, that RD is signed out of the system and then signed back in on his or her return. This leads to much repetition in processes.
- 8.2.3.2 The practice will be eliminated through the integration of systems within the CJS. The structure responsible for ensuring that this ideal is realized is the Integrated Justice System (IJS) board which is a substructure of the National Development Committee of the JCPS cluster.
- 8.2.3.3 The establishment of video remand courts in all the provinces between DCS and DoJCD has assisted in the reduction of administrative processes of checking out of RDs to court and re-admitting them upon their return. These courts will however only be used in certain circumstances judged not to negatively influence the fairness of the court process.

8.2.4 Communication of the security risk to the detention institution

- 8.2.4.1 The process of developing a risk classification system has commenced through the development of the protocol and a risk classification tool. In order to ensure that the principle of presuming RDs as innocent is maintained as a rating system of classification will be only held by such institutions as SAPS, NPA and Courts.

8.2.5 Failure of the remand detainees to present themselves for court appearance

- 8.2.5.1 RDs who are supposed to go to court on a specific day do not respond when they are called. They only avail themselves after the transport to court has left. The challenges will be addressed through the use of multiple biometrics including verification. The possibility of introducing an inmate tracking system within a facility should be examined in order to address the challenge of locating RDs in a facility.

8.2.6 Operational improvements

- 8.2.6.1 The warrant of detention (J7) has been modified so that remand detention institutions are able to determine various categories of remand detainees. Continued interaction between the affected cluster Departments will ensure continued evaluation of systems and focus on improvements thereto.

8.3. Implication for integration

- 8.3.1 The integration of systems within the CJS will enhance information sharing and data

capturing which is critical process for ensuring that the creation of electronic data is minimised within and between Departments.

8.3.2 Information obtained from the docket will be classified accordingly for determination of the information that can be passed to the remand detention institutions.

8.3.3 In order to ensure the success of integration and upgrading of existing systems by the CJS departments and collaborative planning to ensure that inter-linkages are created and maintained, appropriate funding must be made available.

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CHAPTER 9: OVERCROWDING

9.1 Introduction

- 9.1.1 Overcrowding is not a new phenomenon in South African detention facilities. According to the White Paper on Corrections, it can be traced back to the early 1900's when the prison system was regulated mainly by various Provincial Ordinances. The inflated population at the time was related to transgression of the pass laws. In 1984 the driver of overcrowding, according to the Judicial Inquiry into the structure and functioning of the courts, was the incarceration of prisoners as a result of influx control measures and in 1985 the key driver was the mass detention of political prisoners as a result of the State of Emergency.
- 9.1.2 This chapter will focus on the overview of the population of Remand Detainees (RDs) in the department of Correctional Services (DCS), drivers of overcrowding for RDs and Criminal Justice System (CJS) strategies utilized to manage overcrowding of RDs. The Department of Social Development (DSD), as a department detaining persons in specific circumstances, does not have a history of overcrowding.

9.2 Overview of the population in the Department of Correctional Services

- 9.2.1 In the Department of Correctional Services, the population of inmates including RDs grew from an annual average of 111,090 in 1995 to 158,926 in 2011 and the bedspaces increased from 95,002 to 118,154. This translates to an increase in overcrowding from 16.9% to 34.5%.
- 9.2.2 The annual average of RDs had almost doubled over the same period from 23,783 in 1995 to 45,816 in 2011. The highest annual average of RDs was observed in 2000 (57,811); since then the population has been gradually decreasing with seasonal trends of increase during festive periods.
- 9.2.3 Children RDs (14 to 17 years) in DCS rose from 0.3% (80) in 1995 to 4.2% (1192) in 2007. The highest number of children was observed in 2002 (2269). With the introduction of Child Justice Act (Act 75 of 2008) the RD children in DCS reduced from 771 in 2009/2010 financial year to 195 at the last quarter of 2011/12.

9.3 Drivers of the remand detainee population

- 9.3.1 According to international literature, the key drivers of overcrowding are the **use of pre-trial detention** and **the trend on serious crimes**. The increase in serious crimes is closely related to an increase in the use of pre-trial detention without an option of bail.

9.3.2 Other drivers which are beyond the control of institutions responsible for detention of RDs are **the number of admissions** and **the length of stay** at the detention facility. Factors found to be linked to longer of stay in detention as an RD are as follows:

- Multiple number of co-accused in one case or accused linked to other crimes that are under investigation;
- Withdrawal of legal representation by attorneys;
- Delay in securing a date at the high court;
- Loss of court records;
- Changing of legal representatives by the accused;
- Failure of witnesses to appear in court leading to the case being remanded for several times;
- Multiple witnesses in the case;
- Requests for remand either by defence, lawyers of the accused and or the state;
- Failure of accused to appear in court; and
- Request for separation of trials.

9.3.4 There are other factors that are thought to play a role in failure to reduce the number of RDs in addition to the previously mentioned key drivers. These factors include an increased number of RDs who are detained without an option of bail (almost 80% as at?); failure to pay bail by those few RDs who have been awarded bail; and delay in finalizing court cases despite several court appearances. Of the category that has bail, DCS consistently detains approximately between 7% - 11% of RDs who have bail of less than a R1000. Within the RD population detained in DCS, less than 6% are detained for longer than 24 months and among this category, approximately 0.3% spends more than five years.

9.4 Strategies for management of overcrowding

9.4.1 The CJS strategies for managing overcrowding of RDs are outlined extensively in the policy document titled **“Awaiting Trial Detainee Guidelines”** which was developed by NPA in consultation with relevant JCPS cluster departments such as SAPS, DoJCD, DSD and DCS.

9.4.2 The strategies outlined in the documents include, amongst others, measures prior to first court appearance, methods at first appearance, methods to fast-track certain RD cases and management of juveniles.

9.4.3 Measures prior to first court appearance include release in terms of several sections

of the Criminal Procedure Act (Act 51 of 1977) (i.e. sections 59, 59A, 71, 72 and 56). Methods of reducing RDs at first court appearance include bail, diversion and restorative justice.

9.4.4 Methods of fast tracking certain RD cases include amongst others, the use of plea-bargaining, securing of criminal records within 10 days, fast tracking of cases for DNA analysis and probation services and assessments.

9.4.5 The DCS has developed the following eight pronged strategy for the management of overcrowding in its facilities:

- (a) Managing levels of RDs through IJS Case Management Task Team and Inter-Sectoral Committee on Child Justice;
- (b) Managing levels of sentenced inmates through improving effective and appropriate use of conversion of sentence to community correctional supervision, release on parole, and transfers between correctional centres to attempt to establish some degree of evenness of overcrowding;
- (c) Ensuring progress with DCS capital works programme to upgrade our facilities and to build new correctional centres that are both cost effective and rehabilitation oriented;
- (d) Encouraging debate in South Africa about reason for incarceration as a sentence, and encouraging an approach to appropriate sentencing that is focused on facilitating rehabilitation;
- (e) Enhancing community correctional supervision so that it can be better utilised as an appropriate sentence for less serious crimes;
- (f) Improving correction and development programmes within DCS to ensure enhanced facilitation of rehabilitation that targets offending behaviour in a manner which Department has not previously undertaken;
- (g) Encouraging improvement of first and second levels of correction in family and social institutions and social and economic sector government departments respectively to decrease rate of entry into the criminal justice system; and
- (h) Encouraging community involvement in social reintegration of offenders back into their community in order to assist in reducing levels of repeat offending.

9.4.6 Measures included under the strategy “**management of the levels of RDs through**

IJS Case Management Task Team” include implementation of the bail protocol i.e., section 63A of the Criminal Procedure Act (Act 51 of 1977), promotion of section 63(1) which allows the RD or the prosecutor to approach the court for a review of bail, promotion of plea bargain to RDs and submission of the list of RDs detained for more than two years to caseload structures chaired by the Judiciary.

9.4.7 Section 49G of the Correctional Matters Amendment Act will be included under this strategy. The section makes provision for DCS to refer the RDs to court before completing a period of two years for consideration of their detention and thereafter annually if the RD remains in detention after the initial referral. The court will utilize options highlighted in 63A of the Criminal Procedure Act (Act 51 of 1977) when considering the application from DCS.

9.5 Implications for the Department of Correctional Services

9.5.1 It is clear that DCS does not have control over the population of RDs; however DCS can contribute to the containment of the population of RDs within its facilities through implementing measures that are within its control. The ultimate decision with regard to the detention or release of the RD lies with the court.

Chapter 10: OVERSIGHT AND CONTROL

10.1 Introduction

- 10.1.1 The United Nations Standard Minimum Rules for the Treatment of Prisoners (13 May 1977), make provision for regular inspection of penal institutions and services by qualified and competent authorities. Their task is to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.
- 10.1.2 Inspections of detention facilities are an important safeguard against malpractice, physical abuse, ill treatment and breaching of rights of detainees as recognized by international standards.
- 10.1.3 Independent inspections should be considered in the interest of both the executive and administrative heads as a means of monitoring the quality of living conditions and protection against unfair accusations or reports. They also provide heads of detention facilities information on aspects of practice which they may not have been aware of.
- 10.1.4 This chapter will focus on various types of oversights which are already provided for in management of detainees in order to adhere to the above-mentioned UN principle as well as additional proposals for DSD and SAPS facilities.

10.2 Executive Oversight and Control

The institutions detaining RDs will be subject to oversight and control of the Executive in accordance with the provisions of section 92(2) of the Constitution which provides that 'members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Subsection (3)(b) further makes provisions that members of the Cabinet must 'provide Parliament with full and regular reports concerning matters under their control'.

10.2.1 Oversight by the Judiciary and Legislature

- 10.2.1.1 Judges of the Constitutional Court, Supreme Court of Appeal or High Court and a magistrate within his or her area of jurisdiction will be given access to facilities that detain RDs. They must be allowed access to any part of the detention facility and any documentary record and may interview any RD and bring any matter to the attention of the Commissioner of DCS and SAPS and Ministers of DCS, SAPS and DSD.

10.2.1.2 In DCS the inspection of the RDFs will be done by the Judicial Inspectorate in line with Chapter 9 of the Correctional Services Act (Act 11 of 1998). The Independent Correctional Centre visitors who fall under the office of the inspecting judge will handle the complaints of RDs through regular visits, conducting interviews, recording of complaints in the official diary and monitor the matter in which the complaints have been dealt with.

10.2.2 Oversight by the Administrative Head

10.2.2.1 All the administrative heads of institutions that are responsible for the detention of RDs will ensure that internal service evaluations are conducted annually.

10.2.3 Duties and Functions of Heads of Detention Facilities

10.2.3.1 The heads are expected to cooperate with all the oversight bodies by ensuring the following:

- Provision of the facility so that the officials representing the oversight bodies could carry their functions effectively and efficiently;
- Ensure that officials are well versed with the roles of the oversight bodies;
- Ensure that officials from oversight bodies are provided with all the necessary documents;
- Ensure that issues that require clarity are attended to and feedback is provided within stipulated time frames where possible; and
- Principles for handling disputes in relation to each oversight body should be developed and communicated to all officials.