

# ASSESSMENT OF PROLONGED DETENTION PERIODS OF INMATES IN SWAZILAND



March 2016

## TABLE OF CONTENTS

Executive Summary.....	4
1. Introduction.....	6
2. Legislative Framework.....	7
3. Methodology.....	9
4. Findings.....	10
4.1 Prosecutor related.....	10
4.2 Transferred, suspended, death and resignation of presiding officers.....	11
4.3 Committals and Pending Committals.....	12
4.3.1 Committals.....	12
4.3.2 Pending Committals.....	12
4.4 Awaiting judgements/sentencing.....	13
4.5 Inmates committed in the Criminal Mental Health Centre.....	13
5. Follow up Assessment and findings.....	14
6. Conclusions and Recommendations.....	15
6.1 Establishment of a Justice Sector Stake holder Forum.....	16
6.2 Balanced recruitment of court officials within the criminal justice system and provision of court rooms.....	16
6.3 Formulation of a systematic strategy for the transfer of presiding officers.....	17
6.4 Lobby for Strengthening the case management system.....	17
6.5 Advocating for the Legal Aid Bill.....	17

**6.6 Enactment of legislation to deal with convicts from Criminal Mental Health**

**Centre.....18**

## EXECUTIVE SUMMARY

The report presents findings of an investigation conducted by the Commission on Human Rights and Public Administration in seven Correctional Centres in the country. The report also proposes interventions/recommendations for addressing some of the issues identified. This report is complimentary to the complaints that have been lodged on behalf of the inmates who have spent an ‘unreasonably’ long time awaiting their trials. The objective is to address the complaints lodged, but also to come up with solutions that will address the problems in a systematic and sustainable manner.

Trial awaiting detainees face numerous challenges on accessing justice, and these results to prolonged detentions in Swaziland which are human rights and public administration related issues. Evidence drawn from interviews conducted with inmates and correctional officers in November 2016, demonstrate that there were 133 inmates affected by delayed trials. In March 2018 a follow-up investigation was conducted and great progress was observed as majority of the cases were now being processed.

The investigation focused on inmates who have been detained/incarcerated for 12 months or longer, without their cases being finalized. The reasons for the delays in the finalization of these cases vary, and they include; the transfer, death, suspension and resignation of judicial officers and prosecutors; matters awaiting judgment; matters pending committals and; other related reasons. One of the main consequences is that the Correctional Services Department is faced with a challenge of overpopulation which also contravenes the minimum International standards on the situation of the facilities. The department is currently keeping people who would otherwise not be in jail if their cases were completed on time. Statistics from Correctional facilities submitted to the Human Rights Committee where the Kingdom of Swaziland was responding to the list of issues in the absence of an initial report on International Covenant on Civil and Political Rights (ICCPR) shows that the problem of overcrowding is an issue which needs to be addressed (see table 1 below). Almost all the facilities have more than the carrying capacity and in some cases the facility has double what it should normally accommodate which is a serious problem

**Table 1****Statistics of Prisons Facilities & Capacity**

<b>Correctional Centers</b>	<b>No. of inmates</b>	<b>Capacity</b>
a. Matsapha Correctional Centre	807	400
b. Criminal Mental Asylum Centre	35	20
c. Malkerns Young Person's Centre	182	150
d. Mawelawela Correctional Centre	239- Adults 18- Children	120
e. Vulamasango Primary and High Schools	182	300
f. Manzini Remand Centre	330	350
g. Mankayane Correctional Centre	55	50
h. Mbabane Correctional Centre	339	400
i. Piggs Peak Correctional Centre	367	400
j. Bhalekane Correctional Farm	320	350
k. Big Bend Correctional Centre	370	350
l. Nhlangano Correctional Centre	277	230

The Commission observed that there were not enough judicial officers and prosecutors in both the High Court and Subordinate Courts. There is also a clear need of a systematic

strategy that will guarantee the completion of cases in situations where the judicial officers are transferred, fall sick or die.

Furthermore, the Commission identified a need for strengthening the case management system is to ensure the efficient and effective disposal of cases. There is also a need to facilitate a coordinated approach for stakeholders in the criminal justice system to address some of the bottlenecks from a public administration point of view.

In summary, there is need for interventions that will improve the efficiency of the justice systems in order to protect and promote the right to access to justice as enshrined in our Constitution. These interventions will need the collaboration of all key partners involved to ensure effective implementation and sustainability. Ultimately, these recommendations will not only solve the issues of the current inmates, but seek to ensure that this situation is prevented in the future and in essence access to justice is improved.

## **1. Introduction**

The Swaziland Commission on Human Rights and Public Administration (SCHRPA) received reports suggesting that some inmates are held in custody for unreasonably long periods pending finalization of their trials in lower courts and the High Court.

In pursuit of this mandate, the Commission engaged the Correctional Services Department in an endeavour to investigate the alleged prolonged detentions and further establish the form of assistance that could be afforded to the affected people. In this regard, the Commission in consultation with the Correctional Services Department developed and implemented an investigation plan for the assessment which was carried out from the 14<sup>th</sup> to the 25<sup>th</sup> November 2016 to the 27<sup>th</sup> of March 2018.

As agreed on the terms of reference for this assignment, the intention was to get the statements of the affected inmates who are now complainants. The investigation entailed interviews with the inmates, Correctional Services officers and any other relevant additional information available in the correctional centres' personal files. This assessment sought to establish the number of trial awaiting detainees whose cases have taken over 12 months; causes of the delayed finalization of the cases; the type of cases involved and explore available remedies.

The objectives of the investigation were specifically to ;

- a) To profile inmates who have been kept in custody for a longer period pending finalization of their cases. These include; inmates who failed to pay bail and awaiting completion of trials; awaiting judgements; awaiting sentencing and those admitted in the criminal mental health centre.
- b) To ascertain causes for the delayed trials and processing of the inmates. This include among other things, establishing the date of incarceration, presiding officer and last date of appearance in court.
- c) To formulate/propose interventions that will facilitate the timely finalization of these cases.

## **2. Legislative framework**

The vulnerability of trial awaiting suspects is recognised internationally, regionally and at national level. Consequently, there have been safeguards laid down against trial awaiting suspect being kept for prolonged time in detention before their cases are heard by competent adjudicating authorities.

### **2.1 International instruments**

#### **2.1.1 International Covenant on Civil and Political Rights (ICCPR)**

This convention was ratified by Swaziland in 2004, and Article 9(3) thereof provides that:

“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 judgement.

Article 10(1) further dictates that:

‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human being.’

## 2.2 Regional Instruments

2.2.1 African Charter on Human and Peoples Rights, ratified by the Kingdom of Swaziland in 1995, in Article 7(1) provides that,

“Every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) The right to defence, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal**”. (our emphases)

## 2.3 Constitutional framework

2.3.1 Swaziland Constitutional Act, 2005

Section 21(1) provides that:

“In the determination of civil rights and obligations or any criminal charge a person shall be given a fair **and speedy public hearing within a reasonable time** by an independent and impartial court or adjudicating authority established by law (our Emphases)

It is these instruments and constitutional frameworks which form the bases for the investigation by the Commission. The objective is to ascertain the extent to which the right to a fair hearing for trial awaiting suspects is respected in light of the complaints.

### 3. Methodology

The Commission collaborated with the Correctional Services to carry out these investigations; information obtained from individuals who participated in the assessment was obtained with consent and individual confidentiality was preserved. The interviews were done through a questionnaire which was administered by the Commission. The interviews were undertaken with designated officers in the seven centres that were visited and a total of 133 inmates who have spent 12 months and above pending finalization of their cases. Table 1 below shows the number of inmates interviewed from the seven centres. The process culminated to this report and opening of cases for these inmates based on the similarities of the circumstances to ensure that their specific issues are addressed while efforts are being made to also address the systematic issues at a higher level.

**Table 1. Number of inmates interviewed in the centres**

<b>Manzini</b>	<b>Matsapha</b>	<b>Mbabane</b>	<b>Piggs Peak</b>	<b>Big Bend</b>	<b>Nhlangano</b>	<b>Mawelawela</b>	<b>Total</b>
44	8	27	12	26	12	4	<b>133</b>

The findings from the aforementioned interviews illustrated the need to interview the presiding officers and prosecutors to get better insight from their perspective regarding these delays, and also to better understand how best to address the problems in a holistic manner. The Commission also held discussions with a number of stakeholders including the Minister of Justice, the Chief Justice, Registrar of the High Court, Director of Public Prosecutions and, the police. The objective of these discussions was to highlight their role in the Criminal Justice system and possible interventions by each towards bringing solution to the problem. The Commission then revisited the Correctional Facilities (after about twelve months from

the first visit and consultations) to ascertain if there was any change in the status quo. Findings of the second assessment will be enumerated towards the end of the report.

#### **4. Findings**

In the majority of cases, the setting of trial dates and fast-tracking of cases is facilitated by lawyers. In this assessment/investigation the majority of the inmates did not have legal representation which contributed to the delayed finalization of their cases. About eighty percent (80%) of the inmates interviewed expressed that they had made several efforts to enquire about the progress of their cases from presiding officers during their remand hearings their matters could not proceed for a variety of reasons which form the findings of this assessment.

##### **a. Prosecutor related delays**

Of the 133 inmates interviewed, 14 indicated that their cases were stalled due to the unavailability of the prosecutor during trial. Under this category, all the inmates have spent more than a year in custody. At Piggs Peak Correctional Centre, 5 inmates indicated that the prosecutor was constantly indisposed, resulting to the continuous postponement of their cases. Furthermore, some inmates alleged that the prosecution at times fails to bring witnesses to give evidence at the trial and request for postponements which have led to the cases pending for longer periods at the detriment of the detained person. Table 2 below illustrates/quantifies the number of inmates affected by prosecutor related delays on the various centres.

**Table 2. Inmates affected by prosecutor related delays**

<b>Manzini</b>	<b>Matsapha</b>	<b>Mbabane</b>	<b>Piggs Peak</b>	<b>Big Bend</b>	<b>Nhlangano</b>	<b>Mawelawela</b>	<b>Total</b>
9	0	0	5	0	0	0	14

## **4.2 Transferred, suspended, death and resignation of presiding officers**

Under this category, 31 inmates were affected. According to interviews with inmates and correctional officers, the transfer of Magistrates is a huge factor/contributor in the continuation of cases at the Magistrates court level as this has seen 25 cases stalled. The affected cases include matters awaiting judgments or sentencing and partly heard cases due to the transfer, suspension, death and resignation of presiding officers.<sup>1</sup>

It transpired that there is no set out procedure that is used by the presiding officers to finalize cases from their previous workstations. Some of the informants indicated that they have stayed for over two years without either appearing in court or having the Magistrate continue with their cases. In some instances, even if the Magistrate returns to hear the case, the pace at which the process is done takes too long; for example, the presiding officer sometimes visits once after three months or even when they come, they arrive late for the case and with the limited time they only deal with minimal aspects of a case per session.

In as much as it is beyond the control of the administration, the resignation and demise of judicial officers at the Magistrates court level also had an effect on some of the cases. These include cases which were partly heard as these had to start *de novo*, and thus prolonging the incarceration of the trial waiting inmates. Two inmates from Piggs Peak centre indicated that their cases have not been finalised, two years after the demise of the Magistrate. It was further revealed that at the High Court, the suspension, removal and non-renewal of judges 'contracts have impacted on the continuation and finalization of four cases. These cases which were handled by Ota J and Simelane J. Some of the inmates have spent four years and above in custody without conclusion of their cases.

Table 3 shows the number of inmates whose cases have been stalled due to the transfer, suspension, death and resignation of presiding officers.

---

<sup>1</sup> Under this category we have included cases that are awaiting judgements and sentencing which were significantly affected by the transfer and suspension of judicial officers. For purposes of accuracy these were not included under category 3.4 below.

**Table 3. Transferred, suspended, death and resignation of presiding officers.**

<b>Manzini</b>	<b>Matsapha</b>	<b>Mbabane</b>	<b>Piggs Peak</b>	<b>Big Bend</b>	<b>Nhlangano</b>	<b>Mawelawela</b>	<b>Total</b>
2	0	4	4	12	9	0	31

### **3.3 Committals and Pending Committals.**

#### **3.3.1 Committals**

Inmates under this category are held at the Mbabane Correctional Centre. These are inmates who have been committed to the High Court to deliberate on their cases due to the nature of the offences they have committed. There are 19 inmates under this category.

Some of these inmates have spent more than three years in custody without the commencement of their trials. According to them, none of them have been allocated judges for their cases.

These inmates are not even remanded hence they don't get the opportunity to even appear before the court. Some of them indicated that they made efforts to request the prosecution to proceed with their cases; however, this did not yield any positive results. Some alleged that they were advised by the DPP's office to apply for bail in order to gain their freedom because finalization of their cases may be further delayed. In some instances, the Correctional Officers assist the inmates to request trial dates from the registrar of the High Court without any success. It also came out that most of the inmates in this category are either represented by *pro deo* counsel or do not have legal representation at all, which makes it difficult to fast track the hearing of their cases. It was noted that Pro deo counsel often do not communicate with their clients who are in detention, neither was there an indication that these inmates are in fact legally represented. . Some of them thought *pro deo* counsel represented them.

#### **3.3.2 Pending Committals**

This is the highest category with 42 inmates who are spread across five facilities . They consist of suspects who are facing murder, attempted murder, rape, armed robbery and other

related offences which fall under the jurisdiction of the High Court. Most of these inmates have spent three or more years in custody whilst waiting to be committed to the High Court.

**Table 5. Pending Committals**

<b>Manzini</b>	<b>Matsapha</b>	<b>Mbabane</b>	<b>Piggs Peak</b>	<b>Big Bend</b>	<b>Nhlangano</b>	<b>Mawelawela</b>	<b>Total</b>
26	0	0	2	9	2	3	42

### **3.4 Awaiting Judgments/Sentencing**

There were six inmates under this category. During the investigation, it was discovered that some inmates have waited for judgments for over 12 months. These inmates appear for remand hearings and during the hearings they are not given dates for judgments.

Five inmates are still awaiting judgements from the Magistrates Courts whilst one is at the High Court.

**Table 5. Awaiting judgements/ sentencing**

<b>Manzini</b>	<b>Matsapha</b>	<b>Mbabane</b>	<b>Piggs Peak</b>	<b>Big Bend</b>	<b>Nhlangano</b>	<b>Mawelawela</b>	<b>Total</b>
2	3	1	0	0	0	0	6

### **3.5 Inmates committed in the Criminal Mental Health Centre**

This centre holds inmates who have been committed under section 165(3) of the Criminal Procedure and Evidence Act 67 of 1938 and those that have been referred by officers in charge from other correctional centres. These inmates are either mentally ill at the time of trial or have been referred by officers in charge from other correctional centres because they are mentally unstable.

At the time of the investigation, there were 33 inmates kept at the Criminal Mental Health centre in Matsapha. These are inmates kept at His Majesty's pleasure without a period of sentence being fixed. Because of their mental status, the Commission only interviewed eight of them. Of the eight, four have recovered and have medical reports certifying them to be of stable mind. All these have spent more than 10 years in custody. The investigation revealed that these inmates were hoping for the Prerogative of Mercy Committee to pardon them.

It is worth noting that Section 78 of the Constitution limits the exercise of the Prerogative of Mercy by His Majesty the King only to persons who have been sentenced to death or life imprisonment. This is a different scenario from the repealed 1968 constitution which provided pardon for all crimes. This was a favourable position to all convicted inmates to benefit from the Prerogative of Mercy.

One inmate expressed that his matter has not been to court although he was certified fit to stand trial. Furthermore, three inmates had a serious mental challenge and are believed to have been in that state since birth and were not on medication.

## **5. Follow up assessment and its findings**

Having ascertained the above, the Commission engaged stakeholders relevant to the issue including the Office of the Chief Justice, Minister of Justice, Attorney General, Director of Public Prosecutions and Correctional Services. During the engagement process from the stakeholders undertook to address the issue of prolonged detention of inmates. The Commission engaged in a follow up assessment after about 15 months. The objective of the follow up assessment was to measure the impact of the efforts exerted by the Commission in the exercise and to ascertain if the stake holders undertaking to work on the problem materialised. The visits showed that there was great improvement in the processing of cases by the courts.. The Commission found out that the numbers have decreased significantly in the relevant centres because of various reasons which include that: some of the inmates have been convicted and sentenced; some have been released because the time spent at the Correctional centre as a remand exceeds the sentence meted out; some were out on bail; some have been committed to the High Court. The Commission has noted that there was slow progress at the Criminal health centre; the reasons thereof have already been addressed above.

**a. Findings of the second assessment**

Upon realisation that the numbers had significantly decreased, the commission investigated the number of inmates who might have joined the category (of having to wait for trial for a period exceeding 12 months) after the first assessment in November 2016. The numbers had shockingly ballooned to 245 (Two Hundred and forty five) as “**Table 8**” below shows.

**Table 8**

<b>Manzini</b>	<b>Mbabane</b>	<b>Nhlangano</b>	<b>Big Bend</b>	<b>Piggs Peak</b>	<b>Mawelawela</b>	<b>Matsapha</b>	<b>Total</b>
23	161	21	37	3	0	0	245

This clearly illustrated the seriousness of the problem, especially in the Mbabane facility.

**6. Conclusions and Recommendations**

The Commission affirms that the prolonged detention of trial awaiting inmates is in violation of Section 21 of the Constitution read together with other international instruments signed and ratified by the Kingdom of Swaziland. The Commission therefore recommends the following and stakeholders should note that the Commission will be conducting follow ups on the recommendations until the issue is systematically addressed;

## **6.1 Advocate for a Justice Sector Stakeholder Forum**

The Criminal Justice system has a number of stakeholders, including Chief Justice, Registrar of Supreme Court and High Court, Ministry of Justice, Attorney General, Law Society and Correctional Services, to name a few. For the Right to fair hearing to be protected and enjoyed by trial awaiting inmates these stakeholders need to work in synergy. The Commission proposes the revival of the Justice Sector Stakeholder forum within the Ministry of Justice. This forum convene periodic meetings in an effort to harmonise their work, especially in relation to the right to a fair hearing. The forum will include but not limited to the Chief Justice, Registrar of Supreme Court and High Court, Ministry of Justice, Director of Public Prosecutions, Correctional Services and any other relevant departments. Representation in the forum should be those officers who can implement or influence implementation of the decisions of the Forum. The Commission will follow up on the formation of this forum. Correctional Services must regularly submit and or update list of affected inmates.

## **6.2 Balanced recruitment of court officials within the criminal justice system as well as provision of court rooms.**

The investigation highlighted that there has been a significant shortage of presiding officers; both at the High Court and Magistrates courts coupled with the shortage of prosecutors to fast track the cases. For instance, there was an alarming number of inmates who have been committed and awaiting committal at the High Court, but due to the limited number of judges and prosecutors, the inmates end up spending more time in jail without their matters taking off.

There has, encouragingly, a steady increase of Judicial Officers both at the High Court and at the Magistracy as two Judges were appointed in 2017 and another two appointed in 2018. In the subordinate Courts four Magistrates have been hired in 2018. It is also encouraging to note that as at December 2017 over 20 prosecutorial posts were created and filled. However, the fact that no additional courts and court rooms have been constructed flies in the face of whatever good coming with the increased personnel.

The Commission therefore advocates for the construction/provision of court rooms to guarantee the constant turn of the wheel of justice.

### **6.3 Formulation of a systematic strategy for the transfer of presiding officers that will not negatively impact on their caseload;**

The Commission recommends that the Judiciary should improve the manner in which presiding officers are transferred in order to ensure that they are able to complete their cases before their deployment. It also recommends that, a plan with timeframes and monitoring mechanisms be put in place for the already transferred magistrates to complete their cases from their previous workstations.

### **6.4 Strengthening the case management system ;**

During the investigation it was discovered that once the accused person has been granted bail, there is no follow-up from the prosecution to proceed with the matter. In some instances, if the accused person has failed to raise the bail amount, he/she will end up spending unreasonably long periods without trial. In these cases, the matter ends up not taking off because of a variety of reasons which include; loss of evidence, demise of witnesses, loss of memory from witness etc. It is therefore imperative that the criminal justice system develops and implements case management system which will fast track the processing of cases as a public administration issue. This will also assist in ensuring that no cases fall in between the cracks.

### **6.5 Advocating for the Legal Aid Bill;**

The Ministry of Justice and Constitutional Affairs is encouraged to intensify advocacy efforts towards the passing into law of the Legal Aid Bill, this will ensure that inmates, especially those who do not have the means of securing legal representation are guaranteed one. This will minimise the use of *Pro- deo* Counsels who at times do not meet the expectation from a legal representative who is comparatively paid. It should be noted that already this issue has drawn the attention of the Human Rights Committee, as evidence in their concluding observations on Swaziland in the absence of a report ; The Committee observed that:

*“While welcoming the measures taken by the State party to reduce long pretrial detention periods, the Committee remains concerned by the situation. While taking note of the State party’s explanation given by the delegation that pro Deo services are provided in cases that carry the death penalty or life imprisonment, the*

*Committee remains concerned that the legal aid policy has not yet been implemented and that the bill on legal aid has not been passed into law (art. 14).*

*Consistent with the Committee's general comment No. 35 (2014) on liberty and security of person, paragraph 38, the State party should continue its efforts to reduce lengthy periods of pretrial detention, including by adopting provisions to ensure that the trial detention process is not abused, and avoiding unnecessary arrests and delays between the police and prosecutor's office. The State party should ensure that bail is generally available and is not set at an excessive level. The State party should ensure that free legal aid assistance is available in any case where the interests of justice so require"<sup>2</sup>.*

#### **6.6 Enactment of legislation to deal with cases of convicts from the criminal mental health centre.**

The investigation revealed that inmates who have been sentenced at His Majesty's pleasure are usually excluded from pardon by the prerogative of mercy committee. Therefore, there is need for the engagement of the Minister of Justice to have these cases considered.

All stakeholders involved in the handling of cases for mentally ill prisoners must establish a working relationship that will harness their efforts. This will effectively ensure assessment of the inmates, constant evaluation and issuing of medical reports to be used in proceeding with their cases or for parole purposes.

As stated above in paragraph 3.5 issues of inmates who have been committed to the criminal mental health centre according to Section 165 of the Criminal Procedure Criminal Act 1938 (as amended) is not clearly regulated by the law. Section 165(1) provides that if an act of commission or omission is charged against any person as an offence and it is given in evidence of the trial of such person for such offence that he was insane so as not to be responsible according to law for his act at the time when it was done, and if it appears to the court before which such a person is tried that he did the act but was insane as aforesaid at the

---

<sup>2</sup> Par 40 -41 of the observations

time when he did it, the court shall return a special finding to the effect that the accused did the act charged, but was insane as aforesaid when he did it.

The commission therefore calls upon the stake holder forum to identify the Ministry responsible for the enactment of the necessary legislation to regulate the fate of these inmates. At the moment they are thrown into a deep dark pit as it were without a clear legislative system for their absolution. The commission will be following up on this recommendation with the intention to provide assistance where needed.

.....  
**SABELO M. MASUKU**

**COMMISSIONER**

**COMMISSION ON HUMAN RIGHTS AND PUBLIC  
ADMINISTRATION/INTERGRITY**

**INVESTIGATORS: P. SHILI**

**N. ZWANE**

**N. Mamba**