

UNLOCKING JUSTICE:



LAW SOCIETY OF KENYA



A COLLECTIVE EFFORT
TO DECONGEST
PRISONS AND DELIVER
LEGAL AID POSITION
PAPER



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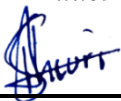
To our esteemed partners UNDP and UNODC, please receive our heartfelt appreciation for the unwavering support that you have accorded to us, both technical and financial. Your expertise and insight have been instrumental in shaping the direction of this project. We extend our gratitude to the Judiciary and the ODPP, who provided critical trainings and for their unreserved willingness to impart knowledge to our members, across the country.

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We must always remember that it is our collective effort to decongest prisons and deliver legal aid!

"Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities." – U.S. Supreme Court Associate Justice Ruth Bader Ginsburg (March 2014)



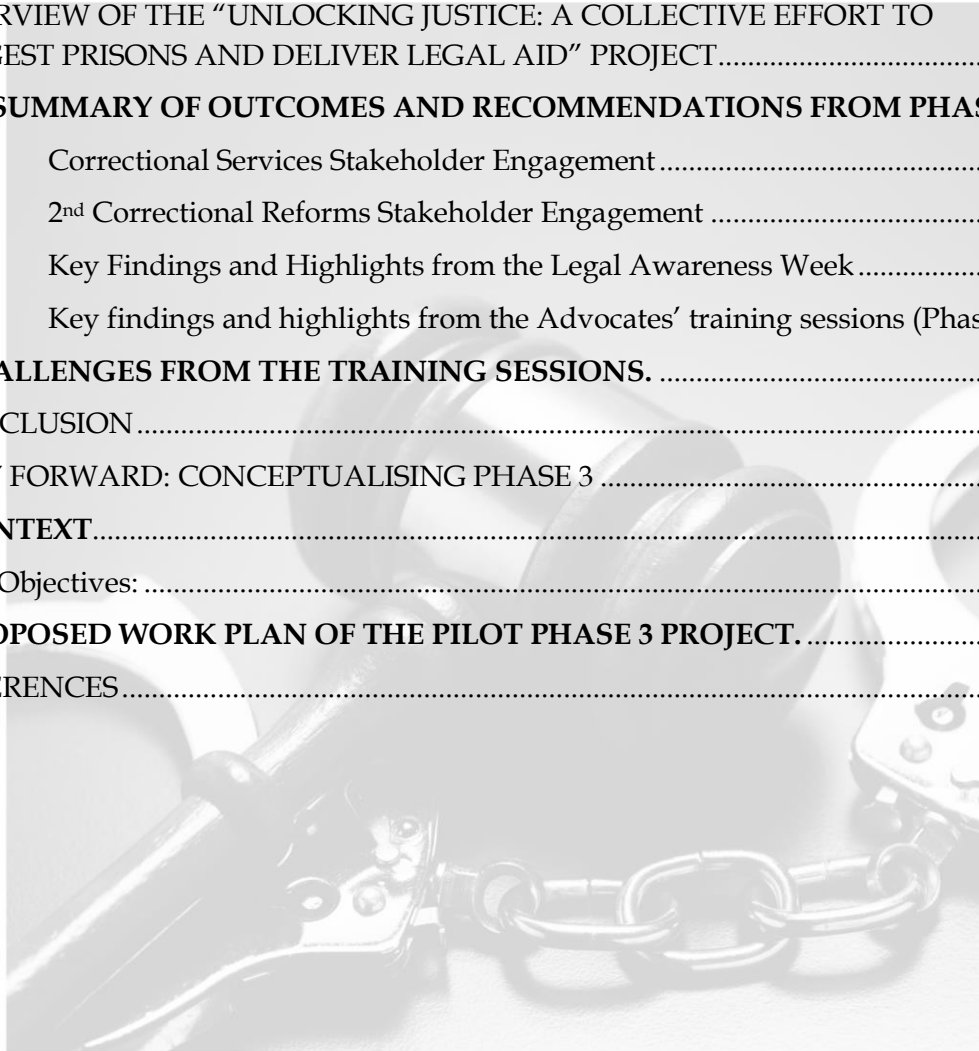
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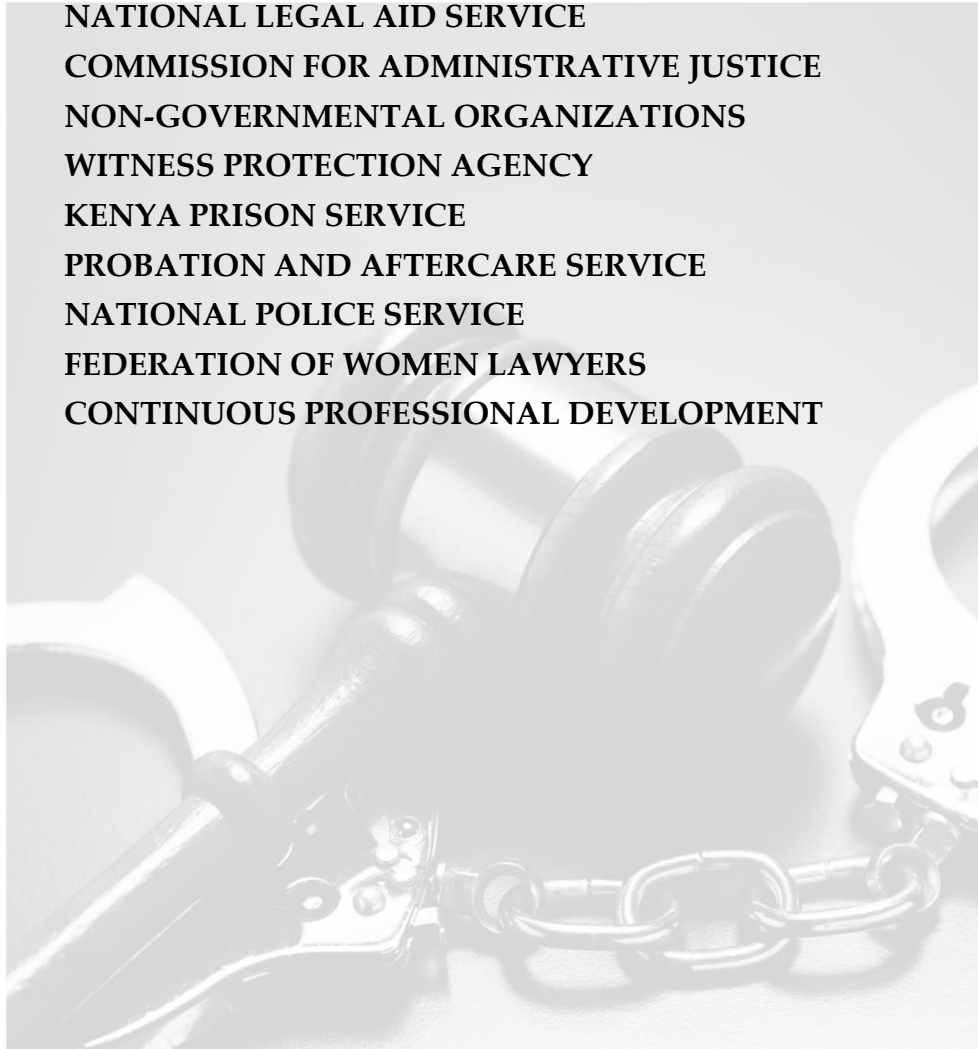
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ACRONYMS AND ABBREVIATIONS

LSK	LAW SOCIETY OF KENYA
LAW	LEGAL AWARENESS WEEK
UNDP	UNITED NATIONS DEVELOPMENT PROGRAM
UNODC	UNITED NATIONS OFFICE ON DRUGS AND CRIME
ODPP	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
KNHCR	KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
NLSA	NATIONAL LEGAL AID SERVICE
CAJ	COMMISSION FOR ADMINISTRATIVE JUSTICE
NGOs	NON-GOVERNMENTAL ORGANIZATIONS
WPA	WITNESS PROTECTION AGENCY
KPS	KENYA PRISON SERVICE
PACS	PROBATION AND AFTERCARE SERVICE
NPS	NATIONAL POLICE SERVICE
FIDA	FEDERATION OF WOMEN LAWYERS
CPD	CONTINUOUS PROFESSIONAL DEVELOPMENT



1. INTRODUCTION

1.1 CONCEPTUALIZING CONGESTION AND DECONGESTION

Congestion has been defined as the state of being crowded.¹ In the context of correctional facilities, remand, jail, or prison. Congestion refers to the state of overcrowding in these facilities, a situation where the prisons are allowed to accommodate more persons than their ideal capacity. Congestion is also a psychological perception of limited space by the persons incarcerated.² Decongestion, on the other hand, is the process of ensuring that the prisons carry their ideal capacity.³ Decongestion entails reducing the number of inmates within the stretched facilities.

1.2 CONGESTION IN THE KENYAN CONTEXT

The problem of prison congestion demands attention and long-lasting solutions. Like many developing countries, Kenya struggles with capacity issues within its correctional facilities.⁴ Prisoners have inadequate space to sit, sleep or move, which compromises their well-being, violates their inherent rights, and undermines the objectives of public safety and the rehabilitation process.⁵ As a result, prisons and other correctional facilities have been part of the National Reform Agenda, since 2002.⁶

The 2010 Constitution gave the country a constitutional foundation for decongesting prisons. Several other laws seek to provide non-custodial sentencing in the country, to reduce the number of people sent to prisons.⁷ Despite these measures, prisons in Kenya remain congested. This position paper provides an overview of the current situation, outlines good decongestion practices around the world and makes recommendations.

¹ 'Congestion Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com' <<https://www.oxfordlearnersdictionaries.com/definition/english/congestion>> accessed 14 January 2024.

² Victoria Juan, Marcel Atianzar and Florence Ramos, 'Jail Congestion: Its Effect on The Well-Being of Inmates' <<https://cirdjournal.com/index.php/bijess/article/view/261>> accessed 14 January 2024.

³ *ibid.*

⁴ George M Murage, 'Challenges Facing Kenya Prisons in Implementing Reform Strategies' (PhD Thesis, University of Nairobi 2011) <<http://erepository.uonbi.ac.ke/handle/11295/12934>> accessed 14 January 2024.

⁵ Mercy Deche and Conrad Bosire, 'The Silver Lining in the COVID-19 Cloud: An Appraisal of Accelerated Prison Decongestion in Kenya', *The Global Impact of the COVID-19 Pandemic on Institutional and Community Corrections* (Routledge 2021).

⁶ *Ibid.*

⁷ *ibid.*

According to the Kenya National Bureau of Statistics, Economic Survey (Republic of Kenya, 2023), the population of Kenyan prisons in 2023 was 54,750.⁸ The number exceeds the Kenyan correctional facilities' capacity of about 34,000. This means that the prisons are currently at a 161% occupancy rate. More than 41% of the population are pre-trial detainees. In 2021, the number of pre-trial detainees hit a record high of 86% of the prison population. As the table shows, the largest number of the prison population is that of the pre-trial detainees.

Table 1: Persons committed to prison

Category of prisoners	2016	2017	2018	2019	2020	2021
Convicted Persons	82433	80404	83896	77347	29306	65263
Un Convicted Prisoners	127794	127764	139822	141948	56813	94658
Total Prisoners	210227	208168	223718	219295	86119	159921
Share of UnConvicted Prisoners	61%	61%	62%	65%	66%	86%

Source: KNBS Economic Survey, 2021

Kenya has a total of 134 prisons. The result of congested prisons is overstretched physical facilities, resulting in unhygienic conditions. Further, the large number of prisoners is not matched with adequate staff. The congestion has led to inadequate and poor living conditions, limited rehabilitation programs, exacerbates existing mental and physical health conditions, creates prisoner tension, adversely affects the quality of nutrition provided to the prisoners and increases violence. Congestion prevents the correctional facilities from achieving their primary objectives and threatens prisoners' and staff's well-being and safety.⁹ Prisons as they are, are life-threatening and harsh.

The Government uses 270 shillings daily on each prisoner, to ensure they are fed, totaling to 5.5 billion shillings, yearly.¹⁰ This amount increases with an increase in the number of prisoners.

This situation presents an urgent need to embark on decongesting of the correctional facilities in Kenya, to achieve benefits such as: -

a. Upholding the Human Rights and Dignity of Inmates

From the overview of the current state of prisons in Kenya, it is evident that the state cannot meet its human rights obligations to persons held under lawful restriction without decongesting the prisons. The inhumane conditions in the prisons violate the fundamental human rights and dignity of the inmates. The decongestion process shall

⁸ Kenya National Bureau of Statistics, 'Economic Survey' (2023) <https://www.knbs.or.ke/wp-content/uploads/2023/12/2023-Statistical-Abstract-Final-PDF_2.pdf> accessed 14 January 2024.

⁹ Deche and Bosire (n 5).

¹⁰ Fred Kibor, 'DPP Pushes for Plea Bargain to Decongest Prisons, Cut Upkeep Costs' (*Business Daily*, 26 January 2022) <<https://www.businessdailyafrica.com/bd/economy/dpp-pushes-bargain-to-decongest-prisons-save-sh5-5-billion-3695540>> accessed 14 January 2024.

ensure that inmates enjoy fundamental rights such as sanitation, medical care, and personal space.¹¹

b. Public Safety

Overcrowded prisons act as a breeding ground for tension, which in some instances lead to violence. Decongesting the prisons allows the prison staff to have a manageable number of inmates, thereby contributing to the overall security of the correctional facilities for both the staff and detainees.

c. Cost-Efficiency

Decongestion of prisons will free resources which can be channeled towards improving the well-being of those held in prisons, by improving the quality of services offered to them. These resources can also be channeled towards renovation of existing correctional facilities as well as constructing new prisons.

d. Promoting Alternative Sentencing Options

The decongestion process will allow the Government to explore options such as plea bargaining, diversion, community service, restorative justice, probation, or diversion programs. While the option of community service is underutilized in the country, the court in the case of *Gilbert Mwangi Kiai v Republic* ([2017] eKLR) explained its essence as follows:

"The Community Service Order is therefore not meant to be an easy way out of a serious sentence. It is the sentence that ensures that an offender serves his sentence within his or her community, while going on with his or her normal life. It is a path to complete reintegration of an offender, who may even have committed a serious offence and who is on the way to recovery. It is the one sentence that is expected to grow the trust of the Mwananchi (ordinary citizen) that the Criminal Justice System works. That is why the offender is to do public work, in the eyes of the community he offended, as a form of payback, for the benefit of the community, while benefiting from its non-custodial nature. It is a serious sentence and must be accorded its place, because in addition it saves taxpayers the money spent incarcerating offenders, reducing contamination by serious offenders and congestion in the prison."

¹¹ Curt T Griffiths, *Strategies and Best Practices against Overcrowding in Correctional Institutions* (desLibris 2009) <<https://policycommons.net/artifacts/1184743/strategies-and-best-practices-against-overcrowding-in-correctional-institutions/1737868/>> accessed 14 January 2024.

2. SHARING GOOD PRACTICES ON DECONGESTION

This section considers some of the good practises adopted across different jurisdictions towards decongesting correctional facilities. These practices are useful in giving comparative considerations for the project referenced below and even thinking through the next phases towards decongestion. These include but are not limited to: -

- a. Sentencing Reforms - Countries such as the United Kingdom rely on risk assessment tools to allow judges to make informed decisions on the best alternatives to sentencing.¹² Norway relies on community service and electronic monitoring as alternatives to imprisonment, reducing overreliance on traditional incarceration.¹³
- b. Use of Diversion Programs- Countries worldwide have established specialized courts and pre-trial diversion programs that allow the criminal justice system to address the underlying issues without the eligible persons entering the criminal justice system. In Canada, the pre-trial diversion program allows first-time non-violent offenders to perform community services and be counselled, thereby avoiding being committed to jail.¹⁴
- c. Decriminalization of Low-Level Offenses- Many of the persons incarcerated are petty offenders; decriminalization of such acts, as was seen when Portugal decriminalized the possession of small quantities of drugs, is a shift of focus from punitive measures to a more well-being-centered approach that results in few people being imprisoned.¹⁵
- d. Identifying and Removing Pre-Trial Remandees from Correctional Facilities- In Cameroon, judges and prosecutors are allowed to go into prisons and work with the prison authorities to determine the inmates who have been held past their trial time¹⁶ and thereafter prioritize such cases.
- e. Use of mobile judges who move around prisons, to ensure that cases of inmates who have overstayed in remands, are dealt with. Through the 'Justice for All'

¹² R Karl Hanson and David Thornton, 'Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales.' (2000) 24 Law and Human Behavior 119.

¹³ Synøve N Andersen and Kjetil Telle, 'Better out than in? The Effect on Recidivism of Replacing Incarceration with Electronic Monitoring in Norway' (2022) 19 European Journal of Criminology 55.

¹⁴ Nicholas Bala, 'Responding to Young Offenders: Diversion, Detention & Sentencing under Canada's YCJA' [2007] Queen's Univ. Legal Studies Research Paper 2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023893> accessed 14 January 2024.

¹⁵ Ashley Mastro, 'A Model Path for Decriminalizing Simple Possession of All Drugs' (2021) 71 DePaul L. Rev. 875.

¹⁶ Nikhil Roy, 'Ten African Solutions to the Problem of Prison Overcrowding in Africa' (*Penal Reform International*, 2013).

program, Ghana has employed mobile judges who review cases within prisons, setting to deal with delays that may be occasioned by the transport of inmates to courts.¹⁷

- f. Collaborating with other Stakeholders- The police, working with the Judiciary, probation, social services, and non-governmental organizations help create interagency dialogue platforms that analyze cases and provide novel solutions to the congestion problem.¹⁸
- g. Prevention of cases getting into the formal justice system or using traditional and community courts/procedures. In Sierra Leone, the state is using traditional and community courts to mediate minor offences. Traditional courts focus on restoring the relationship of individuals, and as such, they hardly recommend the imprisonment of individuals. Connected to the use of traditional courts is the use of alternative dispute resolution mechanisms, to reduce congestion in prisons. In Nigeria, through Front Loading' Restorative Justice Program, minor offences are subjected to Alternative Dispute Resolution (ADR), thereby freeing more time for judicial officers to focus on more serious offences, reducing the number of pre-trial detainees.¹⁹
- h. The institutionalization of pro bono services ensures faster disposal of cases through effective demand for justice.
- i. Collaboration with Civil Societies - Civil societies not only plays a critical role in partnering in the rehabilitation of inmates, but in many ways influence or even drive change or reforms within correctional systems, at the local and national levels. The active involvement of Non - Governmental Organizations (NGOs) to reform prison systems worldwide has proven successful for building comprehensive and multi-stakeholder partnerships and alliances. Rwanda for example has shown the importance of civil society in reformation of correctional service institutions.²⁰

¹⁷ Ibid.

¹⁸ Sophie A Kaibiria, 'The Judiciary's Quest for Case Backlog Reduction: A Reflection into the Court Users Committees' (MA Thesis, University of Nairobi 2020) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/154512/Kaibiria_The%20Judiciary%E2%80%99s%20Quest%20for%20Case%20Backlog%20Reduction.pdf?sequence=1> accessed 14 January 2024.

¹⁹ Macpherson U Nnam, 'Responding to the Problem of Prison Overcrowding in Nigeria through Restorative Justice: A Challenge to the Traditional Criminal Justice System' (2016) 11 International Journal of Criminal Justice Sciences 177; Maiyaki Theodore Bala, 'The Case for Prison Reforms in Nigeria' (2016) 4 Tuma L. Rev. 162.

²⁰ Terry Hackett, No prison is an island – the role of civil society in post-conflict penal reform, (25 November 2015) available at <https://www.penalreform.org/blog/no-prison-is-an-island-the-role-of/>

- j. Local community organizations play a critical role in providing local expertise, contributing to advocacy/awareness raising, and providing tangible examples of effective operational projects in this field. Involvement of local NGOs is also important to ensure the sustainability of the programs.²¹

3. OVERVIEW OF THE “UNLOCKING JUSTICE: A COLLECTIVE EFFORT TO DECONGEST PRISONS AND DELIVER LEGAL AID” PROJECT

One of the key strategies to achieving decongestion of prisons is exploring alternatives to criminal prosecution.²² It is with this background that the Law Society of Kenya (LSK) in partnership with UNDP and UNODC adopted the agenda of decongesting Kenya’s correctional facilities. This agenda formed the cornerstone theme of the Legal Awareness Week (LAW) held by the LSK in 2023: “Unlocking Justice: A Collective Effort to Decongest Prisons and Deliver Legal Aid”. While previously, the LAW spanned 5 working days, the strategy adopted by the LSK in 2023 was different. The LAW was implemented in two main phases, over a span of 3 months. The first Phase of the project consisted of the first Stakeholders Correctional Breakfast. The LSK together with its partners hosted all actors in the administration of justice sector. The deliberations therein informed the theme and the activities undertaken during the LAW, 2023. Thereafter, the LSK conducted its annual LAW from 23rd October 2023 to 27th October 2023, in which legal aid clinics and prison visits were spearheaded by volunteer advocates, who offered pro- bono services to the public.

The data collected from this phase was analyzed with the aim of identifying matters which could go through alternative forms of prosecution, to achieve decongestion. The successful venture of phase 1 of this initiative prompted the LSK and its partners to launch phase 2. This phase comprised of sensitization and capacity building of advocates on the alternatives to prosecution, through training sessions. The training targeted 200 advocates across 5 major regions in the country- Isiolo, Kisumu, Eldoret, Nairobi and Mombasa.

The agenda of the 3-day training sessions as facilitated by the ODPP and the Judiciary in collaboration with UNDP and UNODC, was to enhance the capacity of the advocates to

²¹ UNODC, Prison reforms and alternatives to imprisonment, (2011) available at https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Prison_reform_concept_note.pdf

²² David Shirk, ‘Criminal Justice Reform in Mexico: An Overview’ <<https://biblioteca.cejamericas.org/handle/2015/1655>> accessed 14 January 2024.

deliver legal aid and assist in decongestion by equipping them with knowledge on existing alternatives to prosecution, such as plea bargaining and diversion and the procedures thereof.

3.1 SUMMARY OF OUTCOMES AND RECOMMENDATIONS FROM PHASE 1

3.1.1 1st Correctional Services Stakeholder Engagement

The Correctional Reforms Stakeholders Breakfast Meeting was organized under the auspices of the National Council on the Administration of Justice (NCAJ) and drew participation from an impressive number of state and non-state entities.²³

The objectives of the meeting included:

- i. **Mobilization of Participation in LAW 2023:** This segment aimed to mobilize the active involvement of all participants in the LAW 2023 activities, ensuring a collective and concerted effort.
- ii. **Expounding on the Theme of the Project:** The meeting provided a platform to delve deeper into the central theme of LAW 2023, "Unlocking Justice: A Collective Effort to Decongest Prisons and Deliver Legal Aid." Stakeholders had the opportunity to elucidate their perspectives, insights, and contributions, in line with this overarching theme.
- iii. **Collating Efforts Towards Legal Aid and Case Review Interventions:** This crucial aspect of the meeting focused on the collaborative efforts and strategies for legal aid provisions and case review interventions. Stakeholders were encouraged to share their knowledge, experiences, and proposed actions in this realm.

Some of the key recommendations that emerged from this discussion include.

- a. **Collaborative Commitment:** One of the pivotal takeaways from the meeting was the resounding importance of collaborative commitment. The meeting brought together a diverse group of stakeholders, including the ODPP, NLAS, NPS, Judiciary, Office of the Attorney General, Kenya Prison Service, CAJ, Probation and Aftercare Services, KNCHR, and more, all of whom expressed their

²³ This includes amongst others: Judiciary, Office of the Attorney General – Department of Justice (AG), National Police Service (NPS), Office of the Director of Public Prosecutions (ODPP), Kenya Prison Service (KPS), Commission on Administrative Justice (CAJ), Probation and Aftercare Services, Kenya Human Rights Commission(KHRC), Kenya National Commission on Human Rights (KNCHR), The Power of Mercy Advisory Committee (POMAC), National Legal Aid Service (NLAS), Federation of Women Lawyers-Kenya (FIDA), International Justice Mission(IJM), Legal Resources Foundation(LRF), RODI Kenya, Kituo Cha Sheria, CMR-Africa, Ombudsman, UNDP, UNODC.

unwavering commitment to work together, in addressing the issue of overcrowding in prisons.

- b. **Legal Awareness Week (L.A.W) 2023:** The breakfast meeting reinforced the significance of L.A.W 2023 as a platform for promoting awareness of legal rights and responsibilities among the public. The theme, "Unlocking Justice: A Collective Effort to Decongest Prisons and Deliver Legal Aid," received widespread endorsement, highlighting its relevance and importance.
- c. **Alternative Sentencing:** Stakeholders recognized the critical role of alternative sentencing methods in reducing the number of non-violent offenders entering prisons. Methods such as plea bargaining, diversion, community service, restorative justice, and probation, were discussed as effective means to address this issue.
- d. **Legal Aid and Access to Justice:** The meeting emphasized the need for increased legal aid services, providing free legal consultations and assistance to individuals to navigate the legal system. It is anticipated that this would reduce the number of individuals entering the prison system.
- e. **Advocacy for Pre-trial Reforms:** Stakeholders highlighted the vital importance of advocacy efforts aimed at improving pre-trial detention procedures. These efforts include bail reform and speedy trials, intended to prevent prolonged periods of remand in prisons before cases are resolved.

In summary, the First Correctional Reforms Stakeholders Breakfast Meeting served as a significant platform for a diverse array of stakeholders to come together, share their insights, and collaboratively address the complex issues of prison congestion and criminal justice reform. The conclusions drawn and the proposed way forward reflect the commitment of all stakeholders towards achieving these critical goals.

To build on these critical conclusions and recommendations, the stakeholders collectively charted the way forward and committed to engage on the following agreed action points:

- a. **Collaborative Efforts:** Continued collaboration and coordination among all stakeholders, including government agencies, civil society organizations, and legal professionals, were underscored as being essential in the ongoing efforts to decongest prisons. A united front of stakeholders working together is seen as key to success.
- b. **Community Sensitization:** Recognizing the significance of community engagement, the stakeholders concurred with the recommendation of conducting community sensitization forums, a strategy backed by UNDP and other partners.

These forums are expected to raise awareness and educate the public on legal matters.

- c. **Monitoring and Evaluation:** Regular monitoring and evaluation mechanisms will be established to track progress, identify challenges, and develop adaptation strategies as needed for the implementation of the decongestion project. Continuous assessment is integral to achieving the intended goals of this phase of the decongestion project.
- d. **Advocacy and Awareness:** The meeting concluded with a commitment to a robust advocacy and awareness campaign. This campaign extends beyond L.A.W 2023 and aims to engage the broader community and maintain the momentum generated by the stakeholders' shared dedication.

3.1.2 Key Findings and Highlights from the Legal Awareness Week

The theme of the LAW was, "Unlocking Justice: A Collective Effort to Decongest Prisons and Deliver Legal Aid," which was informed by the challenges faced by Kenya's correctional institutions. In this regard, prison congestion sits at the core of addressing some of these challenges including response to the pressing need to make justice more accessible. The LAW, which spanned from 23rd to 27th October 2023 and continued over the course of three months, was designed to confront these challenges. It engaged several collaborative partners including state and non-state actors. The aim of these partnerships was to raise awareness about the plight of inmates in overcrowded prisons and to provide legal aid and explore alternative sentencing options. Despite constitutional provisions and laws that support non-custodial sentences and bail rights, prisons are bursting at the seams. It is the collective mission of partners and allies to promote legal literacy and facilitate access to justice throughout the country, contributing to a more efficient and responsive legal system.

A collective responsibility exists in response to the congestion challenge and in this regard, there needs to be collaboration between the National Council on the Administration of Justice, the Judiciary, ODPP, KPAS, WPA, NGOs, and all justice sector actors. On admission to the Bar, advocates' also take an oath to uphold justice and should hence embrace pro bono services, especially to bring justice closer to the poor and vulnerable. While acknowledging the Judiciary's progress in enhancing its case management system, a challenge was raised for them to aspire to even greater efficiency, clarity, and transparency, considering these are fundamental elements for a robust judicial system.

A challenge was also raised to the probation and aftercare service and alternative sentencing options as essential tools to decongest prisons. What is the wisdom of incarcerating individuals for minor offenses when they could positively contribute to society and undergo rehabilitation? The hope through the LAW and the decongestion project at large is that there shall be reform in the overall philosophy for correctional institutions, towards restorative justice, envisioning them as community centers of restoration. Although it may seem distant, such a vision is worth pursuing.

During the launch of the LAW, the Director of Public Prosecutions, highlighted his office's active participation in initiatives to decongest prisons, including the "All for Justice Case Review" as an instrumental effort that improved transparency, accountability, and efficiency. The ODPP committed to enhancing access to justice through continuous reviews of ongoing criminal cases, aligning with their strategic agenda. It was proposed that the LSK Service Week's prison decongestion activity becomes an annual program within the criminal justice sector, an idea welcomed by the audience.

The table below represents the summary of findings from the court stationed legal aid clinics and prison visits.

LEGAL AID CLINICS		
STATION	SUCCESSSES	RECOMMENDATIONS
Milimani, Kibera and Madaraka law Courts	<ol style="list-style-type: none"> 1. Highest turnout recorded at Milimani Law Courts, showcasing the effectiveness of the collaboration. 2. Extensive coverage of legal issues across all three locations. 	<ol style="list-style-type: none"> 1. The LSK National Office should strengthen collaboration with the Nairobi Branch to ensure a unified and impactful approach. 2. Explore opportunities for extending the reach of legal aid clinics to more locations within Nairobi.
Isiolo Law Courts and Embu law courts	<ol style="list-style-type: none"> 1. The presence in Isiolo and Embu Law Courts ensured a wider reach of legal aid services. 2. Engagement with clients on various legal issues, promoting access to justice. 	<ol style="list-style-type: none"> 1. Strengthen partnerships with local communities to enhance awareness and participation. 2. Consider expanding legal aid clinics to additional courts within the Mt. Kenya region.

<p>Eldoret Chief Magistrate Court and High Court</p>	<ol style="list-style-type: none"> 1. A wider platform for advocates to offer free legal advice, guidance, and assistance to community members who needed legal services. 2. Law students engaged clients directly, facilitating a mentorship process. 	<ol style="list-style-type: none"> 1. Efficient Processes: To streamline activities at correctional facilities, improved coordination between prison authorities and event organizers is recommended to ensure efficient use of time during prison visits. 2. Paralegal Training: To enhance legal assistance to inmates, the development of paralegal training programs was proposed. These paralegals can work alongside legal professionals, contributing to better addressing the legal challenges faced by inmates. 3. Enhanced Public Awareness: More efforts should be directed towards raising public awareness about the LAW. Efforts such as utilizing a musical band for a week-long public awareness campaign can be considered.
<p>Mombasa Law Courts - Treasury Square Mombasa</p>	<ol style="list-style-type: none"> 1. Increased participation of advocates who came forward to assist the members of the public. 2. Effective teamwork among stakeholders. 	<ol style="list-style-type: none"> 1. Community Mobilization: Involve counties and partners in mobilizing the public. 2. Early planning with stakeholder involvement. 3. Utilize media and radio shows for event mobilization. 4. Disseminate information frequently before the event. 5. Engage more partners to enhance the event's effectiveness.
<p>Kisumu Law Courts</p>	<ol style="list-style-type: none"> 1. Significant advocate turnout, ensuring comprehensive coverage of legal issues. 	<ol style="list-style-type: none"> 1. Explore the possibility of extending legal awareness activities to additional court

	<ol style="list-style-type: none"> 2. Positive engagement with the public, addressing a diverse range of legal concerns. 	<p>stations within the West Kenya region.</p> <ol style="list-style-type: none"> 2. Enhance promotional efforts to increase public awareness of the legal aid services provided during the event.
PRISON VISITS		
STATION	SUCSESSES	RECOMMENDATIONS
<p>Industrial Area Remand Prison, Nairobi West Prison and Langata Women’s Prison</p>	<ol style="list-style-type: none"> 1. High advocate turnout at both correctional facilities. 2. Comprehensive coverage of legal issues affecting diverse inmate populations. 	<ol style="list-style-type: none"> 1. Strengthen partnerships with women-focused organizations for increased impact at women's correctional facilities. 2. Consider organizing follow-up legal awareness sessions to ensure continued support for inmates.
<p>Isiolo GK Prison, Embu GK Prison</p>	<ol style="list-style-type: none"> 1. Meaningful engagement with inmates at both Isiolo GK Prison and Embu GK Prison. 2. Comprehensive coverage of legal issues affecting the incarcerated population. 	<ol style="list-style-type: none"> 1. Explore possibilities for extending legal awareness initiatives to other correctional facilities in the region. 2. Strengthen partnerships with local organizations to enhance the impact of legal aid clinics.
<p>Eldoret Prisons</p>	<ol style="list-style-type: none"> 1. Providing valuable free legal aid to the inmates. This initiative was crucial in ensuring that the incarcerated individuals had access to legal information and assistance. 2. Highlighted the legal challenges and issues faced by inmates. 3. Legal practitioners, students, and various stakeholders provided free legal advice and assistance to inmates. 4. Facilitation of direct mentorship for students who participated in the event, allowing them to observe the dynamics of 	<ol style="list-style-type: none"> 1. Efficient Prison Processes: To maximize the effectiveness of future prison visits, efforts should be made to streamline the processes within correctional facilities. This can include better coordination between prison authorities and event organizers to minimize waiting times and ensure that inmates receive more legal assistance during the visit. 2. Training Paralegals: The establishment of programs to train more paralegals who can work alongside legal professionals in correctional facilities is recommended. This can help address the legal needs of inmates more effectively. 3. Continuous Public Awareness: Efforts should be put into

	real client-advocate interactions.	creating awareness about prison visits to ensure that inmates are aware of the opportunities to receive legal aid and support.
King’orani Remand Prison	<ol style="list-style-type: none"> 1. Provision of critical legal advice and support to inmates. 2. Better-informed inmates ready to engage with the legal system. 	<ol style="list-style-type: none"> 1. Streamlining processes at correctional facilities to avoid time wastage during visits. 2. Development of programs to train more paralegals who can work alongside legal professionals to aid inmates.
Kodiaga Prison	<ol style="list-style-type: none"> 1. Collaboration across multiple chapters ensured a comprehensive approach to legal aid. 2. Positive impact on inmates, addressing various legal issues and concerns. 	<ol style="list-style-type: none"> 1. Continue collaboration with various chapters to maximize the reach and impact of legal aid initiatives. 2. Explore possibilities for regular legal awareness programs within correctional facilities.

3.1.3 2nd Correctional Reforms Stakeholder Engagement

The LSK convened a second Correctional Reforms Stakeholder engagement on 16th November 2023.²⁴ Objectives of this meeting included to:

- a. Report on the conclusion of phase one of the LAW, 2023.
- b. Obtain recommendations from Stakeholders on conclusion of phase one of the LAW and areas for improvement.
- c. Give an overview of the second phase of the LAW.
- d. Get recommendations on the implementation of the second phase of the LAW, 2023.

Following the discussions held, the following recommendations were made by stakeholders:

²⁴ Some of the participants for this engagement included amongst others: Judiciary, Office of the Attorney General – Department of Justice (AG), National Police Service (NPS), Office of the Director of Public Prosecutions (ODPP), Kenya Prison Service (KPS), Commission on Administrative Justice (CAJ), Probation and Aftercare Services, Kenya Human Rights Commission(KHRC), Kenya National Commission on Human Rights (KNCHR), The Power of Mercy Advisory Committee (POMAC), National Legal Aid Service (NLAS), Federation of Women Lawyers-Kenya (FIDA), International Justice Mission(IJM), Legal Resources Foundation(LRF), RODI Kenya, Kituo Cha Sheria, CMR-Africa, Ombudsman, UNDP, UNODC.

- a. Adoption of a Referral Mechanism: From the data collected and analysed, it was noted that some cases were best managed by specific organisations i.e. FIDA, NLAS, Kituo cha Sheria and KNHCR. Stakeholders recommended that in as much as these matters would be referred to different organizations, once taken up, the Society needed to monitor the progress of these cases. A representative of the CAJ and KNHCR noted that they had implemented the referral system in their respective institutions and agreed that the Society could benchmark from their institutions.
- b. Feedback Mechanism Reinforcement: The need to strengthen the feedback mechanism to enhance the effectiveness of the initiative to decongest prisons. This is to enable collection and analysis of data on the success of the initiative. Create a system for feedback and subsequent tracking to follow up on the cases managed in phase 1. Further, LSK should develop strategies to guarantee quality services are delivered during legal aid provision.
- c. Incentivising Pro Bono Work: Propose a model for compensating advocates who undertake pro bono cases, to encourage more participation. This may be by way of recognition, being considered when opportunities arise and awarding of CPD points to advocates. Advocates were of the view that the incentive need not be monetary. There was a proposal to offer tailormade trainings and capacity building, to those that offered pro bono services.
- d. The need to prioritize on-the-ground assessments, particularly in locations such as Garissa, through a 'mashinani' approach. This will provide a more profound understanding of the local situation. The low turnout observed throughout LAW 2023, serving only two clients at the court station in Garissa raised a critical concern. There is an expressed reluctance of organizations to offer legal aid in Garissa's prisons, indicating a crucial need for focused attention and intervention in this area.
- e. Consider leveraging the availability and eagerness of students for pro bono services as part of their mentorship and learning experience. This proposal emphasizes the potential benefits of engaging students who would be able to assist advocates in conducting pro bono services and take part in community sensitization.
- f. There is a pressing need for a comprehensive analysis of best practices of plea bargaining, diversion and alternatives to prosecution implemented in other jurisdictions. It is crucial to stress the significance of adopting similar successful practices to enhance the effectiveness of these initiatives.

- g. Collaborative efforts among stakeholders, emphasizing the need to avoid working in isolation. Encouraging collaboration will enable reaching a larger audience and ensure a more impactful and coordinated approach to addressing legal challenges.
- h. The need to set timelines and targets, along with the formulation of short term, medium term, and long-term goals, was deemed crucial in driving the initiative forward. It was suggested that the reports from the LAW be shared with key stakeholders to push for law reform.
- i. To enhance public participation and turnout during future Legal Awareness Weeks, the LSK should implement a multifaceted sensitization strategy. This may include community engagement programs, media campaigns, collaboration with local organizations who have wider access to the people at the grassroots, distribution of printed materials, mobile legal clinics and consider localized advertising.
- j. A stakeholder recommended that decongestion of prisons could commence with special Interest persons, who had been incarcerated. These include women with children in prison, persons with disability, among others.
- k. Further, a representative from the AG recommended policy reform. Noting that there were short term, medium term, and long-term solutions to decongestion of prisons. Short term solutions included what the Society could undertake with immediate effect, to decongest prisons, while medium term included standardizing practice among stakeholders while long term solutions included legal reform to ensure harmonized policies. He gave an instance where some offences required non-custodial sentences i.e. touting, yet due to the current legislations, many offenders were presently in remand.
- l. There was a recommendation for the Society to conduct sensitization and legal aid across the country.

In conclusion LSK committed to taking up and actioning the various recommendations which were already underway including:

1. Training of 200 advocates, on plea bargaining and diversion as alternative to prosecution, in partnership with the ODPP and the Judiciary in various regions across the country.,
2. Engagement with KNHCR, Kituo cha Sheria and FIDA-Kenya, among others, towards defining case referral systems, emphasizing on the need to find practical resolutions beyond mere paperwork. Systems would also be put in place to monitor referred cases and ensure the provision of assistance to the individuals involved.

3. Efforts towards legislative review and reforms which shall be taken up by the Public Interest Litigation Directorate at LSK.
4. Student mentorship, which was successfully conducted during the LAW in partnership with Kenyatta University. More collaborations with institutions of higher learning are envisioned, to engage students further in future projects.
5. Creation of incentives for advocates who undertake pro bono cases to further encourage participation of more advocates.
6. Publication of a policy paper at the end of the project with key findings and recommendations, for further advocacy and engagement.

3.1.4 Key Findings and Highlights from the Advocates' Training Sessions (Phase 2)

One of the key recommendations from phase 1 of the decongestion agenda by LSK and its partners, was to conduct training sessions targeting 200 advocates across the country, on the alternatives to prosecution. This was implemented in 5 regions: - Isiolo, Eldoret, Kisumu, Mombasa, and Nairobi. The training sessions were very insightful and interactive. While some of the participants were conversant with plea bargaining and diversion by virtue of their practice, a good number were new to the process or just had a cursory knowledge of these avenues. In Machakos for instance, three-quarters of the participants indicated that it was their first time interacting with a plea-bargaining agreement.

The legal and policy foundation of plea bargaining, and diversion were laid out in detail and participants had the opportunity to share their experiences and ask questions. This section highlights the key issues that arose from the discourse and feedback from participants during the different training sessions.

Issues arising from the processes of Plea Bargaining & Diversion as Alternatives to Prosecution.

1. Variance in Sentencing: - The Judiciary retains the discretion to determine the appropriate sentencing for accused persons, despite consent by parties.²⁵ Participants highlighted that in certain situations, courts' sentencing varied greatly with the proposal of the Plea-Bargaining Agreement, thereby undermining

²⁵ Ádám Antal Papp, 'Alternatives to Imprisonment in the Light of Sentencing' [2021] *Debreceni Jogi Muhely* 54; Francis J Merceret, 'Sentencing Alternatives to Fine and Imprisonment' (1976) 31 *U. Miami L. Rev.* 387; Richard Kuuire, 'Non-Custodial Sentences and Alternatives to Imprisonment' (1996) 20 *Rev. Ghana L.* 301.

the trust of their clients and other accused persons in the process with others opting to go through full trial.

2. **Legal Fees:** - There was a concern on the issue of legal fees and costs. The processes of plea bargaining and diversion touch on matters of bread and butter for advocates, since they earn their professional fees from the cases and a shortened process, where a matter does not go through full trial, means less fees charged.
3. **Coordination and Collaboration with the Prosecution:** - Some participants highlighted difficulty in working together with prosecution in securing plea-bargaining agreements. The ODPP representatives, however, laid out a complaints mechanism in which one can address such an issue with their office.
4. The fact that in plea bargaining, the accused person's criminal record is still maintained is a discouraging factor to accused persons and hence makes them hesitant to agree to an offer of plea bargaining, and would rather go through full trial, in a bid to try securing an acquittal.
5. The dilemma of how to handle "Romeo and Juliet scenarios" in sexual offences, given that such offences are prevalent and cannot be diverted or go through plea bargaining.
6. The lack of a database from the ODPP in which one can look through the records of an accused person to ascertain whether they are a first-time offender and should be genuinely considered for diversion and plea bargaining. This stemmed from the concern of releasing back to society habitual criminals.
7. **Public Perception:** - Most members of the public do not consider alternatives to prosecution as an effective way of dispensing justice, compared to one going through the criminal justice system. Non - custodial sentences are considered as letting the accused person go free for the offence committed. This perspective negatively impacts on the cooperation of the victims and their families, with most being reluctant to embrace plea bargaining and diversion. Some conclude that the prosecution and/or court has been compromised. On this premise, reintegration becomes a hurdle as the community may not readily accept the accused person back into society.
8. Lack of awareness and understanding of the procedures of plea bargaining and diversion among the public who are not able to employ these avenues to existing criminal cases, even though they are the main consumers and beneficiaries of these initiatives.
9. Difficulty in analyzing the effectiveness and impact of plea bargaining and diversion to the accused and victims, due to a lack of monitoring and evaluation

mechanism, from the initiation to post sentencing and examines the outcome of these processes.

10. Victim's Participation: - The role of the victims and the extent to which their views are considered was a thorny issue of debate. Several participants felt that the victims' concerns were often sidelined in the quest to pursue alternatives to prosecution.
11. Plea-bargain and diversion could be a breeding ground for corruption: - It was noted that both plea bargaining and diversion could be misused to the benefit of the offender and subsequently, to the detriment of the victim.
12. Delays by after-care service providers (children's officers and probation officers) in provision of reports, which would assist in the decongestion efforts especially in diversion cases.

Challenges From the Training Sessions.

- a. While the capacity building sessions comprehensively tackled plea bargaining and diversion, the aspect of pre- trial detention/ trial advocacy was not addressed in depth. It remains a concern that many of those whose liberty is curtailed in remand, comprise persons waiting for the trial of their cases. This means that they are in custody for whichever reason, which if addressed would enable them to secure their freedom and follow through their cases out of remand, thereby contributing to decongestion of the holding cells and remands.
- b. The training session as envisaged under Phase 2 of the project, was to include a visit to various prisons on the 4th day, to provide legal aid to remandees and those incarcerated, in view of the knowledge acquired from the sessions. The aim was to tackle the files identified during the Legal aid clinics held in Legal Awareness Week (Phase 1). However, this was not possible due to financial, logistical and time constraints.
- c. The training sessions targeted a total of 200 participants. While this is a commendable number to start with, it represents a smaller fraction of the advocates, since there are approximately 23, 500 advocates in Kenya, with hundreds being admitted each year.

The recommendations to address the issues and challenges raised above include: -

- a. To evaluate the effectiveness of the training sessions in Phase 2, a follow up tool is established, for participants to see how many would explore plea bargaining and diversion, in their practice, after the training. This can be achieved through a touch base forum in which the advocates report on the cases, if any, where they have

attempted to apply plea bargaining and diversion, noting the successes or failures or in the alternative, how they have been able to either disseminate the information, educate, or otherwise sensitize a wider audience on the alternatives to prosecution. This process can be virtual (through a survey questionnaire sent to each participant) or physical meetings of the trained participants.

- b. Develop a database of advocates willing to be extensively engaged in the decongestion initiative, to form the required legal and technical support base to which deserving cases can be referred for action and followed through a logical conclusion. The LSK prioritizes participants who took part in the sensitization training, in the different regions to conduct prison visits and subsequently, take up the cases flagged out, in collaboration with the ODPP.
- c. Setting up a fund to support advocates willing to take up pro bono cases (identified by the ODPP in phase 1) to their logical conclusion, while actively applying alternatives to prosecution where necessary, under the decongestion program. This not only acts as an incentive but also addresses the issue of remuneration and the perspective that alternative methods to prosecution are a threat to the bread and butter of advocates, since it affects legal fees and costs. We do acknowledge that this is a legitimate concern.
- d. There is a need to increase the number of participants in the training sessions to have more practicing advocates equipped with the relevant knowledge, to engage in the decongestion agenda. Additionally, the training should be more frequent. The LSK can consider incorporating alternatives to prosecution such as plea bargaining and diversion, as topics to be covered in the annual CPD Calendar, as a strategy to increase the number of advocates trained. These sessions can include the issuance of certificates to further encourage participation. The facilitators should be picked from the cohort of trained advocates during phase 2, together with collaborating agencies such as the ODPP.
- e. There is need for sensitization initiatives on alternatives to prosecution and alternative forms of justice at the grassroots levels targeting chiefs, assistant chiefs and Nyumba Kumi leaders, given that these are the contact persons closest to locals. It is not lost on us that most people make the first stop to consult these leaders, before taking further action on their matters (such as resorting to seeking legal representation). It is therefore important to also equip them with the relevant information to properly advise the locals on the available avenues to resolve their disputes.
- f. There is a need for comprehensive follow up on the impact of plea bargaining and diversion, on the accused persons and victims, after matters have been concluded

to ascertain whether the accused (granted a non-custodial sentence or incarcerated for a shorter period or totally released through diversion) reform. Further, whether the victim believes justice was done and to what extent such persons are accepted and reintegrated back into LSK.

- g. Adopt a standardized approach to sentencing proposals in plea bargaining, to foster predictability and fairness.
- h. A proper record of those who have gone through these alternatives especially diversion should be established by the ODPP, to provide a point of reference for the prosecution to ascertain whether an accused person has been through the process of diversion before. This is to avoid scenarios where there is abuse of these processes.
- i. Allocate more resources (financial, technical, human) towards the decongestion agenda and promote strategic partnerships and collaboration between all relevant stakeholders.
- j. Establish a student mentorship program in which the LSK can work together with select student institutions like the Kenya School of Law or various universities, to offer support to advocates, in handling pro bono cases, which can be taken through alternative avenues of prosecution.



4. CONCLUSION

Phase 2 was key in impacting the necessary knowledge to participants on alternatives to prosecution. Through this phase, advocates were brought on board as an integral part of the decongestion agenda and the role they play cannot be overemphasised, as they create awareness, shape public opinion and lobby within their sphere of influence for decongestion of prisons.²⁶ The decongestion agenda is one to be realized progressively. However, concrete steps need to be taken to achieve practical results of the same, as has been put into motion by Phase 1 and Phase 2 of this project.

Phase 3 of this initiative is highly recommended to crown the progress made during which the recommendations above, including relevant best practices, can be implemented within a reasonable timeframe be it on a short term, midterm, and long-term basis. Further engagement with the relevant stakeholders, collaboration and coordination is fundamental in working towards this noble aim.

Depending on the discussions and proposals by relevant stakeholders and availability of resources, Phase 3 of the decongestion initiative can take different approaches either concurrently or with a focus on one strategy. Some of the proposals for consideration include: -

- a. Acting on the data that was collected, stored, and analysed by the Law Society of Kenya during Phase 1 of the project through the LAW. This data constitutes cases that are viable for either plea bargaining or diversion. Phase 3 can focus on overseeing these cases to completion, to achieve tangible results on decongestion. This approach further provides an opportunity for the advocates trained in Phase 2 to utilize their knowledge and expertise in assisting to reroute these cases from the mainstream criminal justice system and further provide accused persons with the required legal representation.²⁷
- b. With the collaboration of the Judiciary, ODPP, defence counsel and other relevant stakeholders, “mobile courts” can be implemented at select remand centres and prisons, especially those with a high number of remandees to deal with the matters identified as eligible for alternatives to prosecution. An elaborate schedule for frequent “decongestion sessions” through the “mobile court” system can be

²⁶ James Hoggan and Grania Litwin, *I'm Right and You're an Idiot: The Toxic State of Public Discourse and How to Clean It Up* (New Society Publisher 2019).

²⁷ Eric K Mutua, 'Access to Justice in Kenya-a Critical Appraisal of the Role of the Judiciary in Advancement of Legal Aid Programs' (PhD Thesis, University of Nairobi 2018) <<http://erepository.uonbi.ac.ke/handle/11295/105824>> accessed 14 January 2024; Deborah L Rhode, *Access to Justice* (Oxford University Press 2004).

organized by collaborative agencies. This, however, needs proper planning and goodwill from collaborative agencies. The flagging out of matters that are eligible can be undertaken by ODPP with assistance of the trained advocates and students from the Kenya School of Law or various Universities (under a student mentorship program geared towards decongestion).

- c. Another approach of Phase 3 could be to follow up on the impact and effectiveness of the training sessions on the participants engaged in Phase 2. An elaborate monitoring and evaluation mechanism or strategy, can be set up through either virtual means (virtual meetings, comprehensive post survey reporting tool) or in person meetings, where all the participants converge for a day to engage and give feedback on if and how, they have utilized the information from the training sessions.
- d. There is a clear need to scale up the process of awareness and sensitization among legal professionals and indeed the public at large (especially at the grassroot levels), of the existing avenues through which criminal cases can be resolved without going through trial. Upscaling the sensitization and awareness campaign of alternatives to prosecution is therefore another avenue through which phase 3 of the project can be implemented.
- e. As a short-term strategy aimed at increasing sensitization of the legal professionals, the LSK can include plea bargaining and diversion in its CPD Calendar and maintain it going forward. This is a cost-effective way of enhancing awareness of these alternative ways of prosecution to a wider audience in the legal profession over and above organizing training sessions for select participants.
- f. Further, comprehensive plans can be laid out targeting the public at the grass root levels in select regions which initiatives can be spear headed by the advocates trained in Phase 2 in collaboration with community-based organizations.²⁸
- g. Phase 3 can equally take an academic front focusing on collecting and analyzing data to evaluate the impact of the existing alternatives to prosecution and further decongestion strategies to ensure that the government adopts evidence-based policies.²⁹

²⁸ Nancy J Materu, 'Reducing Overcrowding in Prisons: Public Perceptions on Community Services: The Case of Ilala Municipality, Dar-Es-Salaam.' (PhD Thesis, The Open University of Tanzania 2021) <<http://repository.out.ac.tz/id/eprint/3260>> accessed 14 January 2024.

²⁹ David Mills and others, 'Evidence-Based Public Policy Decision-Making in Smart Cities: Does Extant Theory Support Achievement of City Sustainability Objectives?' (2021) 14 Sustainability 3 <<https://www.mdpi.com/2071-1050/14/1/3>> accessed 14 January 2024; Geoff Mulgan, 'Government, Knowledge and the Business of Policy Making: The Potential and Limits of Evidence-Based Policy' (2005)

5. WAY FORWARD: CONCEPTUALISING PHASE 3

HYPOTHETICAL CASE: THE STORY OF MALAIKA

Malaika is a 19-year-old girl who is currently being held in remand at the Shimo La Tewa Prison in Mombasa because she was caught in possession of 1kg of Marijuana in Shanzu and was not able to post the bail which was set at 5000kes. The story of Malaika is a common one. She was born in Sulwe, a small village located near Ndavaya Town in Kwale. She was raised by her grandmother as her father passed away when she was 5 years old. 2 years after the death of her father, her mother remarried and moved to Tanzania leaving behind Malaika and her sister Tangaza. While she was able to finish primary school because of a bursary by the area Member of Parliament, she was not able to continue to high school because it was too expensive for her grandmother. After a year or two of staying at home, she receives word that a distant relative in Mombasa City is looking for a domestic worker to assist in the house. She takes up the opportunity and with support from neighbours gets a one-way ticket to the city hopeful that she will make something of herself.

For 6 months all is well, but she soon catches the eye of the father of the house who keeps making sexual advances at Malaika and threatening to fire her if she refuses. One evening while the mistress of the house is away, he tries to rape Malaika, and she manages to fight free and runs away. With no clothes and no money, she is now in the street in a city unfamiliar to her. The local market women take pity on her and take her to a shelter in Shanzu where other young, stranded girls live with their Madam. She does not know that it is a brothel, and she will be required to sell sex for her upkeep. With limited choices available to her she complies. Thus begins her life in prostitution.

One day her regular client asks her to deliver a package, as she has before. Thinking nothing of it she agrees, and later in the night sets off to deliver the package to the address she was sent. Along the way, a police van stops her, and two officers jump out and start harassing her, accusing her of loitering with the intention to prostitute. She knows these officers as they come to the brothel once a week collecting "rent" from the madam and occasionally the male officer receives services from the girls. They arrest her and take her to the station for processing and while searching find the parcel she is to deliver. On opening it they discover assorted narcotics including cocaine, heroin, and marijuana. Although she insists the package is not hers and she is only making a delivery, she is booked and charged and waiting for her case to be heard. She has been held at Shimo la Tewa for 3 years now. The prosecutor has been transferred three times and they are now sitting before the 5th Judge. She cannot afford a lawyer and continues to hope that she will one day receive her justice.

1 Evidence & Policy 215 <<https://bristoluniversitypressdigital.com/view/journals/evp/1/2/article-p215.xml>> accessed 14 January 2024.

5.1 CONTEXT

The above is a hypothetical case but duly captures a common scenario, especially in Mombasa and certainly other towns at the Coast, where poverty and inequality is high and as a result, many are vulnerable to amongst other things exploitation and abuse. In addition to the above, due to its location along the Coast of East Africa, Mombasa is a source, destination and transit point for the trafficking and smuggling of drugs. Being in possession of any narcotic drugs or substance is a crime under the Kenyan law, specifically the Narcotic Drugs and Psychotropic Substances Control Act. However, as evident in the above scenario, some of those caught in possession of the drugs are oblivious to the situation. Others are young people trying to find their way through life and happen to fall into bad company but if given a chance they can turn a new leaf.

On 1 February 2024, the Moi International Airport Anti-narcotics officers based in Mombasa recovered 300 grams of heroin from the house of a 24-year-old college student. The detectives were acting on an intelligence report, which also led to the arrest of the student at his Mshomoroni house, Kisauni sub-county, officials said. Cases of drug trafficking, possession and consumption in Mombasa have been on the rise despite operations to tame them. Dozens of traffickers have since been arrested and charged in the operation. Police are yet to net main drug lords as only mules are usually arrested. Police say traffickers now use roads as opposed to airports to carry out their business. The most trafficked narcotics from Tanzania and through Uganda is heroin. Cocaine is also trafficked from the two countries.³⁰

It thus follows that there are several people who are in remand or who have come into conflict with the law due to drug related offences. In this regard the 3rd Phase of the bars to Justice project will focus on decongestion of prisons in Mombasa through a project on case review. Under this Phase LSK would be the key coordinator and convenor of a case referral management system, a case review exercise and the effective monitoring and evaluation thereof. This is a key intervention as they would identify certain cases for follow-up as referred from other organizations and institutions. They would also undertake a case review in Mombasa where they shall identify particular cases, especially for

³⁰ <https://www.the-star.co.ke/news/realtime/2024-02-01-police-detain-college-student-found-with-heroin-worth-sh12m-in-mombasa/>

5.2 PROPOSED WORK PLAN OF THE PILOT PHASE 3 PROJECT.

GOAL: TO CONTRIBUTE TOWARDS EFFORTS IN PRISON DECONGESTION THROUGH A DETAILED CASE REVIEW AND ESTABLISHMENT OF A CASE REFERRAL AND MANAGEMENT SYSTEM.

OBJECTIVES:

- a. To undertake a case review exercise in Mombasa for remandees facing charges of possession of drugs (and associated offences).

This part of the project would focus on reviewing a set number of cases according to set parameters. The focus would be on remandees who the larger number of the prison population with a focus on vulnerable groups such a youth and persons with disabilities. The project would seek to pilot this case review in Mombasa and would focus on remandees who have are being held for possession of drugs and other associated crimes. The idea would be to bring relevant stakeholders such as the Judiciary, ODPP, Police, Law Society of Kenya, Correctional Services, together to work through these cases to their logical conclusion, with a preference for non-custodial sentences where relevant and appropriate.

- b. To design and implement a case referral management system that the Law Society of Kenya can use to track cases that have been referred.

This would involve the development and implementation of a case referral and management system that would be managed by the Law Society of Kenya, perhaps as an online data base that assigns each referred case a unique number, and a specific lawyer who would be responsible for the management of the case. This may be done in collaboration with Kenya School of Law as part of the training of law students but with this system in place a set number of cases would be referred through the Judiciary, ODPP and legal service providers such as Kituo Cha Sheria and NLAS for follow up in the hopes that it would reduce the amount of time that a matter is pending for lack of appropriate legal representation. With benchmarking and appropriate needs assessment conducted, the LSK referral system would track cases through to their logical end and would put in place key systems to ensure that all the matters fed onto the system are appropriately assigned, followed up and concluded.

- c. To effectively monitor, evaluate and learn adjusting as necessary towards the realization of programme goals and objectives.

This would involve the development of a detailed monitoring, evaluation and learning framework. It would be important to come together as partners and agree on the theory of change for the project i.e. what is the change one wants to see through the existence of this project, and to develop a detailed monitoring framework against which one would report impact. A key element in this regard would include for example the case back mechanism as a point of accountability and learning but would be collectively agreed upon between partners and identified stakeholders.

RATIONALE:

The LSK is best placed to implement this project as a logical follow up to Phase 1 and 2 of the bars to justice project. The first two phases set the foundation for this phase which seeks to implement the lessons learned and bring together various stakeholders and partners galvanized towards the active decongestion of prisons through a case review and referral system.

The rationale for a case review is to bring together all relevant stakeholders within the justice ecosystem to consider cases that are pending hearing and conclusion. This is informed by the high number of remandees that are currently in prisons awaiting trial. As a Pilot, this Phase shall focus on Mombasa and shall focus on reviewing cases of remandees who are awaiting trial for various drug related charges. The rationale for this is highlighted in the hypothetical case above that provides context for many of the cases that are awaiting trial in our justice system. Indigent and with no means for their own legal representation many find themselves in prison awaiting trial for several years. This case review will therefore seek to bring together all stakeholders for the review of cases to be determined against set criteria. This will include the judiciary, KPS, PACS, developmental partners, under the coordination of LSK to ensure that cases are reviewed and in the same sitting a decision reached, according to the law, on how the specific matter should proceed.

LSK shall also lead in the development of a case referral and management mechanism. Learning from institutions such as KNHCR and CAJ, LSK would develop a system to log, track and conclude specific cases that have been referred to them for provision of legal services and support to the logical conclusion thereof. Of importance here is a platform through which cases that have been referred to the LSK for pro bono service, or those who's accused cannot afford legal services, can be tracked, and managed with a case number attached to each and a clear follow up mechanism that is institutionalized such that the management and referral continue regardless of which lawyer is handling the case.

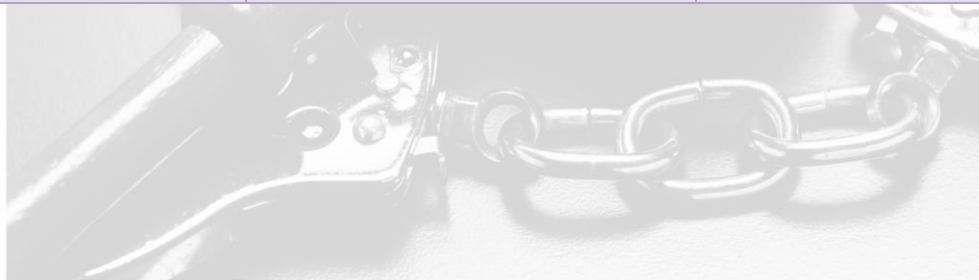
To ensure that the project is on track, a detailed monitoring and evaluation framework shall be developed. It is proposed that this is done with an expert in the area who can lead the team through identification of their theory of change and the key indicators against which progress, and impact shall be evaluated, and how learning shall be adopted and adapted to respond to the evolving needs of the project should they arise.

The table below provides a workplan against which this phase of the project can be implemented. It would be important to co-create this Phase's interventions through consultation and engagement with all actors, including developmental partners and civil society actors to ensure that there is effective buy in for implementation.

FROM BARS TO JUSTICE: PHASE III WORKPLAN		
OBJECTIVE	ACTIVITY	OUTCOME
Undertake Case Review	1. Identify key stakeholders for the case review which would include development partners, Law Society of Kenya, ODPP and Judiciary.	A list of identified partners and stakeholders on board with case review and understand the role of their different offices.
	2. Delineate the nature and scope of cases to be reviewed and which stations within Mombasa County.	A needs assessment that maps the breadth of cases available against set parameters for further review and delineation.
	3. In collaboration with partners identify specific cases and develop case review plan including date, relevant stakeholders that need to be present and venue.	A clear roadmap developed for the review that narrows down on specific cases delineated according to the parameters set by the partners. A clear indication of the dates and required resources (financial, human, and intellectual) required for this exercise.
	4. Undertake case review exercise.	Case review exercise undertaken according to the plan that was developed by partners.
	5. Develop review report highlighting number of cases that were overseen, what the outcome of the review was, timelines for follow up and persons responsible.	A clear analysis and follow up mechanisms put in place to understand what further resources are required to complete the review of cases.
	6. Convene parties for periodic update and review of progress	All partners to the review exercise shall meet periodically to understand what bottlenecks exist in the completion of reviewed cases. These appropriately logged for effective monitoring and learning. At the end of the project there shall be a clear report capturing lessons

OBJECTIVE	ACTIVITY	OUTCOME
Design and Implementation of a Case Referral and Management Mechanism	1. Undertaking a benchmarking exercise with KNHCR or CAJ	There shall be a clear understanding of good practices in the development of a case management system and an indication of potential challenges and opportunities drawing from the experience of other institutions.
	2. Identification of stakeholders and partners and delineation of scope (which cases are being taken over by the LSK and how.	All relevant stakeholders are on board and are available to put in the required resources for the referral and management system.
	3.Undertaking a needs assessment to understand what resources are required and the responsibilities for each partner involved.	A clear road map that delineates what exact resources are required from partners for the implementation of a referral and management system and respective roles.
	4.Setting up an electronic case management system.	An electronic case management system will be in place for the registration, identification and tracking of cases.
	5.Training on the case referral system by LSK	LSK and partners involved in the project shall be trained on the referral system and will know how to input data and ensure ease of information flow.
	6.Pilot of the case referral - with LSK in the lead receiving, reviewing, allocating files for referral and management	Cases shall be logged onto the system and allocated to specific lawyers participating in the pilot exercise.
	7.Follow up meeting to review challenges, successes, and opportunities for improvement	LSK, pro bono lawyers and various partners review progress identifying bottle necks and adjusting as

		required for achievement of program goals.
	8.Continued referral of cases and management on the system to logical conclusion	Enhanced referral and review of cases with adjustments made from review meeting.
	9.Report on the number of cases, and the successes of the system	Report indicating the number of cases that have been effectively managed by the LSK and its network of pro bono lawyers.
OBJECTIVE	ACTIVITY	OUTCOME
Monitoring, evaluation, and learning	1.Develop theory of change and monitoring framework for the project	A detailed monitoring framework in place against which project deliverables and impact would be gauged. Collection of baseline data for effective tracking and learning.
	2.Mid-term evaluation of project against key baseline data	A mid-term review report that highlights result against key performance indicators.
	3.End-term evaluation of project against key baseline data.	An end term report that highlights key project outcomes against the overall strategic framework and theory of change.



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