

Enforcement of court orders and ensuring an effective remedy



Non-compliance is detrimental to rule of law

- ***Southern Africa Litigation Centre v Minister of Justice and Others*** High Court of SA, 27740/2015 – High Court decision confirmed by Supreme Court of Appeal on 15 March 2016
- “A democratic State based on rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues” (High Court, para 37.2).
- “Where the rule of law is undermined by Government it is often done gradually and surreptitiously. Where this occurs in Court proceedings, the Court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice” (High Court, para 38).

Non-compliance and the obligation of an “effective remedy”

- The exercise of supervisory jurisdiction may be necessary to ensure an effective remedy for breach of any constitutional rights [*Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC)]
- Disjuncture between deference to separation of powers and right to an effective remedy
 - When will declarations be sufficient, and when are stronger remedies such as mandatory relief and requirements of government reporting to courts necessary?
 - Effectiveness of remedy closely linked to political will, strength of civil society to monitor compliance, and judicial activism to protect vulnerable or marginalised applicants
 - Once ruling supporting litigant’s claim issued, judges assume that litigant will return if non-compliance - Assumption misplaced in cases where litigants and civil society supporting litigation have resource and other constraints

Experience in the region

- Courts reluctant to step close to the separation of power arguments
- Courts seldom proceed beyond declaratory orders
- Orders often too vague to achieve compliance
- Culture of judicial activism limited in scope and tied to independence of courts
- Judicial powers abused in instances of human rights defenders and political opponents
- Courts, litigants and civil society often unable to monitor and enforce non-compliance with orders
- Failure of non-compliance influences extent to which cases brought to courts, lack of trust that effective remedy will result from litigation

What influences compliance?

- Non-compliance more likely where –
 - Cases not covered by media
 - Media distorting facts of case in favour of State
 - Orders designed to make it difficult to conclude that an official has defied a court order
 - Less transparent contexts
 - Proper implementation depends on choices and efforts made by a variety of actors outside the judiciary
 - Vague court orders

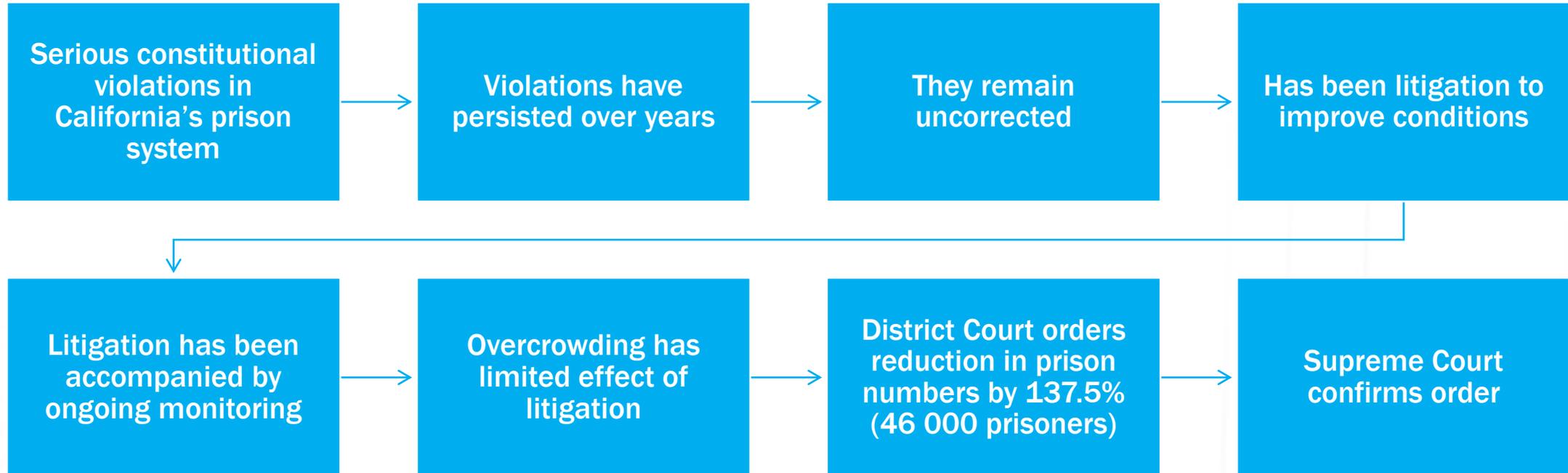
What influences compliance?

- Non-compliance less likely where -
 - Transparency in judicial processes
 - Clear court orders
 - Mobilised civil society
 - Threat to publicise non-compliance linked to elected official's reputational concerns and their ability to direct street level bureaucrats to respond effectively
 - Court protected from political backlash

Onus to monitor compliance?

- Honest evaluation within government departments themselves on rates of compliance
- Courts could utilise a range of strategies including -
 - Systematically reviewing compliance with their orders
 - State officials to report to court in person
 - Correctly identify relevant actors
 - Referring cases of non-compliance to prosecution (difficulties around proof and identification of non-compliance individual)
 - Improvement in exercise of supervisory jurisdiction
 - Informal meetings with government
 - Publicising compliance rates of government departments
 - Working with media to raise awareness among government departments and enable media to follow up problem areas

Brown v Plato



“The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eight Amendment (cruel and unusual punishment). This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding.” (US Supreme Court)

Two cases/issues

- Coleman v Brown – prisoners with serious mental illness
- Plata v Brown – prisoners with serious medical conditions
- Short term gains in the provision of care have been eroded by long-term effects of severe and pervasive overcrowding

- Suicide rate in California prisons 80% higher than other prisons
- Court appointed Special Master found 72% of suicides involved “some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.”
- 4-5 year gap in availability of sufficient beds to meet the treatment needs of many inmates/patients
- In 1995 the District Court found “overwhelming evidence of the systematic failure to deliver necessary care to mentally ill patients.
- Court appointed a Special Master to oversee development and implementation of a remedial plan of action. 12 years later he filed a report stating that state of mental health was deteriorating as a result of increased overcrowding.



Coleman v Brown

Brown v Plata

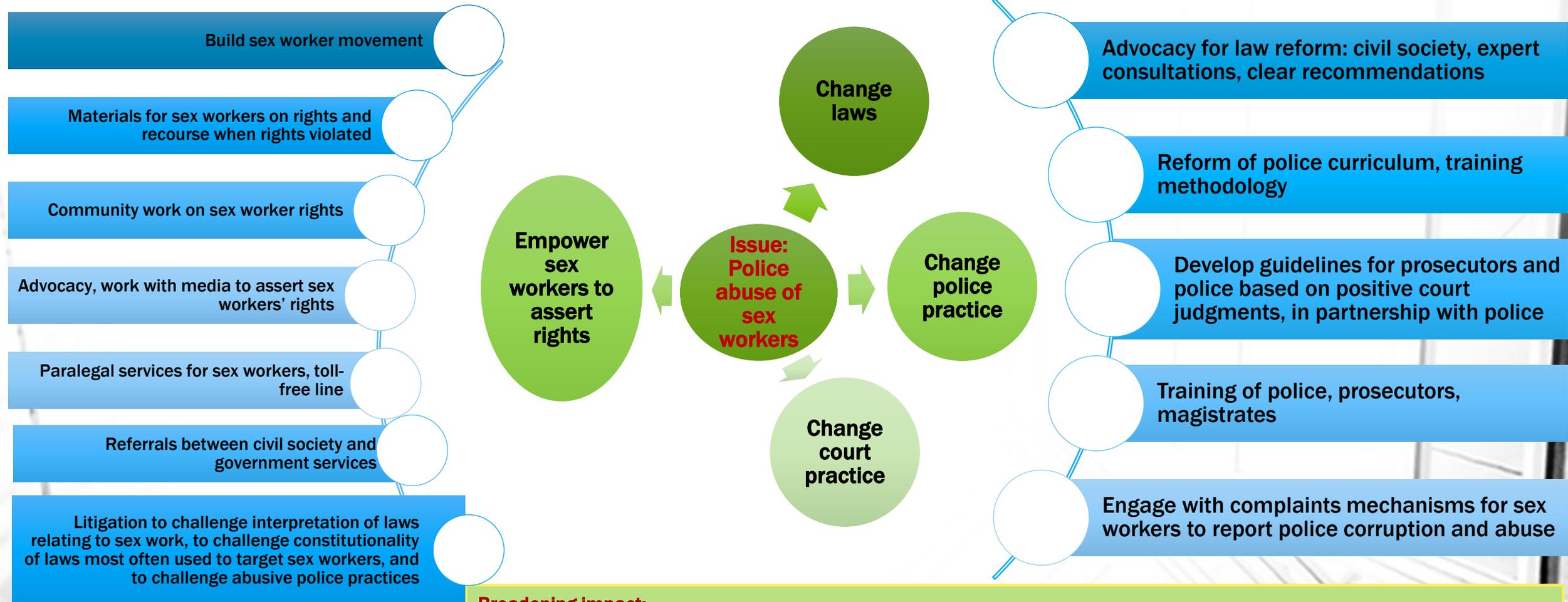
- Focused on prisoners with serious medical conditions
- Prisons designed to meet the medical needs of a population at 100% of capacity so have only half the clinical space needed to treat prisoners if at 200% capacity.
- Up to 50 sick inmates may be held together in a 12 by 20 foot cage for up to 5 hours awaiting treatment.
- Proportion of possibly preventable or preventable deaths was extremely high
- State appointed a Receiver to oversee remedial efforts.
- “The California prison medical care system is broken beyond repair, resulting in an unconscionable degree of suffering and death.” Person dies on average needlessly in prison every 6 days.

Guidelines on reduction

- Court ordered State to formulate a plan for compliance and submit for approval to court.
- Order leaves choice of means to reduce overcrowding to discretion of state officials
- State will be required to release some prisoners before full sentences served
- High recidivism – State must assess each release
- State may employ measures, including good-time credits, diversion of low-risk offenders
- **“Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”**

How do we ensure and sustain change?

Case study: Working as partners to make linkages to improve sex workers' rights in Malawi



Broadening impact:

- Use research, advocacy and litigation to also call for reforms in countries with similar laws
- Link to other marginalised groups affected by same laws, e.g. street children, undocumented migrants
- Link to Africa Campaign to Decriminalise Petty Offences and other initiatives