

## Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

### **EMPIRICAL STUDY**

**The actors of legal protection,  
their professional practices  
and the use of law in detention.**

Report on BELGIUM

*Vincent Eechaudt  
Jasmien Claeys  
Tom Vander Beken*

*Ghent University  
Institute for International Research on Criminal Policy*

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## 1. INTRODUCTION

### 1.1 AIM OF THE NATIONAL EMPIRICAL STUDY

The national empirical study describes and analyses the application of the relevant legal provisions in prisons with regard to prison litigation. Prison litigation is to be understood as any case initiated by a prisoner in connection with his or her detention. The empirical study also assesses the actual impact of legal support and legal assistance mechanisms. It therefore examines who provides legal aid, the formal and informal organisational arrangements and the how the law is applied in prisons.

### 1.2 METHODOLOGY OF THE NATIONAL EMPIRICAL STUDY

A multi-method research design was used for the national empirical study. First, open access data were used, such as the reports of the European Committee for the Prevention of Torture, the reports of the national monitoring body and the local independent monitoring boards<sup>1</sup>, studies published by the Prison Litigation Network and case law of the European Court of Human Rights, the Council of State, the Court of First Instance (interlocutory proceedings) and press articles. On the other hand, data were collected via different experts on the right to access to the judge. A preliminary desk research allowed us to identify the relevant organisations and individuals playing a key role in legal aid and legal support in Belgium (see [figure 1](#)).

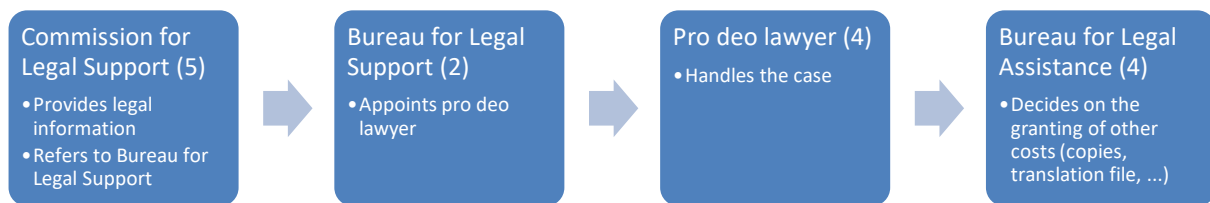


Figure 1: Chain of actors playing a key role in legal support and legal aid

The legal aid and legal support system in Belgium is managed by three organisations: the Commission for Legal Support responsible organising legal first line support, the Bureau for Legal Support responsible for organising legal second line support and appointing pro deo lawyers, and the Bureau for Legal Assistance deciding on advancing the costs related to the lawsuit. A strategic sampling approach was used, with the aim to conduct semi-structured interviews with at least two persons per type of actor. In total 23 experts were found willing to participate in the research. 5 respondents were members of the Commission for Legal Support, 2 respondents were members of the Bureau for Legal Support, 4 respondents were members of the Bureau for Legal Assistance and 4 respondents were pro deo lawyers dedicated to prison litigation to a variable degree. Although each Bar can be organised differently, it was not possible to question lawyers from all 25 bars. However, each lawyer participating in the research was a member of a different bar. Furthermore, other respondents participated in this study, coming from academia, the independent monitoring boards, the community (social) services in prison, the Justice department and, due to the focus on digital tools for prisoners, experts on the 'Prison Cloud' digital platform. More details on the respondents may be found in [table 1](#). [Table 2](#) provides an overview of the number of respondents per category. The strategic sample is not representative for all actors involved in prison litigation.

<sup>1</sup> Independent monitoring of prisons in Belgium is conducted by the National Monitoring Body (*Centrale Toezichtsraad voor het Gevangeniswezen* in Dutch, *Conseil Central de Surveillance Pénitentiaire* in French) and local Independent Monitoring Boards (*Commissie van Toezicht* in Dutch, *Commission de Surveillance* in French). See the legal report for more information on both organisations.

Although we aimed for theoretic saturation, this was difficult to achieve in some cases due to different policies and working methods in each judicial district.

<b>R1</b>	<ul style="list-style-type: none"> <li>Former member of the Federal Public Service of Justice - IT service (Prison Cloud)</li> </ul>	Semi-structured interview (1h06')
<b>R2</b>	<ul style="list-style-type: none"> <li>Member of a Local Monitoring Board</li> <li>Former lawyer</li> <li>Ph.D. researcher</li> <li>Working in the French speaking Community</li> </ul>	Semi-structured interview (1h12')
<b>R3</b>	<ul style="list-style-type: none"> <li>Lawyer dedicated to prison litigation</li> <li>Working in the Dutch speaking Community</li> </ul>	Semi-structured interview (1h34')
<b>R4</b>	<ul style="list-style-type: none"> <li>Member of Community Development of Flanders, responsible for welfare work in prisons</li> </ul>	Semi-structured interview (53')
<b>R5</b>	<ul style="list-style-type: none"> <li>Member of the Federal Public Service of Justice</li> </ul>	Semi-structured interview (16') / questions by e-mail
<b>R6</b>	<ul style="list-style-type: none"> <li>Lawyer dedicated to prison litigation</li> <li>Working in the French speaking Community</li> </ul>	Semi-structured interview (56')
<b>R7</b>	<ul style="list-style-type: none"> <li>Lawyer</li> <li>Member of a network of lawyers striving for social justice</li> <li>Working in the Dutch speaking Community</li> </ul>	Semi-structured interview (1h3')
<b>R8</b>	<ul style="list-style-type: none"> <li>Chairman of a Bureau for Legal Support</li> <li>Lawyer</li> </ul>	Semi-structured interview (34')
<b>R9</b>	<ul style="list-style-type: none"> <li>Member of a Bureau for Legal Support</li> <li>Lawyer</li> </ul>	Semi-structured interview (32')
<b>R10</b>	<ul style="list-style-type: none"> <li>Former member of the Federal Public Service of Justice - IT service (Prison Cloud)</li> </ul>	Semi-structured interview (58')
<b>R11</b>	<ul style="list-style-type: none"> <li>Lawyer</li> <li>Pro deo lawyer in prison litigation</li> <li>Working in Brussels at the Dutch speaking Bar</li> </ul>	Semi-structured interview (1h)
<b>R12</b>	<ul style="list-style-type: none"> <li>Policy coordinator within a Flemish prison, responsible for support and services to prisoners</li> </ul>	Semi-structured interview (1h17')
<b>R13</b>	<ul style="list-style-type: none"> <li>Judge working in a Bureau for Legal Assistance</li> </ul>	Collective interview (28')
<b>R14</b>	<ul style="list-style-type: none"> <li>Judge working in a Bureau for Legal Assistance</li> </ul>	Collective interview (28')
<b>R15</b>	<ul style="list-style-type: none"> <li>Judge working in a Bureau for Legal Assistance</li> </ul>	Collective interview (28')

<b>R16</b>	• Judge working in a Bureau for Legal Assistance	Collective interview (28')
<b>R17</b>	• Member of a local Monitoring Board	Informally questioned on a regular basis
<b>R18</b>	• Member of a local Monitoring Board	Informally questioned on a regular basis
<b>R19</b>	• Chairman of a Commission for Legal Support	Questions by e-mail
<b>R20</b>	• Chairman of a Commission for Legal Support	Questions by e-mail
<b>R21</b>	• Chairman of a Commission for Legal Support	Questions by e-mail
<b>R22</b>	• Chairman of a Commission for Legal Support	Questions by e-mail
<b>R23</b>	• Chairman of a Commission for Legal Support	Questions by e-mail
<b>R24</b>	• Ph.D. researcher	Questions by e-mail

Table 1: respondents, their function and manner of information collection

<b>Commission for Legal Support</b>	5
<b>Bureau for Legal Support</b>	2
<b>Bureau for Legal Assistance</b>	4
<b>Lawyers</b>	4
<b>Local monitoring bodies</b>	3
<b>Federal Public Service of Justice</b>	1
<b>Prison Cloud/IT in prison</b>	3
<b>Social services in prison</b>	2

Table 2: the number of respondents per main occupation

Most experts were contacted via mail or LinkedIn. Some respondents mentioned other experts to be interviewed (*snowball sampling*). Twelve semi-structured interviews were conducted, using the harmonized Eupretialrights guidelines for the national empirical study as a topic list. A collective interview was organised with the judges working in a Bureau for Legal Assistance (four respondents). This allowed us to stimulate interaction between the respondents as practices could be very different between bureaus. The semi-structured interviews and the collective interview were recorded and transcribed afterwards. Informed consent was obtained prior to recording. Two respondents were questioned orally in a more informal way but on a regular basis. The remaining five respondents were questioned via mail, due to scheduling constraints. All respondents were informed on the

scope and the aim of the research. They were also informed about their anonymity and that their field of expertise would be mentioned in the study.

Belgium is a country with a complicated state structure which leads to different organisations and policy levels (federal, community, judicial district, prison) being competent for related topics. Due to time constraints, not all local bodies and not all judicial districts could be questioned.

## 2. THE NATIONAL CONTEXT

### 2.1 PLACES OF PRE-TRIAL DETENTION

Pre-trial detention starts with the judicial arrest of the person involved.<sup>2</sup> For a **maximum period of 48 hours** the person under judicial arrest can be kept **in police custody**. People are held in a cell at the police station of the area in which the person was arrested. Police forces in Belgium are organised and structured on two levels: the federal and the local level.<sup>3</sup> The **federal police** is organised on the federal level, although there is one decentralised department per judicial district, fourteen in total. Hence, the federal police has prison cells in each judicial district. The **local police** is grouped in police districts which consist of one or more municipalities. While smaller municipalities do not always have cells, each police district has at least one police station with cells. In case a police district is still too small to organise cell supervision at the night, the person under judicial arrest is transferred to another police station which has cell supervision around the clock. Since federal police cells are organised via the judicial districts and local police cells via the police districts consisting of one or more municipalities, there are more locations with local police cells than with federal police cells.

The police cells dispose of **a mattress and a blanket** (see [picture 1-2](#)).<sup>4</sup> There is **no lavatory** inside the cell. If the arrested person needs to use the lavatory, he has to ring a bell. Apart from that, he or she cannot leave the cell while in police custody. Furthermore, there is continuous camera surveillance. In conclusion, the cells in a police station are aimed at short-stay imprisonment and therefore they provide the bare minimum. They are not suitable for long-term imprisonment.



Picture 1: Police cells



Picture 2: Inside a police cell

After the maximum period of 48 hours in police custody, the person under judicial arrest either has to be released or an arrest warrant has to be issued. In the latter case, the **pre-trial detention** officially starts and the person under judicial arrest is referred to as a pre-trial prisoner. He or she is transferred from the police station to a **prison**. The investigating judge may decide that the pre-trial prisoner stays in **the prison closest to the place where the investigation is conducted**. If this decision is not taken, the pre-trial prisoner has to stay in the prison of the judicial district where he was found.<sup>5</sup>

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<sup>2</sup> Contrary to the administrative arrest by the police of persons disturbing the public order and endangering the public safety. Administratively arrested persons can only remain in police custody for a period of maximum 12 hours. See the national legal report on Belgium.

<sup>3</sup> Art. 3 Wet van 7 december 1998 tot organisatie van een geïntegreerde politiedienst, gestructureerd op twee niveaus, *BS* 5 January 1999.

<sup>4</sup> The pictures are stills from the video available on the website of the periodical 'Knack'. See "Hoe ziet een gewone politiecel eruit?", *Knack* 27 June 2013, <http://www.knack.be/nieuws/ho-ziet-ee-gewone-politiecel-eruit/video-normal-81340.html>.

<sup>5</sup> Art. 19 § 3 Wet van 20 juli 1990 op de voorlopige hechtenis, *BS* 14 August 1990.

Belgium has 34 prisons, 16 of which in the French speaking Walloon region, 16 in Dutch speaking Flanders and the remaining two in Brussels. According to the Prison Act, pre-trial prisoners and convicted prisoners have to be separated from each other. Therefore there are different types of prisons, *arresthuizen* for pre-trial prisoners and *strafhuizen* for sentenced prisoners. In practice however, most prisons house both pre-trial prisoners as well as sentenced prisoners.

A large part of the Belgian prison infrastructure is outdated. Half of all prisons were built in the nineteenth century. Three recently build prisons have been taken into service in late 2013 or early 2014. This new infrastructure was part of the Belgian Masterplan 2008-2012-2016 on prison infrastructure, which was introduced to face the severe prison **overcrowding** by expanding prison capacity.<sup>6</sup> In the Vasilescu-case, the ECtHR found a **structural violation** of the ECHR in Belgian prisons: *“The problems arising from prison overcrowding in Belgium, and the problems of unhygienic and dilapidated prisons, were structural in nature and did not concern the applicant’s personal situation alone. The conditions of detention about which the applicant had complained had been criticised by national and international observers for many years without any improvement apparently having been made in the prisons in which he had been detained.”*<sup>7</sup> Hence, Belgium was required to take general measures to improve the conditions of detention. Capacity expansion was deemed necessary to ensure humane detention conditions.<sup>8</sup> Together with other measures, this has led to decreasing overcrowding rates (see [table 3](#))<sup>9</sup>:

Year	Prison overcrowding rate
2012	23,70 %
2013	24,10 %
2014	16,60 %
2015	10,10 %
2016	9,60 %
2017	11,8%

Table 3: overcrowding rates in Belgian prisons

There is still a significant overcrowding rate in several prisons, especially in remand prisons (e.g. 637 prisoners on average in Antwerp prison while there is an official capacity of 439 prisoners, 850 prisoners on average in Sint-Gillis prison while there is an official capacity 584 prisoners, numbers are for 2017).<sup>10</sup>

The capacity of Belgian prison cells varies, ranging from **one-person to eight-person cells**.<sup>11</sup> Overcrowding results in cells being occupied by more persons than intended. One-person cells for instance become two-person cells by replacing the regular bed with a bunk bed, or by having prisoners sleep on a mattress on the floor of a cell, in

<sup>6</sup> Snacken, S. & Beyens, K. “Het Belgische beleid ten aanzien van de gevangenisstraf en haar alternatieven” in Beyens, K. & Snacken, S. (eds.). *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 117-118.

<sup>7</sup> ECHR, *Vasilescu v. Belgium*, 2014.

<sup>8</sup> Snacken, S. & Beyens, K. “Het Belgische beleid ten aanzien van de gevangenisstraf en haar alternatieven” in Beyens, K. & Snacken, S. (eds.). *Straffen. Een penologisch perspectief*. Antwerp, Maklu, 2017, 117-118.

<sup>9</sup> FOD Justitie, *Jaarverslag 2017*, Brussels, 2018, 44.

<sup>10</sup> *Ibid.*

<sup>11</sup> Among others in Jamioulx prison.



rare cases even in the hallway of the prison.<sup>12</sup> The fluctuation of the number of pre-trial prisoners results in fluctuating prison overcrowding rates, which in turn results in unpredictable numbers of persons per prison cell. In *Sylla & Nollomont v. Belgium*, a case before the ECtHR, it was clear that Mr. Sylla had to share a **cell of 9m<sup>2</sup>** with two other prisoners and Mr. Nollomont had to share a cell of 8.8m<sup>2</sup> with one other prisoner. The cells were equipped with a toilet and a sink. Consequently, a violation of art. 3 ECHR, the prohibition of torture, was found.

According to the Prison Act, men have to be separated from women. Only eight Belgian prisons have a wing dedicated to **women**.<sup>13</sup> Consequently, visitors of female prisoners, lawyers in particular, often have to travel longer distances. Only two prisons house **mothers with a child** under the age of 3 years, resulting in even fewer detention options. Both prisons are located in Flanders (Bruges and Hasselt), thus leading to female French-speaking prisoners being imprisoned in a Dutch-speaking prison. These two prisons are also the only prisons that have of a **drug-free section**. Applications for drug-free section are voluntary, but long waiting lists exist for interested candidates.<sup>14</sup>

Three prisons, one in Flanders, one in Wallonia and one in Brussels, have a medical centre (Bruges, Lantin and Sint-Gillis). Only one prison (Bruges), has an **individual special security regime** ward, receiving prisoners from all over the country. Hence, their lawyers and other visitors often have to travel relatively long distances. One lawyer participating in this research mentioned travelling almost 200km to visit his client (R6). The same reasoning applies to lawyers having female prisoners, imprisoned mothers with a child or prisoners who chose to stay in the drug-free section as a client. Although Belgium is a small country, its dense traffic infrastructure in combination with the high traffic intensity leads to many (structural) traffic jams on the highways.

The fact that Belgium has three **different language communities** (Dutch, French and German) results in some particular issues when housing prisoners. For instance, French speaking prisoners having to stay in an individual security regime can only be housed in the prison of Bruges where Dutch is the common language. One lawyer participating in the research and based in the French speaking Community has a client housed in the individual special security regime in Bruges. Because his client only speaks French, he is **not able to communicate** with the Dutch speaking prison staff. This leads to communication problems and consequently to a lot of frustration on both sides. During the interviews, that lawyer said: *“We have problems with prisoners, French speaking prisoners, who are housed in Bruges. Why Bruges, because the only security wing at the moment is located in the prison of Bruges.”* The same line of reasoning applies to imprisoned mothers with a child since the only two prisons with a section for these women are both located in the Dutch speaking community. In April 2017, a judge ruled that a French speaking prisoner could no longer stay in the individual special security regime where Dutch was the common language.<sup>15</sup>

## 2.2 MAIN SOCIAL CHARACTERISTICS OF THE PRISON POPULATION IN BELGIUM

The latest figures available on the main social characteristics of the prisoners are for the year 2017.<sup>16</sup> The major trends will be described hereunder.

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<sup>12</sup> Commissie van Toezicht bij de gevangenis te Gent, *Jaarverslag 2016-2017*, 2018, 6, [https://www.ctrg-ccsp.be/nl/system/files/jaarverslag\\_2016-2017\\_definitief.pdf](https://www.ctrg-ccsp.be/nl/system/files/jaarverslag_2016-2017_definitief.pdf).

<sup>13</sup> Directoraat-generaal Penitentiare Inrichtingen, *Jaarverslag 2016*, 2017, 7.

<sup>14</sup> Directoraat-generaal Penitentiare Inrichtingen, *Jaarverslag 2015*, 2016, 16.

<sup>15</sup> “Veroordeling omdat taalwet niet gerespecteerd werd in Brugse gevangenis”, *De Morgen*, 8 April 2017, [www.demorgen.be](http://www.demorgen.be).

<sup>16</sup> Directoraat-generaal Penitentiare Inrichtingen, *Jaarverslag 2017*, 2019.

Over the year 2017, the average daily number of prisoners was **10472**, among whom 3766 or **36%** were **pre-trial prisoners**, 5837 or 55,7% were convicted prisoners and 695 or 6,6% were mentally ill offenders. There is no information available on the different grounds for pre-trial detention.<sup>17</sup> The following table demonstrates the evolution of the mean daily population over the period 2012-2017:

Year	Average daily prison population
<b>2012</b>	11.330
<b>2013</b>	11.645
<b>2014</b>	11.578
<b>2015</b>	11.041
<b>2016</b>	10.619
<b>2017</b>	10.472

Table 4: average daily prison population

The following table shows the total number of imprisonments per reason for imprisonment from 2012 until 2017:

Year	Pre-trial prisoners	Sentenced prisoners	Mentally ill offenders
<b>2012</b>	11.484	5.495	425
<b>2013</b>	11.615	5.764	328
<b>2014</b>	11.660	6.563	310
<b>2015</b>	11.085	6.793	368
<b>2016</b>	10.508	6.564	278
<b>2017</b>	10.919	6.576	91

Table 5: the number of new imprisonments per type of imprisonment

These numbers show that the number of new pre-trial detentions decreased over the period 2012-2016 by almost 1000 (8.5%), but that this trend was reversed in 2017. The number of newly sentenced prisoners increased by almost 20%. The amount of new mentally ill offenders (so called *internees*) decreased sharply, due to the entry into force of the new law on internment.<sup>18</sup>

In 2017 there were on average 10031 or **95,8% male** prisoners and 440 or **4,2% female** prisoners.

<sup>17</sup> Pre-trial detention can be imposed when there is a risk of recidivism, risk of absconding, risk of collusion or a risk of destroying evidence.

<sup>18</sup> Law of 5 May 2014 on internment, BS 9 July 2014.

Citizens of more than 130 different countries were detained in Belgian prisons in 2017, of whom **56%** (5843 prisoners) had the **Belgian nationality**. Prisoners with other nationalities mainly came from the following countries:

Nationality	%
Morocco	9,7
Algeria	5,3
Romania	3,3
The Netherlands	3,1
France	2,1
Albania	1,8
Italy	1,4
Turkey	1,2
Tunisia	1,1

Table 6: nationality of the prisoners as a percentage of the total prison population

The following data shows the age distribution for prisoners imprisoned on 1<sup>st</sup> September 2013 (in percentages)<sup>19</sup>:

Total	<18	18-21	21-25	25-30	30-40	40-50	50-60	60-70	70-80	>80
12.697	0,6	3,7	11,3	18,3	32,6	20,9	8,9	3,2	0,6	0,1

Table 7: Percentage of total prison population per age group, on 1 September 2013.

60% of the prisoners were 40 years or younger. Almost 4% was older than 60 years. A slight increase in the proportion of elderly in prison can be observed over the period 2008-2013 (stocks available for 1st September 2008, 2010 and 2013)<sup>20</sup>:

Year	Total	50-60	60-70	70-80	>80
2008	10.234	8,3	2,1	0,6	0,1
2010	11.382	7,9	2,5	0,6	0,1
2013	12.697	8,9	3,2	0,6	0,1

<sup>19</sup> Gourdin, G., Vyncke, V., Felgueroso-Bueno, F., Eechautd, V., Vander Beken, T., Vander Laenen, F., Trybou, J., Malfait, S., Semaille, P., Willems, S., *Organisation of health care in Belgian prisons. KCE Report 293*, Brussels, Belgian Health Care Knowledge Centre (KCE), 12.

<sup>20</sup> *Ibid.*

**Table 8: Percentage of elderly prisoners compared to the total prison population, on 1 September 2008, 2010 and 2013.**

In April 2018 there were 543 **mentally ill offenders** (*internees*) in prisons.<sup>21</sup> Mentally ill offenders housed in prisons often lack appropriate (mental) health care, which is at odds with international recommendations. Belgium has regularly been criticized by several organizations, including the European Committee for Prevention of Torture, and has been convicted on numerous occasions by the European Court of Human rights on the lack of appropriate health care for mental health. In its latest judgment regarding mentally ill offenders in Belgian prisons, the ECtHR underscored the structural nature of the problem and consequently decided to issue a pilot judgment.<sup>22</sup> The ECtHR had found violations of the ECHR in 23 cases prior to this pilot judgment.<sup>23</sup> It pointed out in its pilot judgment that there are still 50 other pending cases concerning the treatment of mentally ill offenders in Belgian prisons.<sup>24</sup> The number of mentally ill offenders in prison is however **decreasing** in recent years (from 1088 or 9,4% in 2014 to 543 in 2018). This is due to policy changes which should ensure that mentally ill offenders are housed in a forensic psychiatric setting where they receive appropriate (mental) health care. The most obvious change has been the opening of the two new Forensic Psychiatric Care Centres (FPC) which can house 182 and 264 mentally ill offenders respectively.

In 2017, 44 prisoners died in prison or in the hospital to which they were transferred. **Thirteen** deaths were identified as **suicide**.<sup>25</sup> The department of Justice does not release information on the other causes of death for reasons of medical confidentiality.

Regarding the level of **education**, research from 2015 and based on a survey of 782 prisoners show that more than one third (38%) of the prisoners only finished primary school or did not enjoy any education. 22% has a diploma of the first degree of secondary education and 28% finished secondary education. 12% has a diploma of higher education. Persons without a diploma as well as persons with a low level of education (diploma of the first degree of secondary school) are thus overrepresented within the prison (38%, respectively 22% within prison versus 15 %, respectively 16% for the general population).<sup>26</sup>

### 2.3 RECENT INITIATIVES TO MITIGATE LEGAL AND ECONOMICAL INEQUALITIES AMONG PRISONERS

The legal second-line support system organizes legal representation by a lawyer for certain groups in society that have insufficient means to afford a lawyer themselves. Prisoners for instance enjoy a rebuttable presumption of inadequate means of subsistence and therefore are eligible for representation by a state-funded lawyer, unless there is evidence proving otherwise. However, legal representation by a pro deo lawyer requires the litigant to pay a lump sum, irrespective of his means of subsistence, since changes were made to the **pro deo system in 2016**: 20 euros for the appointment of the lawyer and 30 euro per procedure. Although these sums were not due in criminal proceedings, yet they were in all procedures related to prison litigation. Several poverty reduction

<sup>21</sup> Mertens, A., *Detentiebeleving van geïnterneerde vrouwen. Een follow-up onderzoek*, Doctoral dissertation, Ghent University, 2018, 6-7.

<sup>22</sup> ECHR, *W.D. v. Belgium*, 2016.

<sup>23</sup> See for instance ECHR, *L.B. v. Belgium*, 2012; ECHR, *Claes v. Belgium*, 2013; or ECHR, *Bamouhammad v. Belgium*, 2015.

<sup>24</sup> §164 ECHR, *W.D. v. Belgium*, 2016.

<sup>25</sup> Directoraat-generaal Penitentiare Inrichtingen, *Jaarverslag 2017, 2019*, 51.

<sup>26</sup> Vyncke, V., Hanssens, L., Steenberghs, E. & Willems, S., *Onderzoeksrapport 'Gezondheidsprofiel Gedetineerden'*, 2015, 28.

and other social organisations, as well as the Human Rights League protested against these lump sums by arguing they created a serious threshold to start a procedure for the most vulnerable groups in society. They filed a complaint before the **Constitutional Court** which judged on 21 June 2018 that the lump sums indeed created ‘a serious deterioration’ of the right to legal aid, as is ensured by the Constitution. It states that *“although the legislator referred to the financial contributions as ‘modest’ or ‘symbolic’, the amount thereof (...) could still be considered significant for litigants eligible for free legal aid and who have little means of subsistence”*.<sup>27</sup> Consequently, it **annulled** the paragraphs in the Judicial Code introducing the lump sums. Consequently, prisoners who enjoy the services of a pro deo lawyer do not have to pay the lump sums as of 21 June 2018.

The repeated deferral of the formal **complaints mechanism** foreseen in the Prison Act and tailored to detention conditions means it is difficult for prisoners to enforce their rights. The formal complaints mechanism was developed to compensate for the difficulties prisoners encountered when they wished to enforce their rights (e.g. appeal a decision taken by the prison governor). The entry into force of a formal complaints mechanism is foreseen in April 2020.

A third issue regarding the compensation of legal and economical inequalities among prisoners has been brought forward by The Commissions of Legal Support. These Commissions play a key role in the organisation of legal support to prisoners on the level of the judicial district. Interviews with four Commissions show that the way in which **legal support for prisoners was organized changed in recent years**. In some cases this was done **for budgetary reasons**. More concretely, the weekly or monthly sessions of the Commissions of Support in prison were cancelled and replaced by a fortnightly telephonic permanence on Tuesday and Thursday. In partnership with the prison administration, this service is free of charge for the prisoner (R22). Sometimes other motives were given for the reorganisation legal support: *“Currently, there is no organisation of permanence in [location of prison] anymore. Experience has learned that prisoners did not very often solicit the permanence service since their own lawyer gives sufficient information and the prison closely works together with the legal second-line support service.”*(R19). As prisoners are automatically entitled to a pro deo lawyer and because the prison administration brings the prisoner in contact with the lawyer concerned, the added value of organising first-line legal support in prison is deemed useless.

Furthermore, the **rollout of the digital platform for prisoners** (Prison Cloud) has been **postponed** until a later, currently unspecified, date. A former member of the Federal Public Service of Justice attributes the deferment of the roll-out of Prison Cloud to **budgetary reasons and changing priorities** (R10).

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## 2.4 LITIGANT INFORMATION

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### 2.4.1 GENERAL LITIGANT INFORMATION

There is no information available on the profile of litigants, such as their age, sex, nationality or level of education, nor on the types of convictions or grounds for pre-trial detention of the litigant.

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### 2.4.2 CASES

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<sup>27</sup> B.15.3 GwH 21 June 2018, nr. 77/2018.

The figures presented in this paragraph were provided by the legal service of the central prison administration, which is part of the department of Justice. There are several constraints when interpreting the data provided. The data only relates to cases in which the Belgian prison administration is the counterparty. Moreover, cases before the ECtHR are dealt with by another department and are not taken included. This is also the case for civil claims, where a financial compensation is demanded from the Belgian prison administration based on their civil liability. The data hereunder thus only relates to cases brought before the Council of State, the judge in interlocutory proceedings, the Constitutional Court and the Court of Cassation.<sup>28</sup>

The number of prison litigation cases before the courts mentioned above show a positive trend. The following table shows number of prison litigation cases per year:

<b>Year</b>	<b>Number of (reported) cases</b>
<b>2013</b>	105
<b>2014</b>	149
<b>2015</b>	172
<b>2016</b>	416
<b>2017</b>	183
<b>2018 (Jan-April)</b>	52

**Table 9: number of prison litigation cases where the prison administration is the counterparty, excluding cases before the ECtHR and civil claims, per year**

The high number of cases in 2016 is due to the many interlocutory proceedings which were initiated during the gulf of prison strikes in 2016. Belgium did not have a guaranteed minimum service during strikes, which resulted in the violation of basic rights of prisoners.<sup>29</sup> At the same time, many claims were introduced by mentally ill offenders which were detained in prisons, lacking the appropriate mental health care.

In 2018, prisoners have initiated proceedings related to material detention conditions, the language used in the Individual Special Security Regime wing, religious freedom (with regard to attending worship services), disciplinary or security measures, and health care services. The respondent adds: *“One of the issues which comes back regularly is the Individual Special Security Regime. Either the regime or specific parts of the regime are perceived to violate a prisoner’s rights which has to be brought to an end.”*(R5)

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**2.4.3 PRACTICAL MEANS OF LITIGATION**

In all but a few cases before the Council of State, the Constitutional Court, the Court of Cassation or in interlocutory proceedings, the litigant is assisted by a lawyer: *“In five years’ time, it happened maybe three or four times that someone was not represented by a lawyer.”*(R5)

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<sup>28</sup> See National law study: Belgium, iii.2. for more information on the cases these courts deal with.

<sup>29</sup> A legislative proposal introducing a guaranteed minimum service during strikes is currently being discussed in parliament and should be approved in the first half of 2019.

### 3. LEGAL PRACTITIONERS – LAWYERS

The local bars, organised on the level of the judicial districts, are represented by the Flemish Bar Association and the Association of French speaking and German speaking Bars of Belgium respectively. These two bar associations represent 25 local bars spread over the country (see [figure 2](#)). There is bar association on the federal level streamlining and integrating the policies within the two different language communities. This results in (small) differences between the two language communities.

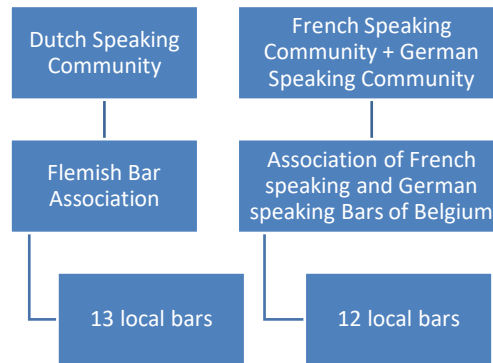


Figure 2: Organisation of the bars in Belgium

#### 3.1 LAWYERS AND LITIGATION WORK

##### 3.1.1 GENERAL POLICY OF THE BAR ON LEGAL COUNSEL FOR PRISONERS

###### A. EDUCATION AND WORKSHOPS

In Belgium, lawyers who have finished law school (three year bachelor degree + two year master degree) have to follow a three year trainee programme at the bar. This trainee programme includes a mandatory educational program supplemented with optional courses. The mandatory programme comprises of four modules at the Flemish Bar Association and five at the Association of French speaking and German speaking Bars of Belgium. The following modules are mandatory in the trainee programme of the Dutch speaking Community: Deontology, Civil Procedural Law, Criminal Procedural Law and Communication Skills. The Criminal Procedural Law module takes up at least twelve hours at the Flemish Bar Association.<sup>30</sup> The Association of French speaking and German speaking Bars of Belgium has the following mandatory courses: Deontology, the Practice of the Civil Procedure, the Practice of the Criminal Procedure, the Organisation of the Office and Legal Support.<sup>31</sup> In practice, the module on criminal procedure organised by the French speaking Bar Association includes a course on prison law (R6). The module on criminal procedure takes up at least ten hours of education at this Bar Association.

Local bars organise workshops and seminars on different themes in order to provide enough training so that lawyers can fulfil their mandatory continuous training. At least one bar organised a seminar on prison law in the past focussing on mentally ill offenders and terrorists in prison, but there are currently no seminars scheduled related to prison law in the bars included in the research. In general, around sixty persons participate in the

<sup>30</sup> Saerens G. & De Grom, B., *Wegwijs aan de Balie. Welkomstboek voor de advocaat-stagiair. 2017-2018*, Mechelen, Wolters Kluwer, 2017, 16.

<sup>31</sup> *Avocats.be, Code de déontologie de l'avocat 2018*, 24.

seminars. These workshops are open to other professions as well, such as social workers and criminologists. Attendance to these workshops is thus not limited to lawyers who specialise in criminal law and who consequently often act as the prisoner's lawyer in prison litigation (R6). Other bars responded that prison law had not been the topic of a workshop in at least the past five years (R24).

Besides the small course on prison law in the trainee education programme of the French speaking Community bar association and the seminars organised in both language communities but rarely dedicated to prison law, nothing is foreseen on prison law. The lawyers working on prison law must take the initiative themselves to ensure they remain up-to-date on the topic and to master prison litigation (R6) Acquiring knowledge on prison law and prison litigation *"requires familiarization. So, you have the criminal law courses of your university education as foundation, but actual prison law is generally not taught at the university. In fact, the principles I applied in prison litigation procedures, I did not acquire them at the university. I just went to the library, I read books and I read the law, case law and legal doctrine (...). You have to learn it on the job."*(R11)

The lack of education and workshops about prison law adds to the difficulty level of representing a prisoner in prison litigation. One lawyer states: *"The lack of education is a big problem and especially affects lawyers occasionally dealing with prison litigation, as you cannot acquire the knowhow and the necessary skills by defending your client once."*(R3) This issue is echoed when it comes to representing mentally ill offenders in cases of prison litigation: *"I was appointed in a prison litigation case as a trainee<sup>32</sup>, and you try to figure out what you have to do, and there is nothing to find about the subject. As a lawyer, they put you with your client and you're more like a flowerpot. It should give the client the impression that, well, there is a lawyer, it is a trial, but in fact, you can't do anything. To begin with, there is no manual, you never had any education on the matter, you can't find anything about the matter in common manuals on criminal procedural law, and if you try to figure out, what do I have to do now, (...) well, it is not clear at all either, is it."* (R3) This situation does not appear to have changed over time either. Since the beginning of the respondent's career, more than a decade ago, *"there is still is no manual, there still is no brochure of the Bar about what should be done in prison litigation cases. The Criminal Law Commission of the Flemish Bar Association once said, about eight years ago, that 'we should create a training'. (...) Well, okay, but we haven't seen anything for years. I informed myself and they said that the recommendation was passed on to the Bar Association. You wait for another six months. You inform yourself again, they tell you that, yes, the recommendation was passed on, but we haven't received a reply yet... Then I contacted the Bar Association myself, up to two times, to say that I was prepared to organise it for them. But even if someone proposes to do it in their place, they still don't manage to say "we shall do it", so... They do not care about it, do they. That is problematic. The Bar doesn't care."*(R3)

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## B. NETWORKS OF LAWYERS

Lawyers working on prison law are not formally organised. However, lawyers mention varying degrees of cooperation between the lawyers active in prison litigation as well as between less experienced lawyers and more experienced lawyers. Lawyers dedicating their time and efforts to prison litigation may know each other since they are not many. Respondents estimate to have some thirty or forty colleagues working in prison litigation in the French speaking Community and Brussels and mention that they have close contacts with each other. *"The lawyers active in prison litigation, we know each other quite well. There are some lawyers at each bar, and we do have a lot of contact, we exchange decisions from the Council of State or the judge in interlocutory proceedings or any other decision. We do communicate with each other."*(R6) These close contacts are sometimes a result of membership of the same NGOs, where they often meet each other in person (see infra: general profile

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<sup>32</sup> In Belgium, trainee-lawyers are obliged to participate in the pro deo system (see infra).



of lawyers active in litigation). This informal networking seems to be limited to the own language community. Language boundaries are thus also boundaries to cooperation.

All lawyers involved in the research mention that helping their colleagues who are less familiar with prison law is a part of their job, since prison law is a particularly difficult topic which is not taught at the universities. Some lawyer respondents, experts in prison litigation, mention being regularly contacted by criminal lawyers taking on a case related to prison law and asking for their help (R3, R6). For instance, one lawyer (R6) says: *"I also have many contacts with younger lawyers who thus do not know the subject matter very well, and who contact me. Or they contact other lawyers, who say, ok, go to [R6], he does it, he will help you with it, or so, that happens quite often, yes."* Respondents fear their help is not always very effective however. *"It happens from time to time, that you help someone with a case of his own. But it is very difficult, if you have to act in just one case. To begin with, they do not know what they have to do. So I explain what they have to do, but (...) if you almost never do prison litigation, then you hesitate too much to stand your ground, you're not confident. (...) So, I always brief those persons, but I also know that little comes of it, as they lack the experience to represent those people."* (R3) Criminal lawyers who happen to have a case in prison litigation often do not know which legal instruments to use and turn to their few knowledgeable colleagues. A trainee lawyer working in the legal support system when he got involved in prison litigation procedures summarises this as follows: *"In the beginning, when I started to complain about the human rights violations during the prison strikes, I immediately took the initiative to call some more experienced lawyers to discuss, to ask their opinion about it, well, how would you deal with it, I was just a young trainee."* The choice of who to contact for advice is made based on the reputation of the contacted lawyer and the network of the lawyer. So, although formal networks are lacking, there are different forms of informal cooperation between lawyers.

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### C. BOOKLETS OR DIGITAL TOOLS PROVIDED BY THE BAR

Although the lawyers participating in the research are all members of different bars, they are all unaware of the existence of booklets or digital tools provided by their Bar. One lawyer states: *"To my knowledge, there still is no manual, there still is no brochure of the Bar about what you can do in prison litigation cases."* (R3) *"Lawyers have to take the initiative themselves."* (R6)

One of the lawyers having a track record of cases in prison litigation related to the detention conditions during the prison strikes mentions he was contacted by the Commissions for Legal Support organising duty shifts for lawyers: *"They asked me to send template conclusions so they could share it amongst the lawyers, in order to have a template in case a new strike happens. I did do that, I invested a lot of time in it, out of solidarity."* (R11) That said, no respondents received similar documents from their bar.

The lack of support of the Bar in terms of education, workshops, information or digital tools as well as the lack of quality norms is problematic according to lawyers: *"Legal support by lawyers to internees in Belgium is problematic. I say this every time I go somewhere to speak on behalf of the Bar: 'be aware that what we are doing is something that the European Court is reviewing'. I do this because it is written in the stars that the Bar will be reprimanded as well for their lack of support to internees. The same problem arises with prisoners. The grounds for the deprivation of liberty is different but support to prisoners is also problematic. (...) There are no quality standards... Everyone who is a lawyer and says 'well, let's do some criminal law' can do it."* (R3)

Some Bars send a newsletter to lawyers, which discuss a wide range of topics. Some topics are relevant for prison litigation, such as the granting of legal aid. However, the newspapers do not focus on specific prison litigation issues

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#### D. RELATION BETWEEN THE BAR AND THE CENTRAL PRISON ADMINISTRATION

The five Commissions of Legal Support participating in the research confirm that they have no contact with the central prison administration, although the prison administration has, according to law, to consult with the Commission of Legal Support.

The Bureaus for Legal Support of the bar have no contact with the central prison administration either. *“We do not have contact with them, not at all. We only have contact with the local prison, and in fact only with the administration of the local prison, not with the director, no.”*(R8) Nevertheless, the bureaus have close contact and good working relationships with the registry of the local prison administration.

Lawyers working in prison litigation say that the relationship between them and the central prison administration is sometimes difficult. There seems to be frustration on both sides. The central prison administration blames the lawyers to have a limited knowledge of prison law. The lawyers on their side mention that circulars often remain unpublished and are thus impossible to consult unless the central prison administration provides them. The circulars are a valuable tool however, as prison law is still spread out over several laws, royal decrees, etc. Contacts between both parties are rare: *“The relationship between the bars and the federal prison administration is not always easy. What do I mean. It is not always easy to get an answer. (...) But what the lawyer is blamed for by the administration is the fact that lawyers do not exactly know the organisation of the administration. For instance, the circulars, yes, they exist, but to find them... I recovered them, but they haven’t been published, (...) so you have to check it and question the administration about the implementation of their policy. And I have heard many directors telling ‘some of your colleagues, they enter here, but they do not know anything, they do not even know about the existence of circulars!’, well...”* (R6). Having the prison administration make the circulars public seems difficult: *“Initially, we did not have access to the circular detailing to the directors when and how to place [suspects of terrorism] in solitary detention. We did not get the permission of the prison administration. I have written a letter then. First a request to the board of the prison. Refused. Then a letter to the central prison administration. Refused. (...) They only replied “This document is not public”. In response, I referred to the law on the disclosure of information by the administration<sup>33</sup> and the necessity to publish the texts as there was a public interest, avoiding that a group of individuals would be subject to an inhuman or degrading treatment. At the same time, I sent a request for advice to the Commission for the Access to Government Documents. (...) Five days later, I received a letter from the Legal Support Unit, disclosing the circular, but still refusing to disclose the attachments, attachments being essential because they include the criteria to assess whether or not a subject is to be categorised as a person that is radicalised or shows indications of radicalisation, directly leading to solitary imprisonment. Eventually, the Commission for the Access to Government Documents agreed that the attachments should be also be disclosed. However, in a subsequent letter, the Legal Support Unit again refused to disclose the attachments. At that moment my client had already been released, otherwise I would have been gone to the Council of State in order for them to disclose the attachments too.”*(R11)

One lawyer refers to his relations with the prison staff and prison directors as *‘fairly good working relationships’*: *“There are many superiors who are particularly careful, but because they know us, they will constructively think along with us. Or in case there is a real crisis situation in terms of security or health, you can easily approach them, ‘keep an eye on that’, or for instance ‘there is a severe risk of suicide here’.”*(R3)

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<sup>33</sup> Wet van 11 april 1994 betreffende de openbaarheid van bestuur, BS 30 June 1994.

It seems thus that contact with the central prison administration is either non-existent or difficult. Tensions have been reported between the lawyers and the central prison administration. On the local prison level, there is some cooperation in certain matters, although even then initial distrust needs to be overcome.

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### 3.1.2 GENERAL PROFILE OF LAWYERS ACTIVE IN PRISON LITIGATION

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#### A. LEVEL OF LEGAL EDUCATION, AVERAGE AGE, POSITION WITHIN THE BAR AND CAPACITY TO BRING PROBLEMS ENCOUNTERED DURING LEGAL PRACTICE TO THE BAR

All participants obtained a master's degree in law. None of them has a PhD in law. Two lawyers obtained an additional non-law-related master's degree. The respondents have 4, 14, 40 and 44 years of experience as a lawyer respectively. Several respondents have obtained special certificates to deal with juveniles or proceedings before the Court of Cassation criminal cases. None of these lawyers holds a key position within their Bar or Bar Association.

Pro deo cases are a substantial part of prison litigation. Prison disciplinary procedures are the only intra-muros form of prison litigation currently existing (awaiting the entry into force of the formal complaints mechanism foreseen in 2020), and a remuneration is foreseen for pro deo lawyers defending their clients. Therefore, there are many lawyers active in disciplinary proceedings. Disciplinary cases in general do not require a lot of work. *"These cases can take up some time if you want to do it well, but indeed, if you are not interested in your client and his case, which is actually the case for many lawyers active in disciplinary proceedings, then it is dealt with in two minutes."*(R3) He adds that the lack of quality standards is problematic: *"Everyone who is a lawyer and says 'well, let's do some criminal law', can indeed defend his client in disciplinary proceedings. That is a big problem."*(R3)

Other prison litigation cases attract different kinds of lawyers. As for all prison issues other than discipline, lawyers are forced to explore the boundaries of the regular courts available to all, as there is no formal complaints mechanism. These cases require more effort than disciplinary proceedings, which consequently results in **only the most dedicated lawyers spending their time and efforts to prison litigation cases others than discipline.**

Issues other than discipline require a profound knowledge of not only prison law, but also of several other branches of law, such as civil procedural law. *"Prison law is tough, not easy, you have to go back and forth to prison, you have to know the procedures, you have to take initiative quickly. In criminal procedures someone is prosecuted, a court session follows, you represent him before the court, a new session follows. But you don't have to take initiative to get the case handled by a judge. In the context of prison litigation, of prison law, it is you, you have to take initiative to initiate a procedure. You have to decide, what am I going to do, at what moment, with which means, via which way, before which court? You have to decide all that by yourself. It is thus a way of doing things that is fundamentally different."*(R6) Coupled with the limited knowledge of lawyers on prison litigation (see *supra*), this can lead to frustration. *"I think that a lot of lawyers get cynical. Because in the beginning, (...), I was a young trainee, and they actually all said, boy, do not start with it, because it has always been like that and it will always be like that. You will not win this battle, they said. Thus, I do think that you get cynical after a while."*(R11) One of the respondents thinks about quitting this kind of cases, because of the strong opposition experienced before the courts (R3).

The lawyers active in prison litigation cases other than in disciplinary proceedings are consequently often more experienced lawyers, since some experience is required to know how to initiate the relevant proceedings and subsequently defend their client. *"We are not many, there are not many lawyers involved in detention issues."*

*Problems in detention are actually a matter not taken on by all criminal law lawyers.”*(R6) Respondents agree that lawyers active in prison litigation are socially committed lawyers.

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#### B. PROFESSIONAL PROFILE OF LAWYERS ACTING IN THE FIELD OF PRISON LITIGATION

Law firms active in prison litigation vary in terms of size and specialisations. Only a small part of their teams dedicates its work to prison litigation, since prison litigation is not well-paid ([see below](#)). There are firms specialised in criminal law, with a small team mainly managing prison litigation issues and there are firms specialised in a broad range of branches of law, ranging from immigration law to labour law, contract law and administrative law. Detention issues are a matter not dealt with by all criminal lawyers, but all lawyers active in prison litigation are also active in criminal law and criminal procedural law.

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#### C. PROPORTION OF LITIGATION CASE WORK WITHIN THEIR EVERYDAY PRACTISE

The amount of prison litigation work differs significantly between lawyers and law firms. Whereas it is sometimes merely taken as a little extra while defending the client in a criminal case, prison litigation makes up a third of the work. The more lawyers are involved in the pro deo system, the more prison litigation cases are taken up (which is a result of prisoners being granted second-line support in almost all cases).

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#### D. CONNECTIONS BETWEEN LAWYERS AND NGOS, HUMAN RIGHTS ORGANISATIONS, LEGAL CLINICS AND UNIVERSITIES

Three out of the five lawyers which were interviewed are active members of one or more NGOs, such as the Belgian section of the International Prison Observatory (OIP), the French OIP, the Human Rights League. One respondent is a member of an international network of lawyers, the International Association of Democratic Lawyers (IADL). The NGO meetings also act as a meeting point for the lawyers active in prison litigation: *“Many of us work together in the Human Rights League, the Prison Committee. We have a monthly meeting there. Also within the Observatoire International des Prisons, the Belgian section, there too we are in contact with each other. Moreover, those two NGOs do also cooperate with each other.”*(R6) He adds that these contact are useful, not only regarding prison litigation before national courts but also in other procedures before national courts and procedures before the European Court of Human Rights in Strasbourg. Furthermore, two lawyers are active in a national or international prison monitoring body such as the local monitoring board or the European Committee for the Prevention of Torture (CPT).

Lawyers who are not a member of NGOs or monitoring bodies also use the reports of NGO and monitoring bodies to substantiate their cases (R3, R11). On certain occasions NGOs are contacted for help or information (R11). This can be a two-way street. *“We were working together in that specific case, the Human Rights League, Amnesty International and a few other lawyers engaged in human rights. (...) There was a request for cooperation from both sides. On one side, there was Amnesty International writing a report (...) and they asked for testimonies. (...) And then there was the Human Rights League which I specifically contacted because I had understood from one of their reports that they were in the possession of the circular that I needed. (...) But to speak of true collaboration, I mean, we have called a few times back and forth, they have forwarded me some reports, I have given them some information. But we did not have some sort of continuous working relationship.”*(R11)

## 3.2 THE FINANCING OF PRISON LITIGATION CASE WORK

### 3.2.1 WHAT IS UNDERSTOOD BY “PRO-BONO” IN BELGIUM?

There are two different stages in the Belgian legal aid system: (1) the provision of legal information and legal advice (legal first-line support), and (2) legal representation in legal procedures (legal second-line support). Regarding (1), there is the organisation of free legal first-line support in every judicial district by the Commissions for Legal Support. This service is open to anyone. Lawyers offer free legal advice and answer simple legal questions. They can for instance be consulted in a House of Justice of a Public Social Welfare Centre.

*Pro bono* legal representation (2), thus a lawyer freely offering his services in a procedure, is not structurally imbedded in the Belgian legal system. However, the bureau for Legal support organises legal second-line support. This system is referred to as the *pro deo* system (in contrast with *pro bono* representation). *Pro deo* lawyers do not work for free but are either completely or partially state-funded, depending on several aspects, such as the income of the applicant. Not everyone is eligible to make use of the services of a *pro deo* lawyer.

### 3.2.2 THE STATE-FUNDED PRE-TRIAL LEGAL AID SYSTEM

Belgium has a bi-fold system regarding legal costs, related to the two different costs linked to proceedings. There is (1) the cost of legal representation by a lawyer and there are (2) all other costs linked to a legal procedure. Legal representation costs (1) are covered by the legal second-line support system. This system runs on *pro deo* lawyers. These lawyers offer their services (partially) for free to the client, but are in return paid by the state. The other costs (2) are covered by the legal aid system, which foresees in the advancement of these costs by the state. The state does not bear these costs definitively, the unsuccessful party in the proceedings can be ordered to bear these costs.

The lawyers working *pro deo* say they earn less than their colleagues doing the same kind of cases outside the legal support system. *“It seems logic to me that we earn less than other lawyers since we work pro deo in 95% of our cases and because the tariffs applied by lawyers usually are a lot higher than the nomenclature foreseen in the pro deo compendium.”*(R3) Another respondents adds that *pro deo* lawyers need a certain idealism to hold on: *“I did that case purely as a matter of principle. You do not do a pro deo case for the money. I literally worked day and night on that case. (...) You don’t do it for the money. I think that everyone dealing with human rights does it out of idealism. (...) A victim of human rights violations is often insolvent, so you do it out of idealism.”*(R11)

The remuneration of *pro deo* lawyers depends on the legal procedure. The remuneration for certain legal procedures seems to more or less sufficient to cover the expenses and make a living, but for other procedures the remuneration was considered to be insufficient. Respondents said they did not have enough time for the *pro deo* cases and that it is not realistic to work only on a *pro deo* basis. Therefore, lawyers accept cases based on whether or not the litigant is eligible for legal support. In case a lawyer refuses to work *pro deo*, in some cases the family (partner or parents) of the prisoner offers to pay the lawyer when they really want him (e.g. bas on a lawyer’s reputation or track record).

Procedures before the European Court of Human Rights are considered to be underpaid: *“The procedure before the European Court, it is just ridiculous. (...) It requires days and days of work, and you get paid as little as 450 euros.”*(R3) One respondent mentions exploring new ways to ensure a decent remuneration in procedures before the European Court: *“The agreement we make with clients from now on is that we do not accept to work pro deo*

*in proceedings before the European Court but that we create an invoice for the client at the end of the case. The client can then ask that the State – if the case is won – has to pay this invoice. So, that is one possibility.”(R3)*

In sum, lawyers working in the pro deo system cannot solely rely on the pro deo remuneration for prison litigation issues to make a living. Therefore, lawyers apply different strategies in order to supplement their income such as pro deo work on criminal cases (which are better remunerated in the pro deo system), case work for private clients or asking that the partner or parents of the client pay for the work carried out.

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### 3.2.3 REMUNERATION OF PRO DEO LAWYERS

Pro deo lawyers are remunerated via a credit system. There is a compendium which lists the services that can be performed by the lawyers and which indicates the amount of credits that can be collected per performance. Lawyers indicate that these credits do not always reflect the amount of time that a performance requires. Moreover, not all performances to be done in the field of prison litigation are included in the compendium which leads to situations where lawyers can only get partially remunerated for their performances: *“You lose a lot of time in prison, and what do you have in the end, sometimes, only different interventions and visits to prison and so, maybe you can only charge one ‘consultation outside the office’, and that accounts for two credits.”(R6)*

The money to remunerate these credits comes from the federal government budget for Justice. Until last year, the remuneration of these credits was based on a fixed budget. This meant that the value of one point was unknown until the total amount of collected credits was known. The fixed budget was divided by the total amount of credits performed that year. Since September 2017, each point represents one hour of work and each credit is worth 75 euros. Prison disciplinary proceedings are worth two credits and is thus remunerated with 150 euros. A consultation outside the office, such as in prison, is worth the same. A maximum of three consultations outside the office can be billed in case the litigant does not go to a (regular) court. Waiting hours in prison cannot be billed, neither is a lawyer remunerated when a procedure gets delayed.

The lawyers have to declare their amount of collected credits electronically at the end of the judicial year. They can only do this for cases that could be closed the latest at the end of that judicial year. This means that credits cannot be declared for pending cases. A final judgement sometimes takes several years and several procedures, which means lawyers have to wait four or five years until they receive their remuneration.

Credits entered into the electronic system are consequently checked by another bar than the one at which the lawyer is connected himself. These crosschecks take a lot of time. The Bureaus of Legal Support are busy with crosschecking from October till February on average.

The whole process from accepting a case until remuneration means lawyers are remunerated one year after the case was initiated at the earliest, if the case was also closed that year. The delayed reimbursement makes it **difficult for starting lawyers** (R8, R9). *“Sometimes you have to wait two years for your pro deo remuneration in a certain case, and sometimes that is a very long time to wait for your money.”(R9)* It also makes working in the legal support system less attractive. Entering the credits into system also requires a lot of time: *“It is almost undoable, we do it systematically at the end of June. We work the weekends, it is a lot of work.”(R6)* Small cases in prison litigation, such as disciplinary cases, make working in the pro deo system more viable as the case is closed the same year it is initiated.



The remuneration is paid by the State via web payment, directly to the lawyer's bank account. Legal performances provided pro deo by a lawyer are currently subject to 0% VAT<sup>34</sup>. In case the VAT-exemption will be implemented, the pro deo performances are subject to 21% VAT. This leads to new discussion about the viability of working in the pro deo system.

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#### 3.2.4 QUALITY OF LEGAL SERVICES OFFERED BY STATE-FUNDED LAWYERS

There are doubts about the quality of some pro deo lawyers: *"I have seen cases before the court in which the litigant would have been better off without a lawyer than with the one he was provided with via the legal support system."*(R2) The lawyers working in the pro deo system are on the one hand trainee-lawyers who are obliged to participate and on the other hand lawyers who freely chose to participate in the pro deo system. Where the former cannot choose a specialisation, the latter can (at some bars) mention their matter of interest or the matter they are specialised in. Prison is no separate specialisation, it is included in criminal law. It has been argued by some that the substandard remuneration of the pro deo lawyers does not attract the best quality lawyers.

The **obligation for trainee-lawyers to take on a certain number of cases within in the legal support system** is contested by some. Trainee-lawyers have to participate in the pro deo system (legal second-line support) as part of their training obligations. The same obligation does not exist at all bars when it comes to providing legal first-line support. Trainee-lawyers cannot choose a specialisation. At some bars, they are even obliged to take on certain cases. This can lead to poor performances: *"I have had such a case, of a trainee-lawyer in his first year, a PhD in organ transplantations, he takes on a divorce and completely blew the case. Just because he did not know anything about it. I called him, as the later lawyer of the client, and he says, 'honestly, I don't know anything about it'. But that woman's life, it has had a serious impact on it."*(R11) In general, the respondents agree that the involvement of trainee-lawyers in the pro deo system can have advantages as well as disadvantages. Trainees can be more motivated to work on pro deo cases than experienced lawyers, but they can also be less aware of the different ways of legal recourse. *"In certain cases you have trainee-lawyers who absolutely don't know anything about that matter and who are obliged to defend a client. (...) But on the other side, it is also an advantage because certain trainee-lawyers will put a lot more effort in a case than an experienced lawyer would do."*(R11) There currently is discussion within the Bar Association about the obligation for trainee-lawyers to participate in the pro deo system without being able to mention their matter of interest or specialisation: *"It certainly is a fundamental concern within the Flemish Bar Association too at the moment, which way do we have to go? Do we have to impose it to every lawyer coming at the bar and deciding 'I only want to do tax law'? Do we have to force them to go the prison as well to handle a criminal case? That is a question, and actually you rather have to reconsider the traineeship then, do we have to turn every lawyer into a general lawyer or can we abide that he specialises from day one?"*(R8)

Doubts were expressed about the deontology of some lawyers working in the pro deo system. All lawyers and two members of the Bureau for Legal Support involved in the research attest that some pro deo **lawyers request money from prisoners for the services provided, although this is forbidden**. Prisoners are not always aware that legal support lawyers cannot ask them for money. It is only when there is a succession of lawyers where the succeeding lawyer does not ask for money that this practice comes to the surface. *"There are also many lawyers who are not correct, who ask the prisoner or his family for money, although they were appointed in the pro deo system. It is not easy to prove it. But you have many testimonies of prisoners. They say, 'huh, I sign (the pro deo appointment form) and you don't ask anything? The others, they asked something'."*(R6) *"There are many abuses within the legal profession regarding that matter [working pro deo], so you hear many clients who have worked*

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<sup>34</sup> Being subject to 0% VAT is not the same as being exempted from VAT in accounting terms.

*with other lawyers, then you hear certain things... that even if there is a pro deo appointment, that they ask for money, which they are actually not allowed to do... so we hear many rumours about that, where I think it would be useful if the bar association would be more strict on that, and take it more serious if people complain about that.”*(R3) A member of the Bureau for Legal Support confirms that there are many complaints every month about **lawyers who do not respond to calls and letters of their clients** or about pro deo lawyers requesting additional money. *“We receive, quite often actually, complaints about ‘look, that lawyer does not work for me’, or ‘he does not react’. (...) The cases in which another lawyer gets appointed, I am not going to say that there are extremely many, but there are several a month.”*(R9)

Disciplinary proceedings in prison are sometimes considered easy money. *“Those cases sometimes request a lot of time if you want to do it in a good way, (...) but indeed, if you are not interested in the outcome, which is the truth for a lot of lawyers doing cases of discipline in prison, then you can handle it in two minutes, but we try to do it thoroughly, to get the best result possible for that client, then you have to know something about the situation you are dealing with, so it requests some time.”*(R3). The substandard quality of legal representation in prison disciplinary proceedings was also highlighted in previous studies. The limited knowledge of prison law leads to lawyers mediating between the prison director and the prisoner instead of making use of legal arguments. Hence, it seldom happens that a disciplinary case is won by referring to procedural mistakes such as evidence being unlawfully obtained, or because the burden of proof is insufficient.<sup>35</sup>

In conclusion, the main issues regarding the quality of the pro deo lawyer are the trainee-lawyer being obliged to take on cases in matters of law he is unfamiliar with and consequently delivers poor performances, and lawyers freely choosing to work in the pro deo system but either don't not take their job seriously or have insufficient knowledge of prison law.

### 3.3 ACCESS OF LAWYERS TO THEIR CLIENTS

#### 3.3.1 INFORMING PRISONERS ON THE EXISTENCE OF LAWYERS

Persons under judicial arrest and questioned by either the police or the examining magistrate have to be assisted by a lawyer. The majority of persons do not have a lawyer yet, and are appointed a pro deo lawyer from the Bar Association's pool of duty lawyers. If the arrested person needs a pro deo lawyer later on during his imprisonment, he can choose to contact that same lawyer which he already knows or get another pro deo lawyer appointed by the Bureau for Legal Support. Lawyers who dedicate their work to prison litigation mention that they do not need to make their existence known to prisoners, since word of mouth between prisoners seems to generate enough requests. Prisoners exchange names and contact details of lawyers who are willing to put effort and time in prison litigation. A lawyer illustrates the creativity of prisoners when exchanging information on lawyers during prison strikes: *“I also got new clients who directly contacted me during the prison strikes. This was not evident since exercise in the open air was limited or even non-existent in prisons. In certain prisons prisoners could not go for a walk for three weeks in a row, or even during the whole strike<sup>36</sup>. Well, how did they exchange that information? What they practically did is, they hung my business cards on strings and then via those strings*

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<sup>35</sup> Eechaut, V., *Penitentiair tuchtrecht en internationale detentiestandaarden : naleving in België en Frankrijk*, Antwerp, Maklu, 2017, 132-133.

<sup>36</sup> The strike lasted for more than fifty days in eleven prisons. *“Na vijftig dagen blijft staking duren in elf gevangenis”, De Standaard*, 14 June 2016, [http://www.standaard.be/cnt/dmf20160614\\_02338742](http://www.standaard.be/cnt/dmf20160614_02338742).



*they passed them on from cell to cell, so I kept receiving new clients.”(R11)* This word of mouth is enough for the lawyers to ensure new clients, especially given that the lawyers active in prison litigation are not many.

Since the lawyers prepared to work in prison litigation cases are not many, they are also known by their colleagues. It happens that other lawyers refer their own client to a lawyer known for being active in and good at prison litigation: *“I already work in prison litigation for a long time, in the same context, and it was one of the client’s lawyers who contacted me.”(R6)* The attention of the media in certain cases can create publicity: *“That case got some attention from the media, so it were both prisoners who contacted me as well as lawyers referring their client to me.”(R11)*

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### 3.3.2 ORGANIZING THE PRESENCE OF THE LAWYER IN DETENTION FACILITIES

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#### A. IN POLICE CUSTODY

According to law, a suspected person may not be questioned without the presence of a lawyer. The police ask suspected persons whether they already have a lawyer or whether they have to call the lawyer from the Bar Association’s pool of duty lawyers. The suspect has the right to a confidential consultation with his lawyer for thirty minutes and within 2 hours after he has spoken to the lawyer from the Bar Association’s pool of duty lawyers. Once a warrant has been issued, the suspect he has the right to speak to his lawyer without limitation.

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#### B. IN PRISON

The organisation of lawyer attendance in prison happens via the same bodies that are responsible for the organisation of legal first-line and second-line support in free society. For legal first-line support, the responsibility lies within the Commission of Legal Support. They are locally organised per judicial district. This results in differences between the different districts. In at least three districts the attendance of a lawyer to provide legal first-line support is not foreseen in prison (R19, R20, R23). In two of these districts there used to be a lawyer but because lawyers reported misuse of the system and because prisoners are automatically entitled to a pro deo lawyer, attendance has been discontinued. In a different district, duty shift were organised in prison on a weekly or monthly basis and lawyers giving legal second-line support went to prison to give legal advice. This was replaced by a two-weekly telephone permanence on Tuesday and Thursday, for budgetary reasons. Calling this permanence is for free for the prisoners. In another district, lawyer attendance in prison still exist. It takes place once a month, on the first Thursday of the month between 3 pm and 4 pm. The lawyer signs up at the prison, all prisoners requesting legal advice are sent to the lawyer one by one. They give general advice such as to send a how to send a registered letter, or how to consult a lawyer or a notary.

Legal second-line support, better known as the pro deo system, is organised by the Bureau for Legal Support. Prisoners who need a lawyer have to fill in an application form. This form is sent by fax by the registry of the prison to the Bureau for Legal Support. The bureau appoints a lawyer the next day at the latest. The appointment happens electronically, the appointed lawyer gets a message via mail. He or she has to take initiative to go to prison to hear the prisoner. It is often only then that the prisoner knows who the lawyer is. In case it takes too long for the lawyer to take action, the prison calls the Bureau for Legal Support and either they contact the lawyer or they inform the Registry of the prison of the personal data of the appointed lawyer in order for the prisoner to seek contact with the lawyer himself. Lawyers can access the prison all day between 7 am and 9 pm.

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### 3.3.3 PROBLEMS RELATED TO ACCESSING PRISONS

All lawyers mention the loss of time going back and forth to the prison, which is particularly the case with remotely located prisons. *“The amount of time you lose by going to prison is incredible, for a consultation of 15 minutes you easily lose two hours.”*(R11) ‘Lost’ travel time is believed to be one of the reasons why so little lawyers are interested in prison litigation by the respondents and some lawyers select their cases based on the location of the prison. *“I have clients at the moment that I can hardly visit.”*(R6)

Some older prisons are located in city centres and therefore quite easily accessible by public transport. However, this is not the case for many prisons and lawyers feel mention this as one of the obstacles to go to the prison. *“You have to take your time because these prisons are located in isolated spots, it’s in the middle of nowhere. It is impossible to go by public transport, and even from here it’s a trip of about thirty, forty minutes if you go by car.”*(R3) *“The new prisons are not [easily accessible by public transport]. Old prisons, you can sometimes go by train. They are in the city centre. But the others, you absolutely have to go by car. For visitors... It is sometimes not feasible, is it...”*(R6) None of the lawyers mention the issue of costs of transportation. They get 0.0125 credits per km, with a minimum of 20 km. In case one point is worth 75 euros, this comes down to 18.75 euros per 20km.

During prison strikes lawyers have been denied access to prison. *“Take for instance [a specific prison], I have been there five times and I have been refused access, so, how do you defend a client if you have never seen him? So how do you keep in touch? I “guess” prisoners have alternative means of communication to contact the outside world, but that is thus very problematic, isn’t it.”*(R11) During the latest prison strikes in June and July 2018, the same issue emerged. Only few visiting moments were organised and prisoners did not receive their mail. The Flemish Bar Association stated that the difficult communication between lawyers and clients impaired the rights of defence and the right to a fair trial. Thirteen prisoners of one prison started interlocutory proceedings against the Belgian State.

Lawyers also lose time because of the security measures in prison. Until 1 June 2018 they had to undergo the same security measures as regular visitors. This led to several complaints and a discussion between the Bar Association and the prison administration. From 1 June 2018 on the rules have changed and lawyers are checked in the same way as the prison staff. The security measures remain the same, but lawyers will no longer be checked together with the visitors. The new measures were officially put in place in order to ensure a smoother movement. Mobile phones, laptops and other electronic devices are not allowed in prison. This means that lawyers cannot work during the waiting times (R11).

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### 3.3.4 PROBLEMS WITHIN PRISONS

Lawyers mention the long waiting times when visiting clients in prison. *“You are waiting a lot there, aren’t you. That regime is not, it is not really aimed at quickly helping the lawyer, so you enter the prison a bit as a spectator, and they try to help you further, but sometimes you just sit there for hours and hours.”*(R3) Both the lawyers working in legal first-line support and second-line support also mention the waiting times between consultations with different clients. *“Communication does not always run smoothly. There is not someone in the vicinity to ask or to follow up whether someone else is coming or not. (...) There is often 20 minutes between prisoners.”*(R21)

Lawyers working on prison litigation cases describe their contacts with the prison staff as problematic some of the times, due to the fact that they represent ‘difficult’ prisoners. *“I heard afterwards that certain staff members were quite proud, ‘he has had to wait one hour, thanks to me’, so you are considered to be the prisoner himself, aren’t you. You intervene for certain difficult clients, and in the eyes of certain staff members, the lawyer of the prisoner, he has to be treated in the same way.(...) They sometimes act difficult when I access the prison, but that*

*is, well, I am used to it.*"(R6) Lawyers do not mention any confidentiality issues. There is a separate parlour foreseen in prisons to ensure a confidential consultation between the lawyer and his client.

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### 3.3.5 ACCESS TO PRISONERS AND PRISONER'S FILES

Lawyers do not automatically have access to their client's prisoner files. Only in disciplinary proceedings they are provided with a short summary of the incident (a copy of the disciplinary report given to the prisoner). This sheet does not contain previous disciplinary measures. Lawyers mention that it is difficult to defend a new client when his antecedents are unknown (R3). A respondent also mentions that the language is a huge barrier for providing sound legal advice (R21). In disciplinary proceedings the lawyer can access to the prison file of their client via the registry of the prison.

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### 3.3.6 INITIATING PRISON LITIGATION CASES

Disciplinary proceedings are the only prison litigation cases for which a formal procedure is foreseen in the Prison Act provisions (which have entered into force). These cases are initiated by the prison governor. The prisoner is asked whether he requires assistance of a lawyer during the proceedings. In case *internees* are involved in disciplinary proceedings, they cannot refuse the assistance of a lawyer.

In other prison litigation cases, however, the initiative mostly lies with the lawyer since the prisoner is unaware of the possibilities. *"My client was complaining, 'what is all this', it was his first time in prison, so I guided him, of course he does not know article 3 of the ECHR. So I had to tell him that this right exists and that those conditions were not normal. So, although you act on the instructions of your client, somewhere you are the driving force."*(R11) Pre-trial prisoners sometimes fear the impact of prison litigation on their sentencing. *"this is brought forward by almost everyone during the consultations, that fear of negative consequences on their possible future sentence. I really had to convince some of them that it would not impact their actual sentencing. I turned out to be correct, I never had the impression that the actual sentencing was negatively impacted. At the contrary, some prisoners got an earlier release or a lower sentence because of their traumatising experience."*(R11)

## 4. INVOLVEMENT OF NGOS, HUMAN RIGHTS ORGANISATIONS, LEGAL CLINICS, UNIVERSITIES AND MONITORING BODIES IN PRISON LITIGATION

### 4.1 NGOS AND HUMAN RIGHTS ORGANISATIONS

There are two NGOs playing a, rather small, role in prison litigation. There is the Human Rights League, which is active in both Flanders and Wallonia, and the Belgian branch of the International Prison Observatory, which was originally founded in France but is also active in the French speaking part of Belgium.<sup>37</sup> NGOs in Belgium are only indirectly involved in prison litigation issues, via the dissemination of their reports on prison conditions for instance. Lawyers can use these reports to substantiate their case and sometimes contact these NGOs for help or information.

The lack of involvement of NGOs in prison litigation has a bi-fold reason. To begin with, NGOs lack the authority to initiate proceedings in prison litigation. Lawyers affiliated with NGOs sometimes represent prisoners in court, but this is not on behalf of these human rights organisations.<sup>38</sup>

### 4.2 NATIONAL MONITORING BODIES

Belgium has local Independent Monitoring Boards in each prison and an overarching National Monitoring Body.<sup>39</sup> Members of the Independent Monitoring Boards do not have the legal mandate to give legal advice to prisoners. However, some members occasionally do this in an informal way, insofar they have the appropriate legal background. In general members of the Independent Monitoring Board advise the prisoner to contact his lawyer when a legal issue arises. A lawyer criticises the limited clout of the monitoring bodies: *“You have the local monitoring boards who report from time to time, and the national monitoring body, but well, those have been their work was hampered by the Minister of Justice. Consequently, they haven’t produced much for years.”*(R3) Indeed, the National Monitoring Board has only published two activity reports since 2008, in spite of its legal obligation to write a report every year. The National Monitoring Body has blamed this on insufficient financial and human resources.<sup>40</sup>

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<sup>37</sup> For more information on the Liga voor de Mensenrechten, see <https://mensenrechten.be/pagina/wie-zijn-we>. For more information on the Ligue des droits de l’Homme, see <http://www.liguedh.be>. For more information on the Observatoire International des Prisons (OIP) – section belge, see <https://oipbelgique.be>.

<sup>38</sup> Cliquennois, G. & Herzog-Evans, M., “European monitoring of Belgian and French penal and prison policies”, *Crime, Law and Social Change* 2018, afl. 1, 131.

<sup>39</sup> *Commissie van Toezicht / Centrale Toezichtsraad voor het Gevangeniswezen* in Dutch, *Commission de Surveillance / Conseil Central de Surveillance Pénitentiaire* in French.

<sup>40</sup> Centrale Toezichtsraad voor het Gevangeniswezen, *Jaarverslag 2011-2014*, 2016, 3; Centrale Toezichtsraad voor het Gevangeniswezen, *Jaarverslag 2008-2010*, 2011, 7-9.

## 5. PRISONERS AS LITIGANTS

### 5.1 THE RIGHT TO INFORMATION

#### 5.1.1 ACTORS PROVIDING INFORMATION

Prior to pre-trial detention, suspects are informed about their basic rights on three occasions: two times by the police and once by the examining magistrate. The first time is at the time of their arrest. The next time is prior to the first police questioning. The third time is prior to the questioning by the examining magistrate. A so-called ‘explanation of your rights’ is handed over by the police and the examining magistrate to the suspect. He or she can keep this document with him or her. This document of four pages is available in 59 languages.<sup>41</sup> During all interrogations the suspect is assisted by either his own lawyer or a pro deo lawyer. In case the suspect does not understand Dutch (in the Dutch speaking Community), French (in the French speaking Community) or German (in the German speaking Community), an interpreter is summoned to translate during the interrogations.

Once in prison, the prisoner sees the prison director within 24 hours after his arrival in prison, who explains to his rights and duties in a general way.<sup>42</sup> A copy of the internal regulations, detailing his rights and duties and the practical organisation of prison life is to be made available to each prisoner. Apart from the internal regulations, little information on legal procedures is given in prison. The prison thus relies on the lawyer to inform the prisoner about his other (human) rights and the legal remedies available. An example hereof is the legal advice that a lawyer gave to his client during the prison strikes: *“My client was complaining, ‘what is all this’, it was his first time in prison, so I guided him, of course he does not know article 3 of the ECHR.”*(R11)

Some other actors sporadically provide legal information to prisoners.

To begin with, members of the **local Independent Monitoring Board** of the prison consult with prisoners on a weekly basis. Legal information is given occasionally, insofar as members have the necessary knowledge. This is done in an informal way. Usually the advice is given to a lawyer when a legal issue arises.

There is also the **Psychosocial Service in prison**. They provide psychiatric, psychological and social support to prisoners. This service can refer the prisoner to legal support services. Some respondents attribute a similar limited role to the **Prison Welfare Services**. Their lack of involvement in the legal support system is considered a missed opportunity by social workers in order to connect legal and social support to prisoners. *“Currently, there is little cooperation between **social workers** and the legal support system. The legal first-line support is provided by the bars, by lawyers, but legal problems are often multidimensional and have a social dimension as well. Lawyers often overlook that, they mainly reduce the issue to a legal question.”*(R4) *“Social issues, legal issues, they are often in the same boat. People with debt problems for instance, you can approach it via a legal way, but there is also a lot of misery involved.”*(R12) For example, matrimonial problems could result in a divorce or a dispute over rent. In that case, social welfare workers refer to the lawyer of the prisoner or to other organisations with in-house legal expertise related to a specific issue, such as the Tenants’ Association

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<sup>41</sup> For a copy of the ‘explanation of rights’, see FOD Justitie, *Your rights when being detained*, [https://justitie.belgium.be/nl/themas\\_en\\_dossiers/documenten/documenten\\_downloaden/verklaring\\_van\\_rechten/uw\\_rechten\\_als\\_u\\_van\\_uw\\_0](https://justitie.belgium.be/nl/themas_en_dossiers/documenten/documenten_downloaden/verklaring_van_rechten/uw_rechten_als_u_van_uw_0).

<sup>42</sup> See, among others, Commissie van Toezicht van de gevangenis van Sint-Gillis, *Jaarverslag 2017* and Commissie van Toezicht van de gevangenis van Beveren, *Jaarverslag 2016*.

The NGO **Observatoire International des Prisons (OIP)** wrote a booklet on prisoners' rights. It is written with the purpose of informing prisoners of their rights and is called '*Guide du Prisonnier en Belgique*'<sup>43</sup>. According to [R6] it is quite well-known in French-speaking prisons: "*Prisoners really know this booklet. I even had a prisoner once, he came with his book, quite proud, to me, a first consultation in the consultation room and he came with his book, 'I have read it, can you do this and that?'*" It has also been distributed in prisons by the local Monitoring Boards. Regrettably, the book only exists in French, there is **no Dutch version** available (yet).

**The family of the prisoner** can freely access the internet and other information services and consequently share this information with the prisoner. They can also search for lawyers who are more well-known and contact them in name of their imprisoned family member.

**In short**, little legal information is provided to prisoners. Non-legal professions or volunteers only provide limited guidance to prisoners with regard to legal information. The social workers and case workers in prison do have a referral function regarding social issues with a strong legal dimension, but do not provide legal information themselves. Information on the (human) rights of prisoners and how to enforce them is mainly provided by lawyers.

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### 5.1.2 POLICY IMPACT

Prison Cloud is a digital platform which prisoners can access from their cell. With the use of Prison Cloud, (legal) information can be provided to the prisoners, ensuring they always have the latest prison rules to their disposal. While the roll-out of this digital platform was foreseen in Belgian prisons, currently only three of the thirty-four Belgian prisons are equipped with Prison Cloud. The **roll-out of the digital platform for prisoners** has been **postponed** until a later date still to be determined. While the Minister of Justice promised to unroll this system in all Belgian prisons, the necessary funds were not allocated. Thus, due to the limited efforts in the area of the right to information for prisoners, there is a limited policy impact as well. For more information on Prison Cloud, see the next chapter.

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### 5.1.3 THE QUALITY, AND ACCESSIBILITY OF INFORMATION ON RIGHTS AND DUTIES

New prisoners receive several information leaflets or booklets from the prison staff, usually only available in French or Dutch. In most cases the leaflets inform the prisoner on the internal regulations, how to apply for legal second-line support (requests for the appointment of a pro deo lawyer) and the existence of the local Independent Monitoring Board. In general, prisoners are informed that a copy of the Internal regulations is available in the library of the prison.

In several prisons, **the accuracy of the internal regulations** is problematic. In 2017, the Independent Monitoring Board of Sint-Gillis prison reported that the latest version of the internal regulations dated back from 1 August 2014. "*There are prisoners who complained to the Commission that they received and old version or even no internal regulations. [Important parts of the Prison Act were changed in that period].*"<sup>44</sup> In Ghent prison, "*for a certain period in 2017 there was confusion about when prisoners could call their lawyer, because amended practices were not reflected in the internal regulations. (...) The information available on paper was no longer*

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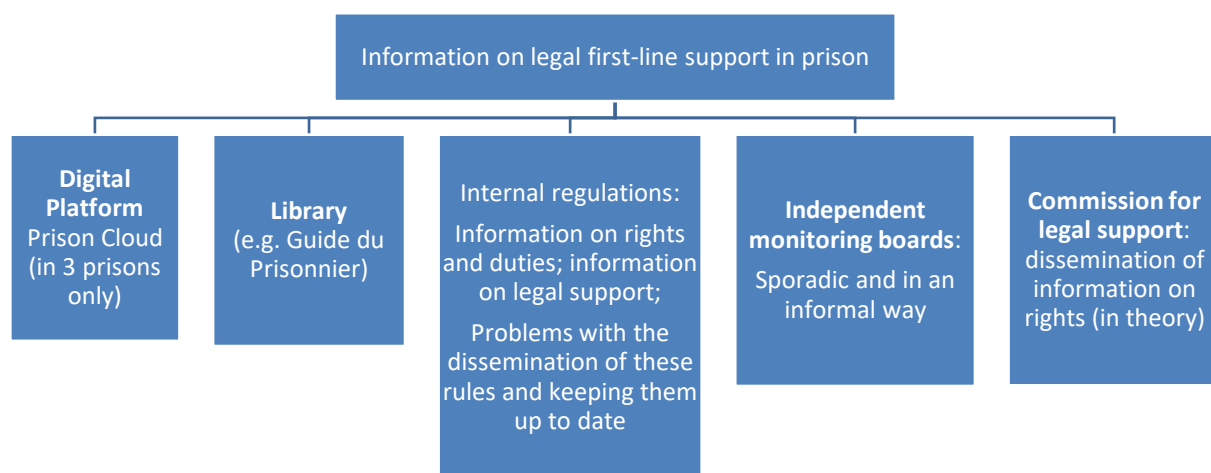
<sup>43</sup> Beernaert, M.-A., Mary, P. & Nève, M., *Le Guide du Prisonnier en Belgique*, Waterloo, Editions Luc Pire, 2016.

<sup>44</sup> Commissie van Toezicht van de gevangenis van Sint-Gillis, *Jaarverslag 2017*.

accurate.”<sup>45</sup>. the same goes for other prisons. “We conclude that it is difficult for prisoners to consult an up-to-date version of the internal regulations. Local practices are different from the internal regulations which were officially approved by the Minister. Moreover, there may be other rules depending on the wing and the section. The lack of internal regulations make it difficult for prisoners to know which rules apply to them.”<sup>46</sup>

Research on disciplinary proceedings shows that in none of the seven prisons involved in the research provided a copy of the internal regulations when entering the prison. Furthermore, prison staff repeatedly appeared to be reluctant to provide the internal regulations to prisoners asking for them. Reasons hereto vary from the internal regulations not being available or up-to-date to mere unwillingness. The prison governors acknowledge that the legal jargon used in the internal regulations is not tailored to prisoners. Furthermore, said research shows that the information provided on discipline in prisons is incomplete and not up-to-date. Hence, prisoners turn out to be unaware of new disciplinary infractions or more stringent sanctions which were introduced in 2013.<sup>47</sup>

Figure 4 shows how prisoners are informed of first-line legal support.



**Figure 3: Access to legal information in prison**

#### 5.1.4 THE RIGHT TO TRANSLATION AND INTERPRETATION

Suspects under arrest by the police have their rights explained orally prior to the interrogations by the police and the examining magistrate, in order to properly inform less literate or illiterate suspects. The aforementioned ‘explanation of rights’ is available in 59 languages.

The assistance of a sworn interpreter is foreseen on certain occasions. In police stations and at courts, prisoners are entitled to the assistance of a sworn interpreter during the confidential consultation with their lawyer in case

<sup>45</sup> Commissie van Toezicht van de gevangenis van Gent, *Jaarverslag 2016-2017*, 2018.

<sup>46</sup> Jaarverslag CvT Brugge, 2016, [https://www.ctrg-ccsp.be/nl/system/files/cvt\\_brugge-ruiselede\\_-\\_jaarverslag\\_2016.pdf](https://www.ctrg-ccsp.be/nl/system/files/cvt_brugge-ruiselede_-_jaarverslag_2016.pdf).

<sup>47</sup> Eechaudt, V. *Penitentiair tuchtrecht en internationale detentiestandaarden: naleving in België en Frankrijk*, Antwerp, Maklu, 2017, 77, 81.

they do not understand or speak the language of the proceedings, or in case they have hearing or speech impediments. The interpreter is free of charge. In case the suspect wishes to speak a language that is different from the language of the proceedings, a sworn interpreter will be called up to assist the suspected person during the interview. The interrogation cannot take place until he or she has arrived. This is also free of charge.

The assistance of an interpreter is provided for by law in police stations and during court proceedings. When the suspect commands a less commonly spoken language, providing a translator might be more difficult: *“In 2017, there were no Latvian interpreters available in Belgium, what did the pre-trial court do? They ask ‘Does your client speak Dutch?’, ‘No.’, ‘Sorry, there is no interpreter, but your client has the choice to request a postponement of the pre-trial hearing<sup>48</sup> or to choose to be represented today by his Dutch-speaking lawyer, so his right to be tried in a language he understands is covered. That is a bit of a catch-22, isn’t it? You would like to invoke the right to a fair trial and a lawful pre-trial detention. You build this defence on the absence of an interpreter or, alternatively, you invoke the right not to be incarcerated without being brought “promptly” to a court in a language the person understands. But because the person is able to formulate this defence by virtue of his Dutch-speaking lawyer, his rights on a fair trial and a lawful pre-trial detention are covered. In the end, the person who is sent back to prison for one or two months, does not have a clue what happened.”*(R11)

Lawyers can also take interpreters to prison to assist them when visiting their client. These translation services are free of charge if the client enjoys a pro deo lawyer if the interpreter is needed to discuss the criminal case of the prisoner. The assistance of a sworn interpreter is not foreseen for prison litigation.

In prison, the **internal regulations** are available in the language spoken in French or in Dutch, depending on the location of the prison. The Independent Monitoring Board report of Sint-Gillis prison reported that *“prisoners complained to the Commission that (...) the internal regulations only exist in Dutch and French. Many prisoners cannot read it and are thus not aware of the applicable rules.”*<sup>49</sup>

Sworn interpreters are *de facto* absent in prisons. Fellow prisoners or prison staff are usually relied upon to provide translation when the prison governor or prison staff wants to communicate with a prisoner (e.g. during disciplinary proceedings).<sup>50</sup> The sheer number of languages spoken in prison means prison staff will not be able to translate to each language spoken in prison. *“Language is a major issue. There are many non-native speakers. Because of the language regulations and the fact that we do not have in-house staff who speak all languages. Nor with the prison staff, thus the security staff, nor with the social workers or service providers.”*(R12) There are some ethical issues using these prisoners or prison staff as translators, as the prisoner who doesn’t speak the language might choose to withhold information because the topic is sensitive or in fear of retaliation. Interpretation by telephone, involving a sworn interpreter, is available for social workers and certain other services. However, this interpretation is only provided when discussing the prisoner’s social problems, not in prison litigation.

## 5.2 ORGANISATIONAL AND PRACTICAL ISSUES RELATED TO LEGAL SUPPORT

There are two ways in which a prisoner can be appointed a pro deo lawyer. He can either inform the prison administration that he wants to consult a pro deo lawyer or he can contact a lawyer himself, by letter or by telephone. In case the prisoner informs the prison administration, they send a fax or an e-mail to the Bureau for

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<sup>48</sup> To a date after the statutory deadline.

<sup>49</sup> Commissie van Toezicht van de gevangenis van Sint-Gillis, *Jaarverslag 2017*, 31.

<sup>50</sup> *Ibid.*, 8.



Legal Support, including evidence that the person requesting the assistance of a pro deo lawyer is imprisoned. There is a standard application form, but it is rarely used.<sup>51</sup> This causes useful or necessary information to be missing (reason for imprisonment, length of imprisonment, reason for appealing to a lawyer). The application form is available online, but needs to be printed by prison staff since prisoners have no access to the internet or, in general, a printer. *“Sometimes it happens that they indeed are aware of the existence of the application form and that it has been filled in by the prisoner. Sometimes quite poorly, since it is something that prisoners are completely unfamiliar with.”*(R9) The application form is only available online in French, Dutch and English. This raises issues regarding non-native speakers: *“Of course... For those non-native speakers, remarks have already been made...”*

The prisoner can also contact a lawyer himself, via letter or by telephone. Prisoners have no access to internet, so they need to know the contact details of the lawyer beforehand. These details are most often provided by visitors. If that lawyer provides services within the legal support system, the lawyer visits the prisoner in prison and he brings the application form with him. They fill in the application form together.

In short, the application form regarding the appointment of a pro deo lawyer is thus not freely available in the prison, it is mostly the lawyer himself to bring it to prison to fill it in with the client.

The application form for a pro deo lawyer is three pages long, and it is the same form any other citizen requesting the assistance of a pro deo lawyer needs to fill in. The data required relates to the purpose of the application, personal data of the requesting party, statements regarding the nature and amount of his means of subsistence and possessions (including real estate, savings and vehicles). Most questions are tick-the-appropriate-box and filling out the form takes about five minutes. Nevertheless, interviews show that the literacy level of prisoners is sometimes too low to fill in the form themselves: *“Usually I let them sign it and for the rest. (...) I fill it in because there are still many people who barely can... They can sign and can say, yes, read and approved.”*(R6) *“You have to sit together with them and explain the content of the document they sign. Because, well, it are strict categories now, and it is just plain copy-paste of the law, so that is absolutely illegible.”*(R11)

Proof of their client’s imprisonment is sent by the registry of the prison when they send a fax or an e-mail to the Bureau for Legal Support. This is done automatically and the prison administration thus provides the necessary documentation.

Prisoners can appeal the refusal to provide legal support before the Labour Court. The threshold to initiate proceedings before the Labour Court is low: the assistance of a lawyer is not required and the procedure can be started by letter.

In theory, prisoners enjoy a rebuttable presumption of inadequate means of subsistence. Hence, their means of subsistence are presumed to be insufficient to pay a lawyer themselves. However, this presumption is subject to evidence of the contrary. In practice, prisoners are almost automatically granted legal support, unless there are very obvious counter indications suggesting that the prisoner is able to afford a lawyer himself (R8, R9). *“In reality, it is not feasible to actually do a full research on the means of subsistence every time. It’s all good on paper, but in practice the majority, 99%, is eligible to a pro deo lawyer anyway.”*(R8) *“We still accept that a prisoner has no free access to possible savings he might have on an account, so we actually always appoint a*

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<sup>51</sup> For the English version of the application form see:

<http://www.ordeexpress.be/UserFiles/ArtikelDocumenten/Oaanvraagformulier%20juridische%20tweedelijnsbijstand%20ENG%20vanaf%201%20september%202016.pdf>

lawyer. (...) To my knowledge, legal support is never refused... Provided that the necessary documents are provided of course.”(R9)

There is no department within the prison or prison administration, nor a particular member of the prison staff, centralising and transmitting claims for financial support. Nor is there one with the Bureau for Legal Support. Applications coming from the prison are dealt with together with all other applications.

The Bureau for Legal Support decides whether or not a pro deo lawyer will be appointed. They are locally organised, which means every Bureau can organise itself differently. Some Bureaus of Legal Support are staffed by lawyers while others are staffed by administrative employees. Trainee-lawyers are never a member of the Bureau: “No trainees, definitely not. (...) There is no written prohibition to do so but it is definitely an unwritten rule. You need some kind of experience, you get in contact with all kinds of people (...) So, we choose people who are at least five years at the bar.”(R8)

Once the prison administration has faxed or e-mailed the application form to the local Bureau for Legal Support, a lawyer is usually appointed within a couple of days. In some cases, such as disciplinary proceedings, the appointment happens almost immediately, since prisoners are always eligible to a pro deo lawyer.

### 5.3 SPECIAL CATEGORIES OF PRISONERS

Prisoners deemed particularly dangerous or violent are placed in the **individual special security regime**, which only exists in the prison of Bruges. They have been particularly aggressive towards fellow prisoners or prison staff, for instance. Prison staff performs a visual of the cells every 30 minutes and the cells are screened daily for dangerous objects. For each eight prisoners there are thirty security officers, one psychiatrist, one psychologist, one social worker and an educator. Radicalised prisoners can be held in separate, so-called, DERADEX-wings existing in two Belgian prisons.

The research did not bring forward particular obstacles for these prisoners with regards to legal aid or legal support, except for the fact that due to the limited amount prisons with these special regimes, clients are held too far away from their usual lawyer. “It is not feasible to lead a trial from so far, it is particularly difficult. I have clients at the moment that I can hardly visit.”(R6)

### 5.4 LEGAL REMEDIES WITHIN PRISONS

The complaints mechanism provided for in the Prison Act will only enter into force in 2020. The complaints board will be able to annul or change decisions taken by the prison governor. However, in the meantime, no legal remedies exist within prison and prisoners have to rely on the same legal remedies available in society at large. These remedies have been proven to be ineffective, and thus contrary to art. 13 ECHR, by the European Court for Human Rights. More specifically, the Court rules that there was no effective remedy for prisoners wanting to appeal their transfers between prisons, the inhuman detention conditions they were confronted with, or the lack of adequate health care for mentally ill offenders.<sup>52</sup> Moreover, research shows that the Council of State, when appealing a disciplinary decision, most often rules long after the disciplinary sanction was enforced.<sup>53</sup>

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<sup>52</sup> ECHR, *Vasilescu v. Belgium*, 2014 ; ECHR, *Bamouhammad v. Belgium*, 2015; ECHR, *W.D. v. Belgium*, 2016.

<sup>53</sup> Van Acoleyen, M. & Eechautd, V., “Beroepen bij de Raad van State tegen penitentiaire tuchtsancties: doeltreffend of louter symbolisch?”, *Nullum Crimen*, 2019, afl. 1, 29-36.

## 6. ACCESS TO DIGITAL TOOLS AND INTERNET FOR PRISONERS

### 6.1 PRISON CLOUD, A DIGITAL PLATFORM FOR PRISONERS

In 2014, Prison Cloud was introduced for a first time in a Belgian prison. Prison Cloud is an electronic service platform interconnected through the intranet and proposing several services to prisoners. The prison administration wanting to develop a digital service platform for prisoners, it subsequently created Prison Cloud based on three basic principles: (I) security, (II) network-based (the platform should run within a network), and (III) flexibility (a broad range of services should be able to run flexibly on the platform). Besides those basic principles, the platform also has to be:

- (1) Person-based: Prison Cloud should allow **tailor-made, individual services** to prisoners. *“What always happens is that we are asked, ‘does the prisoner have this or that right?’, and it is always about all prisoners, about all 11.000 and it is never said ‘maybe someone who is in an open regime in Ruiselede and who works during the day and who can do everything he wants, that he can use the internet in the evening’. I mean, it is absurd to compare that situation to the High Security Wing in Bruges. That was something fundamental, we absolutely wanted to tailor to the prisoner.”(R10)*
- (2) Location-based: different services should be provided depending of the location. *“Previously, we could only provide certain services in the library or perhaps in a classroom, but we wanted to bring those services to the cell, or maybe in remand centres to the wing, depending on the service. We also thought of the internees, so we could provide services tailored to them, as they do not always have the right skills to participate in activities. It was something fundamental in the concept.”(R10)*
- (3) Time-based: it should be possible to activate or deactivate certain services depending on the timeframe. *“we needed to be able to differentiate, also due to security reasons, some things should not be accessible 24/7.”(R10)*

### 6.2 THE RELEVANCE OF PRISON CLOUD FOR PRISON LITIGATION

In a general sense, Prison Cloud can be used to provide prisoners with tailored **information** (through the intranet) and **services** (through the applications). The intranet allows the prison administration to inform prisoners on life in prison (visiting hours, weekly menu, activity calendar, internal regulations, etc.).

Research shows that providing prisoners with accurate, detailed and up-to-date information on their rights and duties in prison, in a language they understand, is one of the main areas of concern (see *supra*). An in-cell electronic service platform provides opportunities in this area since legal information, such as the internal prison regulations, information about a prisoner’s rights or information about the system of legal support. The benefits in the context of prison litigation are obvious.

Several applications provided through Prison Cloud are also of relevance for prison litigation. Prisoners can consult their (digitalised) criminal file through the ‘consult online’ application. Prisoners could access this file in their cell or in the meeting room with their lawyer. Prison Cloud also foresees a videoconferencing application, allowing prisoners to contact their lawyer, to converse with legal authorities or to appear before court. A restricted internet connection should moreover allow prisoners to consult websites of the bars or other websites relevant for prison litigation. The electronic service platform also lets prisoners send requests and messages to prison services. This should allow the prisoner to file a complaint against decisions taken by the prison governor in the context of the complaints mechanism entering into force in 2020.

### 6.3 CURRENT OBSTACLES AND LIMITATIONS OF PRISON CLOUD

In practice, Prison Cloud is currently available in **three languages**, being Dutch, French and English. The aforementioned language barriers are thus still relevant to a certain extent as not all prisoners are familiar with these languages. Furthermore, a recent study shows that not all applications and services are available in all three languages.<sup>54</sup> Making all functions available in different languages and providing a translation application should improve access to Prison Cloud according to prisoners. Moreover, a more extensive Help-application and an initial information brochure on Prison Cloud could be useful.<sup>55</sup> Lawyers do notice that prisoners residing in a prison with Prison Cloud use the services to prepare their cases: *“It is easier for them to get in contact with the local prison administration. They sometimes come to the parlour with notes they received and stuff. It is more or less useful.”*(R6)

Only three out of 34 prisons have the necessary digital infrastructure to allow Prison Cloud to function, being Beveren, Marche-en-Famenne en Leuze-en-Hainaut prisons. The roll-out of the system to the other prisons was envisaged in the Policy Paper on Justice of 2015 to happen before end of 2018. Due to budgetary constraints and new priorities this objective will not be met.

Moreover, only a **limited number of applications are accessible for prisoners** in the Belgian version of Prison Cloud. Videoconferencing is not possible for instance, although this could be an interesting tool to minimize the transfers of prisoners to court and the subsequent queueing for lawyers. Respondents with different backgrounds are in favour of allowing videoconferencing: *“That would be great. Then I don’t have to go to prison anymore. The amount of time you lose by going to prison is incredible, for a consultation of a quarter-hour you easily lose two hours. It would certainly make my work easier. (...) It would be great and not only for the consultations with the lawyer, but also for the appearance before court. Take for instance, during that strike, I still do not understand that the judges did not just go to prison, but simply judged in the absence of the prisoner involved. And that would be possible using such a Skype on Prison Cloud.”*(R11) *“Access to lawyers is only possible by telephone at the moment. It think it would be much better if it was also possible via videoconferencing. First and foremost, lawyers charge a lot of money to go to prison, well, that is to say, for prisoners it is a lot. (...) So why not use that technology, it would definitely be a plus. Also with regards to judges, there has been a lot of commotion regarding the use of videoconferencing for the appearance before court, I do think however that it often is a plus for both parties.”*(R10) Privacy and security concerns were given as a justification for not enabling videoconferencing. The prison administration does not want to have a camera in the cell and prefer not having outsiders seeing the cell.”(R1, R12)

Restricted access to internet was previously possible. Originally, prisoners had access to a limited number of websites via the internet-application of Prison Cloud. However, access has been made impossible after an incident with a prisoner who sent a message to a journalist using a job search page. This measure was said to be only temporary, but up to now, access is still withdrawn. (R24)

Furthermore, Prison Cloud is used to make information available to prisoners. The information currently available includes the internal prison regulations and information on the modalities of the execution of sentences, penitentiary leave, limited detention and electronic monitoring. Information on legal support and legal aid (e.g. regarding pro deo lawyers and how to apply for one) is also made available. Prisoners pointed out they would prefer more external information. The information currently available on the intranet relates mainly to the internal prison regulations and other information regarding the prison itself. Consulting the Prison Act, federal

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<sup>54</sup> Feys, Y. & Robberechts, J. “PrisonCloud, het elektronische dienstenplatform in detentiecontext: de stand van zaken geüpdatet” in *Handboek Politiediensten*, Mechelen, Wolters Kluwer, 2017, 189.

<sup>55</sup> *Ibid.*, 217.

and community legislation and parliamentary documents would be welcomed by prisoners. *“Frankly, according to me it is a very good system if you take full advantage of the potential because nowadays that is not the case yet. It is even quite rudimental at the moment, it is used very basically.”*<sup>56</sup>

A more general observation is that a blanket ban is often imposed on prisoners when all in all minor problems arise. A former member of the Justice department reflects: *“It is now very difficult for prisoners to access the website of the Justice Department. That website has information on how individuals can file a complaint when they are dissatisfied with the services provided by the Justice department. When the information was accessible through Prison Cloud, some prisoners contacted these services directly. Subsequently, access to this information was no longer possible. But that is a fundamental question, isn’t it, if any other regular citizen is allowed to complain, then why not the prisoner? Instead of cancelling access to complaints information, we could provide that service with more means so he can also handle requests of prisoners. It is a difficult situation, if we think about prisoners, suddenly a lot less is allowed.”*(R10)

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<sup>56</sup> *Ibid.*, 195, 212 & 231.