



**SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND  
CORRECTIONAL SERVICES on the JUDICIAL INSPECTORATE OF CORRECTIONAL  
SERVICES 2013/14 ANNUAL REPORT**

**Submitted by  
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**Introduction**

1. During the course of 2012 and 2013 the Portfolio Committee on Correctional Services dedicated a significant amount of time and discussion towards the legislative setup of the Judicial Inspectorate of Correctional Services (JICS), more particularly its institutional independence.
2. It is worth noting that JICS itself lamented its compromised its structural setup both before parliament and in its 2012/2013 Annual Report.<sup>1</sup> In its 2013/2014 Annual Report it stated the following:

‘Over the years the Inspectorate has come under scrutiny for not having full independence from the Department it is mandated to report on, and for its unenforceable findings. More importantly, the ability of the Inspectorate effectively to fulfill its mandate is impeded by its situational analysis. This refers to the current extent to which the Inspectorate is dependent on the financial and administrative support of the Department it is mandated to oversee.’<sup>2</sup>

<sup>1</sup> See pages 14-19 2012/2013 JICS Annual Report.

<sup>2</sup> See pages 19-20 2013/2014 JICS Annual Report.

3. Given the importance of effective oversight in relation to places of detention we wish to revisit these discussions. The submissions that follow are therefore based on submissions placed before the previous Committee.

### **The value of independence**

4. A vitally important aspect of any oversight mechanism is its independence from the institution or organization it intends to assess and freedom from “undue political interference”.<sup>3</sup> Corder points out that institutional independence has two facets:

“In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government. Approval by the executive of budgets, or other issues of staffing is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases”.<sup>4</sup>

5. The Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa*<sup>4</sup> stated that independence (in respect of the Independent Electoral Commission) required *both financial and administrative independence*.<sup>5</sup> Likewise, if the JICS is to function effectively and with maximum impact, then it is important that steps be taken to safeguard its long-term independence. Meaningful independence is necessary not only to ensure that the JICS is in a position to freely disseminate its findings and lobby with civil society for particular reforms, but to ensure for public confidence and trust. Its performance must ultimately be measured against the objective criteria of prisoners’ rights in the Constitution and the Correctional Services Act.

### *Financial independence*

6. Financial independence requires that an organization be in a position to acquire funds whenever necessary in order to perform its statutory duties. Jagwanth notes that both the guarantee of and the source of funding are crucial. If funding is sourced from the same organ that is the object of oversight, the independence of the oversight body and the

<sup>3</sup> See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 188.

<sup>4</sup> H Corder, S Jagwanth and F Soltau *Report on Parliamentary Oversight and Accountability* (June 1999), 56. Available on the web at: <http://www.pmg.org.za/bills/oversight&account.htm> See also Jagwanth S. (2004) *A Review of the Judicial Inspectorate of Prisons in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre.

<sup>5</sup> 1996 (6) BCLR 489 (CC).

perception thereof may be compromised.<sup>6</sup> In *New National Party*, the Constitutional Court noted that an arrangement whereby a “government department makes funds available from its own budget to a public entity for the performance of certain functions...is fundamentally inappropriate when applied to independent institutions...”<sup>7</sup> Accordingly, the Court stated, it was for parliament, and not the executive arm of government to provide for funding...”<sup>8</sup>

7. Although section 85(1) of the Correctional Services Act 111 of 1998 (the Act) guarantees the independence of the JICS, section 91 states that it is the Department that is responsible for all the expenses of the Judicial Inspectorate. The esteem in which judges are held brings credibility and a measure of independence to the Office. This safeguard remains fragile, however, for it is reliant on an individual and not in the Office itself.
8. The budget of the Judicial Inspectorate should not be linked to the Department, but should come directly from Parliament or be transferred from the executive in such a way that it would ensure, in the opinion of the Inspecting Judge, the independent and effective functioning of the JICS. This change would require an amendment to section 91 and 88A(1)(b). We recommend, therefore, that this be proposed to the Department.

#### *Administrative Independence*

9. Administrative independence “implies control over matters directly connected with the functions that such institutions must perform.”<sup>9</sup> In relation to the JICS, this means, at least, control over the processing of applications for the appointment of staff and separate administrative systems. Unless efforts are made for administrative separation, there is the danger that an independent body is merely perceived as a directorate of the parent department both by the department itself as well as staff in the office, and the user public.<sup>10</sup>
10. A 2004 report on the Office of the Judicial Inspectorate, based on interviews with staff of the Judicial Inspectorate, members of civil society, Chapter Nine institutions, senior staff of the Department of Correctional Services and Members of Parliament, stated the following: “A persistent concern raised by those interviewed was whether and the extent to which the Inspectorate was truly independent of the Department of Correctional Services. The concern

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<sup>6</sup> Jagwanth, p. 37-8.

<sup>7</sup> At para 89.

<sup>8</sup> Id.

<sup>9</sup> Jagwanth at 48.

<sup>10</sup> Id.

arose from both the administrative and financial link between the Inspectorate and the DCS, as well as the fact that some staff of the Inspectorate were drawn from the ranks of DCS officials. Some expressed concern about the degree of independence of the IPVs, who some prisoners saw as being too close to prison officials. The perception that the Inspectorate was not independent of the DCS, or that it was a part of the DCS, was commonly held.”<sup>11</sup>

### **The United Nations Convention against Torture**

11. Prisons operate outside of public view. Insular environment such as these put detainees at risk of abuse, neglect, and poor conditions. The absence of any form of independent scrutiny provides no challenge to this treatment, rendering detainees vulnerable to the abuse of processes as well as violence and assault from both each other and state officials. The words of the Special Rapporteur on Torture Juan Mendez are particularly appropriate:

“Experience shows that most acts of torture, and certainly the most cruel and egregious, happen in the first few hours or days after a person’s arrest, and while he/she is technically under preventive detention.”<sup>12</sup>

12. UNCAT, which the South African government ratified in 1998, states the following in Article 2(1):

‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.’

13. The former United Nations Special Rapporteur, Manfred Nowak, stated the following regarding this article:

‘...one of the most effective measures to prevent torture is to create independent national commissions with the power to carry out *unannounced visits to all places of detention*, to have access to the prison registers and all other relevant documents, to interview all detainees in private and to subject them to independent medical examinations.’<sup>13</sup>

14. Article 11 of UNCAT states:

‘Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons

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<sup>11</sup> Id.

<sup>12</sup> Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2011, A/HRC/16/52

<sup>13</sup> M Nowak and E McArthur ‘The United Nations Convention against Torture: A Commentary’ (Oxford University Press), at 115.

subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.'

15. The Committee on the Prevention of Torture, a body of experts established by UNCAT, is tasked, amongst other things, with the interpretation of UNCAT. In relation to article 11, the Committee has said that '*systematic* requires the establishment of an effective and independent system of control over prisoners' complaints and the external and civic inspection of the prison system.<sup>14</sup>
16. State parties are therefore required to implement a system of regular and independent *inspections of all places of detention* and provide access by NGOs to these places of detention.<sup>15</sup>
17. Despite the wealth of commentary and examples of international best practice, South Africa has yet to fully implement a truly independent and effective oversight model.
18. It is worth mentioning at this point, the importance of the ratification of the Optional Protocol to UNCAT.
19. The OPCAT established an international inspection system for places of detention. The Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is authorised to visit all places of detention in State parties and provide advice and assistance to them.<sup>16</sup>
20. Under the OPCAT the SPT is entitled to unrestricted access to all places of detention and must be granted access to have private interviews with the persons deprived of their liberty, without witnesses, and to any other person who in their view may supply relevant information, including government officials.
21. State parties to the OPCAT are also required to establish a 'National Preventive Mechanism'

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<sup>14</sup> UNCAT Commentary above note 13 at 403.

<sup>15</sup> Ibid.

<sup>16</sup> Although the South African government signed the OPCAT in September 2006, it has yet to ratify this instrument.

(NPM): 'one or several independent national preventive mechanisms for the prevention of torture at the domestic level.'<sup>17</sup>

22. The SPT specifically included in its own guidelines<sup>18</sup> that that states should ensure that its own preventive mechanisms should be able to carry out unannounced visits at all times to all places "in accordance with the provisions of the OPCAT" and is quick to encourage or recommend NPMs to conduct unannounced inspections.<sup>19</sup>

23. Manfred Nowak notes the following regarding OPCAT.

States parties to the CAT are provided with an excellent opportunity to open up their prisons and detention centres to more transparency and independent monitoring by both the UN *Subcommittee on Prevention* and so-called *national preventive mechanisms*. Preventive visits to places of detention have a double purpose. The very fact that national or international experts have the power to inspect every place of detention at any time without prior announcement has a strong deterrent effect. At the same time, such visits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention. One may, therefore, conclude that the ratification of OPCAT by States parties to the CAT and the creation of independent national visiting bodies can be considered as one of the most effective legislative measures to prevent torture in terms of article 2(1) of UNCAT.

### **The Independent Police Directorate Act**

24. As the 2012/2013 Annual Report acknowledged, the IPID Act, in certain respects, serves as an excellent comparator when considering the value of institutional independence.

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<sup>17</sup> Article 17 of OPCAT states:

"Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions."

<sup>18</sup> Id supra note 10.

<sup>19</sup> See for example 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, 7 June 2010.

Guideline 5 of the SPT's Guidelines (Twelfth session Geneva, 15–19 November 2010) states:

- "A programme for intended visits for the upcoming year shall be published by the Subcommittee by the end of each year and States parties to be visited shall be notified through their Permanent Mission in Geneva.
- A second notification containing the dates of the visit and the names of the members of the visiting delegation shall be communicated to the State party together...
- The notification may indicate some of the places that the delegation intends to visit. This shall not prevent the visiting delegation from visiting other places of detention not indicated in the notification."

25. It is therefore worth emphasizing the following provisions from the IPID Act, which, ultimately, we hope the Correctional Services Act will emulate:

- a. Section 3(3): The Directorate is financed from money that is appropriated by Parliament.
- b. Section 4(1): The Directorate functions independently from the South African Police Service.
- c. Section 4(2): Each organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively.

### **Conclusion**

26. The signatories to these submissions share the concern that JICS falls short of the internationally envisaged standard of the protection of detainees, and, importantly, the prevention of torture and ill-treatment. We recommend therefore, that the Portfolio Committee consider urgently the legislative setup of JICS so as to bring it in line with the requirements of UNCAT and international best practice.

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