CSPRI SUBMISSION TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES

18 August 2015

EXECUTIVE SUMMARY

Law and policy

- The Department commissioned independent consultants to conduct a review of the White Paper on Corrections in 2013, but the review has yet to be made available;
- Despite torture having been criminalised in 2013, and despite numerous reports of serious assaults implicating DCS officials, DCS does not list the Prevention and Combatting of Torture of Persons Act as part of its legislative mandate;
- Compliance with international and domestic rules and regulations can only be assessed against clear measurable standards, something that is often missing in DCS strategic plans and annual reports.

Offender management

- Many remand detention facilities face levels of overcrowding that are much higher than national averages. This is the responsibility of the criminal justice system as a whole, which this Portfolio Committee oversees. Making more reliable and regular data on actual overcrowding levels publicly available and making use of legal provisions aimed at alleviating overcrowding would start to address this problem;
- Because of the uneven medical treatment received by prisoners, especially following gross human rights violations committed by warders, medical personnel in prison should be under the employ of the Department of Health, not DCS;
- The standard solitary confinement regime in place at Ebongweni super-maximum prison fails to comply with all relevant legal, constitutional and international standards and values and should be terminated immediately.

Offender rehabilitation

- Current rehabilitation programmes are not based on the actual needs of prisoners and the broader society they are supposed to re-integrate.
- This is in particular the case in relation to access to education, for both adults and children. The latter have a right to access education, whether they are sentenced or unsentenced, until they have reached the age of 15 or attained Grade 9;
- Access to reading material is a constitutional right and not a privilege) for all prisoners.

Independent monitoring

- The Judicial Inspectorate for Correctional Services is not financially and administratively independent from DCS. As a result, it cannot fully exercise its oversight mandate over DCS. The fact that JICS as an institution has probably been captured by DCS has been noted in earlier research.
- Year after year, JICS reports on an increasing number of assaults committed by DCS officials, some of which result in the death of an inmate. Almost all of these assaults remain unpunished. In a few cases, the official will be disciplined, but sentences are usually very light. In any case, internal disciplinary sanction cannot be seen as adequate punishment for acts of assault, some of which will amount to torture;
- JICS has also repeatedly reported that neither SAPS nor the NPA have taken adequate action to ensure that these officials are criminally prosecuted;
- The current complaints system and broader mandate of JICS is therefore ineffective in ensuring full accountability of DCS members committing gross human rights violations against inmates. CSPRI makes a series of recommendations in this submission to improve individual and institutional accountability of DCS officials and DCS management as a whole, and will be happy to engage with the Portfolio Committee further on this issue.

International obligations

- South Africa must report every four years to the UN Committee against Torture on the measures taken to implement its international obligations under UNCAT. It has not done so since 2006. At the end of 2014, the government hastily drafted a report to the UN Human Rights Committee because it was going to be examined in the absence of a report on the implementation of the International Covenant on Civil and Political Rights in South Africa;
- In 2012, then Deputy Minister Andries Nel publicly committed to ratify the Optional Protocol to the UN Convention against Torture in 2012 still. This has yet to happen.

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Introduction

1. This submission deals with South Africa's performance in relation to, and compliance with, international standards with reference to offender management, offender rehabilitation and independent monitoring, as was requested by the Portfolio Committee on Justice and Correctional Services (the Portfolio Committee).

2. By way of introduction, it is necessary to make a number of methodological remarks on the issue of compliance. Based on research conducted in South Africa and elsewhere on the continent, it is important to note that compliance can only be assessed against clear measurable standards. Moreover, the evidence that will be used to assess compliance needs to be determined in advance. For example, if the standard to be assessed is that prisoners should be able to access a medical practitioner within 24 hours for non-emergency procedures, then the evidence to be used will be the time lapse from requesting an appointment with a doctor until the doctor is seen. The value of this is that both the researcher (or other agent) monitoring compliance as well as the official responsible for the performance know what the standard is and how compliance will be assessed.

3. In our experience monitoring compliance is more effective when the process is done in a transparent manner and the officials who are being monitored are aware of the standards and the required evidence. A less transparent approach frequently elicits evasive and defensive responses from officials.

4. It is furthermore submitted that the Constitution,[1] Correctional Services Act and its accompanying Regulations and Standing Orders, provide more than sufficient guidance to the Department of Correctional Services (DCS) on what the standards on offender management and rehabilitation should be. International standards should be seen as supportive of the exiting domestic regulatory framework.

[1] See sections 12, 28 and 35.

Overarching policy

5. In April 2013, DCS reported to the Portfolio Committee that a review of the White Paper on Corrections would be undertaken and completed by November of that year.[2] In February 2014, DCS reported to the Portfolio Committee that the review had not been completed as problems had developed with the contracted researchers.[3] Nearly two and a half years later, it is unclear what has happened with the review process. If the DCS deemed it necessary to undertake such a review in 2013, it is not clear if those reasons have now dissipated. Nonetheless, it is submitted that such a review remains necessary and DCS needs to update the Portfolio Committee in this regard.

Offender management

Pre-trial detainees

6. Chapters 3 to 6 of the Correctional Services Act deal with offender management and sets clear standards in this regard. However, in practice, the overall impression is that there is significant variance between different prisons and different categories of prisoners. For example, it is a consistent pattern that unsentenced prisoners are worse off in respect of their treatment and conditions of detention. It is also the case that unsentenced prisoners are concentrated in large urban areas where they spend significant periods of time in severely overcrowded prisoners (i.e. more than 175% occupied). Admittedly it is not the fault of DCS that cases drag on for months and even years in the courts – it is to some extent the victim of inefficiencies of the criminal justice process. However, the fact that the Departments of Justice and Correctional Services are now overseen by the same Portfolio Committee present an excellent opportunity to address problems created at court level impacting of DCS. In this regard the following are recommended:

    - DCS to make comprehensive statistics more regularly available, per prison.
    - Use section 49G of the Correctional Services Act 111 of 1998 and section 342A(1) to (6) of the Criminal Procedure Act 51 of 1977 – as we recommended in our submission on the 2015/16 DCS budget

[2] Report on the meeting of the Portfolio Committee on Correctional Services, 24 April 2013, https://pmg.org.za/committee-meeting/15760/
[3] Report on the meeting of the Portfolio Committee on Correctional Services, 26 February 2014, https://pmg.org.za/committee-meeting/17002/

Prohibition of torture

7. The Correctional Services Act states that all prisoners must be treated with dignity. The Constitution places an absolute prohibition on the use of torture and other ill treatment.[4] This is furthermore supported the Prevention and Combating of Torture of Persons Act (13 of 2013) defining torture as:

> 3. For the purposes of this Act, ''torture'' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person-
>
> (a) for such purposes as to—
>
> (i) obtain information or a confession from him or her or any other person;
>
> (ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or
>
> (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or
>
> for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

8. During the preceding financial year the Judicial Inspectorate for Correctional Services recorded 4203 complaints from prisoners alleging assaults by DCS officials.[5] Moreover, the Inspecting Judge has expressed on more than one occasion his concern about the lack of prosecutions in cases where DCS officials are implicated in the deaths of prisoners.[6] Research conducted by CSPRI has found that a general culture of impunity exists in the DCS and that it is indeed a rare event that DCS officials are prosecuted for assault and torture of prisoners, even when the assault was fatal.[7]

9. Section 9 of the Prevention and Combating of Torture of Persons Act places an obligation on the state to prevent torture and other ill treatment by:

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[4] Ss 12 and 36.
[5] JICS *Annual Report 2013/14*, p. 82.
[6] JICS *Annual Report 2009/10*, 30; JICS *Annual Report 2010/11*, 26-27.
[7] Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in South African Law Enforcement agencies*, CSPRI Research Paper.

- conducting education and information campaigns on the prohibition of torture aimed at the prevention and combating of torture;
- ensure that all public officials who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, are educated and informed of the prohibition against torture;
- provide assistance and advice to any person who wants to lodge a complaint of torture;
- train public officials on the prohibition, prevention and combating of torture.

10. The Prevention and Combatting of Torture of Persons Act is not listed in the 2013/14 DCS Annual Report as part of the legislative mandates of the Department.[8] In respect of planned policy initiatives, policy and procedure emanating from UNCAT as well as the Prevention and Combatting of Torture of Persons Act are also not reflected in the Annual Report.[9] It is not clear why DCS does not see as part of its core mandate addressing torture and other ill treatment, especially in the light of the number of alleged assaults perpetrated by its officials.

Access to medical care

11. Principle 2 of the *UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[10] states:

> It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment".

12. In the *McCallum case* the victims of a brutal mass assault by DCS officials at St Alban's prison in 2005 were denied access to a doctor for several weeks. The UN Human Rights Committee ruled that this was a violation of Article 10 of the International Covenant on Civil and Political Rights.[11] In 2013 it was reported that prisoners in isolation cells were denied

[8] pp. 22-23.
[9] p. 23.
[10] Adopted by General Assembly resolution 37/194 of 18 December 1982.
[11] CCPR/C/100/D/1818/2008 para 6.8.

essential TB and HIV treatment.[12] These two examples certainly do not constitute an exhaustive list of instances of denial of adequate medical care in prison. The fact that ICCVs recorded more than 52000 complaints relating to health care in the 2013/14 financial year (more than 10% of the total number of complaints recorded and almost one complaint relating to health care per 3 prisoners) is testimony that medical care in prison is reason for deep concern.

13. CSPRI has previously submitted that health care services in prisons should be rendered by the Department of Health and not by health care practitioners employed by DCS. The current situation compromises the independence of health care practitioners and there is also reason to believe that the quality of services is adversely affected.

Super-maximum and solitary confinement

14. Ebongweni Super-maximum prison in Kokstad follows harsh regime, relying heavily on long term solitary confinement. All prisoners are housed in single cells. Under Phase 1 of detention, which lasts an absolute minimum of three months, there is no contact with other prisoners and prisoners are locked up 23 hours a day.[13]

15. The *UN Istanbul statement on the use and effects of solitary confinement* defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.[14] In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.

16. Principle 7 of the UN Basic Principles for the Treatment of Prisoners states that "efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged", while the Human Rights Committee stressed that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Art. 7 (prohibition of torture)".[15] The revised UN Standard Minimum Rules for

[12] Hopkins, R. 'G4S accused of holding South African prisoners in isolation illegally' *The Guardian*, 28 May 2013, http://www.theguardian.com/world/2013/may/28/g4s-south-african-prisoners-isolation
[13] DCS programme description Ebongweni Super-maximum prison, http://www.dcs.gov.za/AboutUs/COE/centre/KZN/EbongweniMaxCC.aspx
[14] Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul, A/HRC/13/39/Add.5 para 55.
[15] General Comment No. 20: Replaces General Comment 7 concerning the prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992. CCPR General Comment No. 20 para. 6. See also the Istanbul Statement: 'As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort.'

the Treatment of Prisoners (2015), renamed the "Mandela Rules", prohibits in Rule 44 solitary confinement in excess of 15 consecutive days. Regional instruments have also prescribed that "solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible."[16]

17. While it is submitted that there is a need for segregation to deal with disruptive prisoners, the current generalised regime at Ebongweni Super-maximum prison of prolonged solitary confinement does not, in our view, meet the requirements of the UNSMR (2015) and may be violations of UNCAT and the ICCPR as well, thereby violating international standards.

Offender rehabilitation

Parole and correctional supervision

18. Parolees and probationers are frequently neglected in the discourse on the prison system. The applicable international minimum standards are contained in the so-called UN Tokyo Rules.[17] The minimum standards for community supervision are noted to be, amongst others:

> 10.1 The purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.
>
> 10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

19. From the two above cited minimum standards it is clear that the task of the DCS is to support parolees and probationers to reduce the risk of re-offending by rendering services. Nothing prevents the Department from contracting in services from other service providers to supplement its own capacity.

20. A closer examination of the DCS strategic objectives for the programme Social Reintegration reveals that the indicators have little relevance to facilitating reintegration or is of such a

[16] Art. 60.5, European Prison Rules (revised 2006). See also *Prisons in Cameroon - Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*. The African Commission on Human and Peoples' Rights, Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa, From 2 to 15 September 2002, ACHPR/37/OS/11/437; Communication 54/91, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000)(Annex V) para 115. African Commission on Human and People's Rights Communications: 64/92: *Krishna Achuthan (on behalf of Aleke Banda)* / Malawi; 68/92: *Amnesty International (on behalf of Orton and Vera Chirwa)* / Malawi; 78/92: *Amnesty International* / Malawi.

[17] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

restricted scope that they are meaningless in the face of the demand for support services. For example, despite the fact that halfway houses have not been shown to be effective in offender reintegration[18], the DCS is persisting with this initiative. Moreover, it is of such a limited scale, that only a handful of released prisoners will be accommodated. Furthermore, many so-called reintegration programmes are more geared towards keeping prisoners busy rather than focusing on successful reintegration into society.

21. It is furthermore noted that the same sentence calculations and thus eligibility for parole periods apply to children as to adults. Article 37(b) of the UNCRC states that "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." The Constitution in section 28(1)(g) requires that the detention of a child must be a measure of last resort and then for the shortest possible period. Since the Correctional Services Act does not make a distinction between adults and children in this regard, it is open to a constitutional challenge as it treats children exactly the same as adults.

22. What is required is a thorough re-think of the services needed by released prisoners and the services rendered by DCS, other government departments to support released prisoners and their families.

Reading material

23. Rule 64 of the UNSMR states that "Every prison shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it." The Constitution in section 35(2)(e) reads: "Everyone who is detained, including every sentenced prisoner, has the right- to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".

24. Despite the clarity of the Constitution in this regard, it appears that it is the exception that South African prisons have libraries to which all categories of prisoners have access to. Earlier research by CSPRI also found that even if there is a library at a particular prison, then access is restricted on arbitrary and unlawful grounds.[19]

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[18] Latessa, E. (2012) *What Science Says About Designing Effective Prisoner Reentry Programs*, Wisconsin Family Impact Seminars, 'Pennsylvania Study Finds Halfway Houses Don't Reduce Recidivism' *New York Times*, 24 March 2013, http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html?_r=0

[19] Muntingh, L. and Ballard, C. (2010) *Report on children in prison in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre.

Rehabilitation programmes and education

25. The UNSMR (1955) requires in Rule 66(1) that for the purposes of rehabilitation that

> "all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

26. The revised UNSMR (2015) in Rule 104 reads:

> 1. Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterate prisoners and of young prisoners shall be compulsory and special attention shall be paid to it by the prison administration.
>
> 2. So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

27. The core issue from the two rules is that education should be accessible to at least all sentenced prisoners and that illiterate and young prisoners should be a priority. It is regrettably the situation that the Correctional Services Act is at odds with this requirement. Section 38(1) requires that all admitted sentenced prisoners must be assessed against a range of issues, including educational needs. However, section 38(1)(A)(a) states that a sentence plan will be developed only for prisoners serving a sentence of longer than two years. This requirement applies to all prisoners, regardless of their age, level of literacy or previous access to education. Attention is furthermore drawn to section 19(1)(a) of the Correctional Services Act stating that all children of compulsory school-going age must have access to such education, whether they are sentenced or unsentenced. Compulsory school going age is under 15 years or attaining Grade 9.

28. In respect of children's access to education, it was reported in 2010:

> Firstly, unsentenced children do not have access to education even though the Correctional Services Act requires that they should have if of compulsory school-going age. Secondly, from Brandvlei it was reported that sentenced inmates with further charges are not permitted to attend school as they pose a security risk and the

school building is less secure than the lock-up section. Thirdly, at Emthonjeni it was found that children in the "Special Needs Section" are also excluded from education. Fourthly, from Pollsmoor it was reported that only children serving sentences longer than two years are allowed to attend education programmes.[20]

29. It needs to be emphasised that the Correctional Services Act does not make access to education for children on compulsory school-going age conditional to having been sentenced, facing further charges, or sentence length. Not allowing children of compulsory school-going age to attend school is a flagrant violation of the Correctional Services Act and the Schools Act.

30. A survey conducted by JICS and CSPRI in 2014 found the following:

> The survey data found that with the exception of Bizzah Makhate that unsentenced children are not provided with access to any educational services despite the Correctional Service Act being clear that all children of compulsory school-going age must have access to education. The unsentenced children interviewed confirmed that none of them have access to any education or training. In respect of sentenced children, the situation looks somewhat better, but three of the centres do not provide compulsory education being Kroonstad, Piet Retief and Pollsmoor Med A. As is the case with unsentenced children, there appears to be confusion about the definition of compulsory school-going age. For example, from Kroonstad it was reported that there is no sentenced child of age 15 years or younger implying that they have no children of compulsory school-going age. This interpretation is, of course, incorrect as age is one of the two variables determining compulsory school-going age, the other attaining the ninth grade of basic education.[21]

31. With regard to adults serving sentences of less than two years, it is unclear what services are rendered to them as they are excluded from having sentence plans. It can indeed be argued that first time prisoners, serving a relatively short sentence should be a specific target of DCS in order to reduce the risk of re-offending, and therefore have access to extensive reintegration programmes. As the Department has in recent years not made public comprehensive statistics on the prison population, it is not possible to estimate what the demand for services in this category is, but it can be assumed that it will be substantial as there is a high turnover of prisoners serving short sentences.

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[20] Muntingh, L. and Ballard, C. (2010) *Report on children in prison in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre, p. 69

[21] Muntingh, L. and Petersen, K. (2015 forthcoming) *Survey of children in South African Correctional Centres*, Judicial Inspectorate for Correctional Services.

32. The planned and actual achievements of the DCS to provide access to education are modest, as reflected in Table 1.[22] In short, some 85 000 were targeted, but only 17 654 accessed education, or 21% of the target. From this it is evident that access to education, an essential tool for preparing for release, is the preserve of an estimated 15% of the total sentenced population. If 85% of the prison population is not accessing education, it clearly shows that there is a major problem in how the Department is running educational services. To this it should be added that it is not clear from the DCS annual reports what the nature of these educational programmes are and how many hours per week are spent on this.

Table 1 Access to education in the correctional environment, 2013/14.

Category	**Target**	**Achievement**	**Percentage**
Educational programmes per sentence plan	16929	9793	57.8
	39566	986	2.5
FET College	13536	2986	22.1
	15436	3889	25.2
Total	**85467**	**17654**	**20.7**

Independent monitoring

International obligations

33. As a party to the UN Convention against Torture, South Africa is obliged to report every four years to the UN Committee against Torture on measures taken to give effect to its obligation under the treaty. South Africa has failed to submit two periodic reports at the time of writing. After South Africa ratified the ICCPR in 1998 it has not submitted a single report until late in 2014 when a manifestly hastily drafted report was submitted. This was prompted by the treaty monitoring body (the Human Rights Committee) scheduling a review of South Africa in the absence of a report, a gesture that can only be interpreted as a strong diplomatic rebuke.

34. South Africa signed OPCAT in 2006, but is yet to ratify the Protocol. Reasons for the delay are unclear, especially since the then Deputy Minister of Justice, Andries Nel, informed an international summit in August 2012 that the South African government would do so in 2012 still.

[22] Dept of Correctional Services *Annual Report 2013/14*, pp. 46-47.

Judicial Inspectorate for Correctional Services

35. The Judicial Inspectorate is the designated oversight institution for the DCS. When assessing the independence of the JICS one should keep in mind the results that one would ultimately want to see from an oversight structure of this nature.[23] The large number of complaints recorded by the Independent Visitors, particularly those in relation to assaults, indicates that there are a range of fundamental problems within the prison system. Moreover, the range of persistent problems within DCS relating to human rights violation and governance problems further affirm the position that this Department finds it difficult to take instructions and advice or assistance from external institutions. The fact that DCS did not want to take advice or meaningfully engage with external stakeholders was already regretted by the Jali Commission.[24] Whether the powers of JICS remain by and large restricted to making recommendations or are expanded to make more binding decisions will largely determine how rapidly or not the human rights situation in our prisons improves. It is CSPRI's position that JICS must promote transparency and accountability in the prison system by dealing with complaints promptly and effectively and that the DCS be held accountable when it fails to take measures against frequently reported problems. Moreover, it is unacceptable that the DCS Head Office continues to ignore, year after year, the recommendations made by the Inspecting Judge. In consequence, the unavoidable conclusion is that the rank and file of the Department continues to act with impunity.

The value of independence

36. A vitally important aspect of any oversight mechanism is its independence from the institution or organization it intends to assess and freedom form "undue political interference".[25] Institutional independence has two facets, namely financial and administrative independence, and the need to 'be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government'. [26]

[23] The remainder of this section on JICS is a shortened version of a submission made by CSPRI (prepared by L Muntingh and C Ballard) in 2012.
[24] The Jali Commission Report p. 945
[25] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 188.
[26] 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 JagwanthS. (2004) *A Review of the Judicial Inspectorate of Prisons in South Africa,* CSPRI Research Paper, Bellville: Community Law Centre.

37. The Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa*[27] stated that independence (in respect of the Independent Electoral Commission) required *both* financial and administrative independence.

Financial independence

38. 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 perception thereof may be compromised.[28] 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…"[29] Accordingly, the Court stated, it was for parliament, and not the executive arm of government to provide for funding.[30]

39. 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.[31]

40. 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

41. Administrative independence "implies control over matters directly connected with the functions that such institutions must perform."[32] In relation to the JICS, this means, at least, control over the processing of applications for the appointment of staff and separate administrative systems.

[27]121 1996 (6) BCLR 489 (CC).
[28]Jagwanth, p. 37-8.
[29]121 1996 (6) BCLR 489 (CC) para 89.
[30] 121 1996 (6) BCLR 489 (CC).
[31]Jagwanth supra at 48.
[32] Id.

42. A 2004 report on the Office of the Judicial Inspectorate stated that numerous stakeholders inside and outside JICS or DCS perceived JICS not to be independent from DCS. A 2012 confirmed that JICS as an institution had probably been captured by DCS and no longer presented a sufficient degree of independence necessary to ensure that it was protecting inmates' interests.[33]

43. We recommend, therefore, that where administrative independence is lacking, that the requisite action be taken, be it through legislative amendment or operational processes.

Human rights violations and the complaints system

44. As stated in the Act, the Inspecting Judge, besides being empowered to visit and inspect prisons, is also empowered to "deal" with a complaint referred to him or her from the National Commissioner, the Minister, the Visitors Committee or an Independent Visitor (IV).[34] Moreover, for the purpose of conducting an "investigation," the Inspecting Judge "may make any enquiry and hold hearings."[35]

45. In the event that a serious incident occurs involving the injury, assault or death of a prisoner, the Inspecting Judge would be notified via the mandatory reporting system or via a complaint, and thereafter empowered to "deal" with such a complaint which may or may not require the investigative processes set out above and, where relevant, in terms of the Commissions Act 8 of 1947.

46. Ultimately, a finding by the Inspecting Judge that the criminal liability of the Department or a member of the Department should be investigated by the SAPS and the National Prosecuting Authority would be conveyed in the form of a recommendation to the Department itself and thereafter reported to the Portfolio Committee.

47. By contrast, the IPID Act stipulates that any deaths in police custody, deaths as a result of police action or any complaint of torture or assault against a police officer in the execution of his or her duties *must* be investigated by the Directorate.[36] Furthermore, the IPID Executive Director "*must* refer criminal offences revealed as a result of an investigation, to the National Prosecuting Authority for criminal prosecution and notify the Minister of such referral."[37]

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[33] Steven Wood 'An Exploratory Study of Staff Capture at the South African Inspectorate of Prisons' (2012) 36 *Int J Comp Appl Crim Justice* 45 at 45-59.
[34]Section 90(2).
[35]Section 90(5).
[36] Section 28(1) IPID Act.
[37]Section 7 IPID Act.

48. Many of the complaints that JICS receives concern serious human rights violations, such as assault, torture and attempted murder. In some annual reports, JICS has provided more detailed information on unnatural deaths in custody, and more specifically on the results of SAPS investigations into these deaths. In all cases that actually reached the NPA, which represents a minority of criminal charges brought by prisoners against DCS officials, JICS reported that the NPA declined to prosecute.[38] In most cases, there was no response from SAPS on the status of their investigation.[39]

49. It appears, therefore, that since 2009, there has not been a single criminal prosecution of a Departmental official implicated in the death of a prisoner, despite 26 such homicides having been reported by JICS.[40] CSPRI has already submitted to the Portfolio Committee on Correctional Services that there appear to be clear patterns when officials are implicated in the deaths of prisoners, in that they were the result of aggravated assaults inflicted either as punishment or in retaliation for an assault on an official and were committed by groups of officials on single prisoners. [41] In several of the cases it was noted that the assaults continued after the prisoner was subdued and/or the situation stabilised, thus exceeding the use of minimum force requirements in the Act.[42] The most common weapon used by officials was a baton (tonfa), but prisoners were also subjected to kicks, teargas and electroshock equipment.[43] In a number of cases the deceased was denied prompt medical attention even though the Act is clearly states that any prisoner who is subjected to the use of force must immediately undergo a medical examination.[44] It is also apparent that in the rare occasion when disciplinary action was taken against officials, the proceedings took extremely long to be finalised, the charges were inappropriate, and the sanctions imposed were light. [45]

50. In light of this, the results of investigations reported offer little reason for optimism, but rather, the sense that the prevailing lack of criminal investigations serve to perpetuate

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[38] JICS *Annual Report 2011/12*, 41, JICS *Annual Report 2012/13*, 52.
[39] Files reviewed for this research and JICS *Annual Report 2010/11*, 27; JICS *Annual Report 2011/12*, 52-53; JICS *Annual Report 2012/13*, 51-52 and 59.
[40] JICS *Annual Report 2009/10,* pp. 59-77; JICS *Annual Report 2010/11*, pp. 57-75; JICS *Annual Report 2011/12*, p. 52; JICS *Annual Report 2012/13*, p. 56.
[41] Submission by CSPRI to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011. http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres
[42] s 32 of the Correctional Services Act.
[43] The appropriateness of having and using electroshock equipment in prisons is increasingly under question. (Omega Research Foundation and the Institute for Security studies (2011) Submission on the Prevalence of Torture in Correctional Centres, Jointly Submitted to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011. http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres Accessed 21 December 2011.)
[44] s 32(5) of the Correctional Services Act.
[45] JICS *Annual Report 2009/10*, 27-28 and 30, JICS *Annual Report 2010/11*, 27-29; JICS *Annual Report 2011/12*, 42 JICS *Annual Report 2012/13*, 51, 56 and 59.

impunity. While there may be legitimate reasons why the Director of Public Prosecutions (DPP) declines to prosecute, the lack of transparency in this regard does little to support the accountability of the Department or the role JICS. Such issues are not limited to deaths in custody, but are also relevant in respect of assaults.

51. The lack of transparency is also problematic in respect of investigations purportedly undertaken by the Department and SAPS into unnatural deaths in custody. Indeed, the lack of prosecutions indicates that such investigations are not particularly thorough or sufficiently independent.

52. Given the clear duty to detain all inmates in "safe custody whilst ensuring their human dignity…"[46], internal Departmental investigations into deaths and serious assaults (implicating officials) for disciplinary purposes should not take precedence over investigations for determining criminal liability. Moreover, any direct involvement of the Department in criminal investigations (where it would interview witnesses, alleged perpetrators and assess physical evidence) goes against the internationally accepted requirement that such investigations must be conducted by impartial and independent authorities.[47]

53. By virtue of the fact that the alleged perpetrator is an employee of the Department, the Department is implicated because the death in question indicates a material failing or neglect on the part of the Department to provide safe custody and uphold the right to life.

54. Given the lack of successful prosecutions described above, there is reason to believe that problems persist with the manner in which SAPS investigates such cases, whether this is the result of interference by DCS officials or collusion between SAPS and DCS officials is open to speculation.

55. The current situation with regard to the investigation of deaths in custody is unsatisfactory and requires urgent attention. Unless drastic changes are made to the current investigation regime it is unlikely that more successful investigations and prosecutions will take place. Importantly, it is ultimately in the interests of the Department that deaths and assaults implicating officials are properly investigated and the perpetrators held criminally responsible.

[46]Section 2(b) of the Act.
[47]UNCAT art 13 and 14. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

56. JICS has a limited role when it comes to the investigation of deaths and assaults in prison. The Act states that "any death prison must be reported forthwith to the Inspecting Judge who may carry out or instruct the Commissioner to conduct any enquiry." Although the Inspecting Judge may hold an inquiry for the purpose of conducting an investigation, he or she may only deal with complaints referred by the National Commissioner, the Visitors Committee, the Minister and, if urgent, an independent visitor.[48]

57. We recommend, accordingly, that the Committee conduct its own investigation into the problem and call on the NPA, SAPS, the Department and the JICS to provide clarity on how investigations are being conducted, the problems in investigations, how decisions to prosecute or not are made, and the current lack of criminal prosecutions implicating DCS officials in the deaths of prisoners.

58. In addition, we recommend that the following legislative amendments be considered:

- that the Correctional Services Act and the Inquests Act 58 of 1959 be amended to provide that all custodial deaths, whether the cause is natural or unnatural, be subject to an independent forensic examination;
- that upon receipt of reports on deaths, incidences of serious assault and torture, the JICS conduct its own investigation into the incident and report its finding to the SAPS directly along with its recommendation as to whether the matter should be criminally investigated by the SAPS;
- that the Department be prohibited from tampering with a crime scene of any unnatural death until independent forensic pathologists and JICS have accessed the scene;
- that the Department be prohibited from conducting any internal investigations into deaths and assaults until the JICS and SAPS have completed their own investigations;
- that JICS has the authority to provisionally suspend DCS officials or has the authority to instruct the Commissioner to suspend officials implicated in an on-going investigation;
- that the JICS publish the findings and recommendations of all its investigations into deaths, serious assaults and torture; and

[48]Section 90(2) and (5) of the Act.

- that the results of investigations and prosecutions be published annually by JICS, including the reasons why the DPP has declined to prosecute where such a decision was made
- that the DCS National Commissioner explains on an annual basis what actions it has taken to implement the recommendation of the JICS, or alternatively the reasons why it was decided not to implement one of or more recommendations.

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