



SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES

**The purpose and impact of the Judicial Inspectorate
for Correctional Services and recommendations to
improve its independence and effectiveness**

For meeting on 21 September 2016

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Executive Summary

Prison oversight mechanisms are vital to the protection and promotion of inmates' human rights. The Judicial Inspectorate for Correctional Services ("JICS") therefore is an important and necessary institution. However, in order for JICS to be effective, it requires strong independence and a clear mandate to fulfill its functions. Sonke Gender Justice is concerned that it lacks both independence and a clear mandate, preventing it from fulfilling its objective of protecting the rights of inmates. Our key recommendations are summarised here.

- a. JICS empowering legislation should be reviewed to provide for JICS' financial and structural independence from the Department of Correctional Services (DCS).

In order to enhance the structural independence of JICS, it is recommended that its empowering legislation be reviewed. Whether through amendment or promulgation of new legislation, provision must be made to insulate JICS from undue influence by DCS. As financial independence is necessary for an independent oversight body, JICS' budget should be allocated directly from the Treasury.

- b. JICS should be given clear investigative powers with regard to specific circumstances, and other departments such as DCS, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) should be required to cooperate with it.

JICS should be mandated to investigate specific serious issues, including unnatural deaths, torture, assault, or rape involving DCS staff, and where the facts reveal criminal conduct on the part of DCS staff, it should have a clear mandate to refer cases to SAPS or the NPA. Additionally, JICS' governing statute should make it a criminal offence for anyone to hinder or obstruct the work of JICS or to fail to make mandatory reports to the Inspecting Judge.

- c. JICS should be required to provide mandatory reports upon all systemic challenges within DCS facilities.

The Correctional Services Act ("CSA") requires JICS to report on inmate deaths, inmate segregation, unauthorised use of force, the use of mechanical restraints, and cases of solitary confinement. JICS should also be required to report on prisoner rape, sexual assault, and known health challenges that are contributing to the number of 'natural deaths' in DCS facilities, specifically, HIV/AIDS and TB. JICS should conduct mandatory investigations on the delivery of health services

for inmates who have died from HIV and AIDS and/or TB, as well as complaints of medicine stock-outs.

- d. Independent Correctional Centre Visitors (“ICCVs”) should be insulated from institutional capture, and should receive comprehensive and regular training.

In order to improve the effectiveness of ICCVs and ensure they have a critical understanding of the purpose of, and requirements of, their work, it is suggested that training for ICCVs include a substantial component on the role of JICS, their powers as ICCVs, human rights in prisons, and on the systemic issues related to correctional centre reform. This training should be provided to new ICCVs as well as on a regular basis thereafter. ICCVs should also have access to their own infrastructure, such as offices, telephones, and internet, independent of DCS.

- e. The Inspecting Judge’s mandate should be extended to allow them to act as a complaints mechanism.

Although inmates, their families or their representatives are able to make complaints to JICS, other stakeholders such as non-governmental organisations (NGOs) providing services in prisons have no recourse should DCS abuse its powers or fail in its obligations. The Inspecting Judge should therefore be given the mandate to receive and address complaints from NGOs.

- f. The CSA should be amended to ensure that all inmates are informed about JICS and how to access ICCVs.

Noting that inmates often are unaware about JICS, the CSA should be amended to require all inmates – sentenced and unsentenced – to be informed about JICS and how to access ICCVs. Obstacles to inmates’ reporting to JICS should be examined, and measures should be put in place to protect inmates from potential retaliation, where they make complaints to JICS about DCS members.

- g. JICS must be adequately resourced to achieve its mandate.

It is clear that a drastic expansion of JICS’ mandate and powers would require considerable additional capacity in JICS, and thus it must be adequately resourced in terms of its budget and personnel.

1. Introduction

1.1. About Sonke Gender Justice

Sonke Gender Justice ('Sonke') welcomes the opportunity to make this submission to the Portfolio Committee on Justice and Correctional Services ('the Portfolio Committee') on ways to strengthen the Judicial Inspectorate for Correctional Services ('JICS'). However, Sonke and other civil society organisations have made a number of submissions on the matter of JICS' independence over the past five years without result, and we are concerned by the failure to take steps to address serious concerns about JICS' independence and efficacy. Sonke therefore urges the Portfolio Committee to address the concerns raised in this and other submissions, as it is the constitutional obligation of the Portfolio Committee to ensure that a robust oversight mechanism is in place to provide for accountability of the Executive.

Sonke is a non-profit human rights and social justice organisation that strives to achieve gender equality in South Africa by building capacity, mobilising communities and improving accountability. Sonke works to create the change necessary for women, men, young people and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies.

One of Sonke's advocacy objectives is the transformation of prisons. As part of this project, Sonke advocates for law and policy reform to improve government accountability to address the social and structural drivers of sexual violence, HIV and TB in prisons. Sonke is a member of the Human Rights Advocacy and Communications Working Group on the National Task Team on TB and HIV in Prisons, and is a member of the Detention Justice Forum, a civil society coalition working towards the transformation of South African prisons.

We therefore have a great interest in making this submission on JICS to the Portfolio Committee, as we recognise the importance of ensuring the existence of an independent oversight body that can monitor and support the human rights of inmates and detainees in the South African correctional system.

1.2. Structure of the submission

Based on a comprehensive analysis of challenges facing JICS and comparisons with other similar institutions both in South Africa and in other countries conducted by Sonke, this submission touches on a number of themes that emerged from that report and presents potential ways in which the JICS could become more

independent and increasingly successful in fulfilling its mandate as the watchdog body for South Africa's Department of Correctional Services (DCS).

The submission is structured as follows:

- 1.2.1 Purpose and importance of an independent prison oversight body;
- 1.2.2 Mandate, powers and functions of JICS;
- 1.2.3 Independence of JICS;
- 1.2.4 Lessons learned from oversight bodies in South Africa and other jurisdictions;
- 1.2.5 Recommendations and conclusion.

2. Purpose and importance of prison oversight bodies

Accountability is one of the core values of South Africa's constitutional democracy. The preamble to the Constitution states our constitutional commitment to 'a democratic and *open* society ... in which ... every citizen is equally protected by law.'¹ Section 55(2) of the Constitution mandates the national legislature to provide mechanisms to ensure the accountability of all executive organs of state, and to maintain oversight over the exercise of national executive authority, and any organ of state. Sections 92(2) and (3) similarly provide for the accountability of members of the executive to the national legislature for the exercise of their powers and the performance of their functions. Finally, section 195(1) of the Constitution requires that the public administration is governed by 'democratic values and principles' enshrined in the Constitution, including, *inter alia*, accountability and transparency.

Oversight mechanisms are crucial to accountability; they allow the national legislature (and the public) to monitor the activities of the executive and the public administration.

Oversight and accountability are necessary for all government departments, but are particularly important in relation to prisons, 'which, by their very nature and function, are closed institutions far removed from the public eye.'² The primary function of prisons is the deprivation of people's liberty, which provides vast potential for abuse of power and failure to perform functions.³ In the prison context,

¹ Constitution of South Africa, 1996 (hereinafter "the Constitution").

² Parkes, D. and Pate, K. 'Time for Accountability: Effective Oversight of Women's Prisons' *Canadian Journal of Criminology and Criminal Justice* 48:2 (2006) 251 at 265.

³ *Id* at 265.

oversight is not an end in itself, but is directed at the ‘transparency of public institutions and accountability for the operation of safe and humane prisons’.⁴

International human rights law emphasises the necessity of prison oversight bodies. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁵ (“ Body of Principles”) states at Principle 29 that,

‘In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.’

The Optional Protocol to the Convention Against Torture⁶ (“OPCAT”), which South Africa has signed but not yet ratified, is directed at establishing a system of regular prison oversight as a means to prevent torture and cruel, inhuman or degrading treatment. Under the OPCAT, every State Party is obligated to maintain a designated independent body or bodies, dubbed a ‘National Preventive Mechanism’, to visit prisons and places of detention.⁷ JICS would be suitable as one component of a National Preventive Mechanism, but in its present form, would not satisfy all of the OPCAT criteria for a preventive mechanism.

Prison oversight should seek to be multi-faceted, incorporating a number of functions, not all of which need necessarily be carried out by the same body. These functions include:

- **Regulation**, which involves the setting of standards and formulation of policies, with the authority to enforce them.⁸
- **Auditing**, to establish whether or not government department is meeting the standards and policies formulated by the regulating body.⁹

⁴ Deitch, M. ‘Distinguishing the various functions of effective prison oversight’ *Pace Law Review* 30:5 (2010) 1438.

⁵ UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988.

⁶ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/57/199, 18 Dec 2002. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> [accessed on 2 September 2015].

⁷ *Id* Article 3.

⁸ Deitch *supra* note 4 at 1440.

⁹ *Id* at 1440-1441.

- **Accreditation**, which requires a government department to meet performance standards in order to receive a stamp of approval by a professional organisation in the field.¹⁰
- **Investigations** of inmates' complaints or systemic issues, carried out by ombudsmen or similar entities.¹¹
- **Legal processes** for redress and restitution where it is found that rights have been violated.¹²
- **Reporting**, by the media, human rights organisations and commissions of inquiry, for the purpose of exposing prison conditions and investigating particular incidents.¹³
- **Inspection and monitoring** by an entity outside of the relevant government department with the mandate to routinely inspect all correction facilities within a jurisdiction, and to report publicly on how people within each facility are treated.¹⁴

Whatever the functions and powers of an oversight mechanism, or mechanisms, in order to be effective, it or they must at the very minimum have a clear mandate, functions and powers, and must be independent and accessible.¹⁵ Therefore it is vital that no matter its form, South Africa's prison oversight mechanism must enjoy meaningful independence and a clear mandate, functions and powers.

3. Challenges facing JICS

JICS is a vital watchdog body that is directed at respecting, protecting and promoting inmates' constitutional rights. The mission of JICS is to "facilitate inspections relating to the treatment of inmates and conditions in correctional centres".¹⁶

JICS also acts as an interface between the correctional system, community stakeholders and the public. This is particularly important because of the lack of transparency inherent in the correctional system. Through JICS' reporting on the conditions in correctional centres, the community can gain better insight into the correctional system and use that increased knowledge as a platform to engage with JICS and DCS to help protect inmates' human rights.

¹⁰ *Id* at 1441.

¹¹ *Id* at 1442.

¹² *Id* at 1442

¹³ *Id* at 1442-1443.

¹⁴ *Id* at 1443.

¹⁵ Parkes and Pate *supra* note 2 at 266.

¹⁶ Judicial Inspectorate for Correctional Services, *Annual Report 2011/2012* (hereinafter "JICS Annual Report 2011/2012").

However, presently JICS faces two primary challenges, namely: its lack of legal, operational, institutional, and financial independence; and its limited and vaguely defined functions and powers. These challenges limit JICS' impact and efficacy as an oversight body, and must be addressed if South Africa is to have effective oversight of its prisons.

3.1. Independence

3.1.1. Definition of 'independence'

To assess JICS' independence, it is necessary first to define independence for the purposes of an oversight body for DCS. Independence is a vital requirement for the effectiveness of prison oversight. From the Constitutional Court decision in *Glenister v President of the Republic of South Africa and others*¹⁷ ("*Glenister*"), international law, and academic literature, it is evident that there are several components to independence that are crucial for an oversight body such as JICS: legal and operational autonomy; security of tenure; financial autonomy; associational independence, and the perception of independence.

Legal and operational autonomy requires that the oversight body power has a statutory mandate, and the authority to develop its own processes for fulfilling that mandate. If the body is to provide reports on its findings, reporting should not be to the department that the body is overseeing.¹⁸

Security of tenure requires that members of the oversight body have entrenched job security so that they may carry out their duties vigorously and fearlessly.¹⁹ This is not to say that investigators or inspectors can never be dismissed, but rather that the grounds for doing so must meet a higher threshold than is required for ordinary government employees. Furthermore, the director should have a non-renewable term of office to minimise his vulnerability to political pressure.²⁰ Another aspect of security of tenure is the autonomy of the oversight body to appoint and, where necessary, to dismiss its own staff, so as to ensure that those charged with oversight have the requisite qualifications and experience in order to confidently exercise informed and independent judgement.²¹

¹⁷ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

¹⁸ Parkes and Pate *supra* note 2 at 267.

¹⁹ *Glenister* *supra* note 18 at para 222.

²⁰ *Id* at para 223.

²¹ Parkes and Pate *supra* note 2 at 267.

Financial autonomy requires that the oversight body does not depend financially on the department that it is tasked to oversee²² and that it has adequate resources and sufficient staff, office space and equipment.²³ This is to prevent undue political influence through financial inducements or punishments, and to prevent the department in question from hindering the oversight body from effectively carrying out its mandate by limiting its budget. The United Nations' Principles relating to the Status of National Institutions ("Paris Principles"),²⁴ which provide guidance on the role, composition, status and functions of national human rights institutions, state that financial autonomy is a fundamental requirement of independence. Without financial autonomy, an institution cannot exercise operational autonomy or independence in decision-making. Key to this is an institution's ability to draft its own annual budget, and its ability to decide how to use its resources on an independent basis. This means that decisions must be free from control and the need for authorisation or approval. Independence requires that other institutions or funding sources cannot compromise an oversight body's ability to report freely on its observations and recommendations.²⁵

Associational independence acts as a safeguard against the potential for the members of oversight bodies to become too sympathetic with the department that they are inspecting, investigating and reporting on.²⁶ In a similar vein, if investigators and inspectors rely too much on the assistance of the department to carry out their functions, this will have an impact on their ability to challenge correctional decisions and to issue reports without fear of damaging a close working relationship.²⁷

3.1.2. JICS' inadequate independence

3.1.2.1. Legal and operational autonomy

JICS' mandate is statutory in nature, which is necessary but not alone sufficient for its independence as an oversight body. JICS reports to the National Commissioner for Correctional Services, the Minister for Justice and Correctional Services, and the Portfolio Committee for Justice and Correctional Services. It is therefore effectively

²² *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5, 13 April 1999 at 89. Available at: <http://www.saflii.org/za/cases/ZACC/1999/5.html>.

²³ Deitch, M. 'Special Populations and the Importance of Prison Oversight' *American Journal of Criminal Law* 37:3 (2010) 291 at 302.

²⁴ Principles relating to the Status of National Institutions (The Paris Principles). Adopted by General Assembly resolution 48/134 of 20 December 1993. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> [accessed 8 Sept 2016].

²⁵ Beck J. 'Role of the Correctional Association of New York in a Paradigm of Prison Monitoring'. *Pace Law Review* 30:5 (2010) 1572 at 1573. ^[L]_[SEP]

²⁶ Parkes and Pate *supra* note 2 at 268.

²⁷ *Id.*

reporting to the department it is supposed to hold accountable, which undermines both its independence and effectiveness.

JICS' CEO, who is responsible for the administrative and financial functions of JICS, must be appointed by the National Commissioner for Correctional Services – a member of the department that JICS is supposed to oversee. In the event of any misconduct or incapacity on the part of the CEO, they must be referred to the National Commissioner for disciplinary action. This is problematic as it both compromises the CEO's security of tenure, and has the potential to act as a disincentive for the CEO to carry out his functions without fear or favour, leaving the CEO and consequently JICS open to political influence.

JICS' service delivery has in the past been hindered by DCS' administrative systems. For example, in its 2013/2014 Annual Report²⁸ JICS reported delays by DCS in the creation of posts for JICS staff and in the payment of salaries, leaving JICS to appoint people on a contractual basis. Employment on a temporary basis leads to the loss of valuable institutional knowledge and the lack of continuity in service provision. This illustrates the negative impact of the administrative entanglement of JICS with DCS, which hamstrings JICS in the performance of its functions due to insufficient and/or unpaid employees.

3.1.2.2. *Financial independence*

Financial independence is a cornerstone principle for effective oversight mechanisms. Yet JICS receives its budget from DCS, which compromises its ability to be fully independent. As noted by the Constitutional Court in *New National Party of South Africa*,²⁹ the arrangement whereby “a 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.”

JICS has noted that its financial dependence on DCS has “from time to time, caused serious operational challenges to JICS inasmuch as the DCS has at times imposed, or attempted to impose, its internal financial and administrative policies and procedures on JICS...this frequently [led] to delays in service delivery.”³⁰

²⁸ Judicial Inspectorate for Correctional Services *Annual Report 2013/2014*. Available at: [http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20\(2\).pdf](http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20(2).pdf). (hereinafter 'JICS Annual Report 2013/2014').

²⁹ *New National Party v Government of the Republic of South Africa and Others* supra note 24.

³⁰ The Judicial Inspectorate for Correctional Services, *Report^{SEP} on Matters Relating to its Operation and Independence*, 1 March 2011.

This financial dependence also raises the concern that DCS might reduce JICS' funding, or may give a lower priority to the funding needs of JICS. There is necessarily a conflict of interests inherent in the financial relationship between DCS and JICS. DCS is required to fund the body that holds it accountable, while JICS is expected to report impartially and robustly on the activities of the department from which it receives its budget.

3.1.2.3. *Employment security, training and support of JICS staff*

JICS staff and Independent Correctional Centre Visitors ('ICCVs'), who perform the vital function of regularly monitoring prisons and receiving and resolving inmates' complaints, are employed for a term decided by the CEO upon their appointment, providing little employment security. Security of tenure is necessary if ICCVs and other employees are to execute their functions objectively and without fear of reprisal.

3.1.2.4. *Associational independence*

ICCVs have been found to be at risk of institutional capture; that is, they are likely to sympathise with the institution that they are supposed to oversee.³¹ Often ICCVs pursue employment opportunities with DCS once their contracts expire. Moreover, ICCVs are widely reliant on Department officials for access to basic and necessary apparatus, such as computers, office space, telephones and internet, and they depend on Department officials for security. They therefore are unlikely to want to antagonise the Department and its employees when necessary for the performance of their functions. The threat to JICS' independence therefore extends throughout its structure, from CEO to ICCV.

Most ICCVs' contracts are three years. While this was intended to preserve independence and prevent the institutionalisation of ICCVs to their assigned correctional centres, it may actually diminish independence because ICCVs may seek more long-term employment with DCS as a result.³² Having a longer tenure for ICCVs may also reduce transaction costs of frequently hiring and training new ICCVs, improve the institutional memory of JICS, and provide the opportunity for greater skill building of ICCVs who hold this position for longer periods of time.³³

³¹ Wood, S. 'An Exploratory Study of Staff Capture at the South African Inspectorate of Prisons' *Int J Comp Appl Crim Justice* 36:1 (2012) 45.

³² *Ibid* at 55.

³³ *Ibid* at 54.

3.2. Lack of clear functions and powers

JICS receives its mandate from the Correctional Services Act (CSA) ‘to report accurately on the conditions of incarceration in South African correctional centres and to ensure the protection of inmates’ human dignity’.³⁴ However, neither the CSA nor any of its Regulations clearly sets out JICS’ powers and functions.

The CSA provides that the Inspecting Judge may ‘deal’ with complaints,³⁵ and may access any document or interview any person for the purpose of an investigation,³⁶ but no other reference is made to the power of JICS to investigate, nor to clarify what the term ‘deal’ entails – investigation, arbitration, or disciplinary action. While the Inspecting Judge may investigate complaints, the extent of this investigatory power is not stipulated by the CSA.

In the same vein, ICCVs are only expressly given the power to ‘discuss’ complaints with the Head of Correctional Centre ‘with a view to resolving the issue internally,’ without explication of what further powers that might entail.

Moreover, JICS has no power to enforce its findings and recommendations, nor is there a concomitant obligation upon the Department to account for any of JICS’ findings. The lack of clarity on JICS’ powers and functions and ambit thereof limits its effectiveness as an oversight body.

In contrast, the Independent Police Investigative Directorate Act³⁷ (“IPID Act”), which provides the Independent Police Investigative Directorate (“IPID”) with its mandate, explicitly sets out in the Regulations for the Operation of the Independent Police Investigative Directorate³⁸ (‘the IPID regulations’) the circumstances in which the IPID must investigate; the powers that the IPID may exercise in such investigations and specifically how they must be exercised; and the manner in which they must report on investigations. Further, it provides for disciplinary action for misconduct by the IPID staff, something that is absent from the CSA in relation to JICS staff. Finally, it makes it a punishable offence for any member of the South African Police Service to obstruct the investigations of the IPID.

The work of JICS has also been limited by the fact that the Correctional Services Amendment Act of 2001 removed from the Office of the Inspecting Judge the function of investigating corruption and dishonest practices. Section 85(2) was

³⁴ JICS Annual Report 2013/2014 *supra* note 30 at 16.

³⁵ Correctional Services Act, section 90(2).

³⁶ Correctional Services Act, section 90(5).

³⁷ Independent Police Investigative Directorate Act 1 of 2011.

³⁸ Regulation no. 35018, published in the Government Gazette on 10 February 2012.

amended to remove the investigation of “[any] corrupt or dishonest practices” from the objects of JICS.³⁹ This was done because the then Inspecting Judge specifically requested to be relieved of this duty because it would compromise the relationship between JICS and DCS and because DCS already had an Anti-Corruption Unit, among other reasons.⁴⁰

The removal of this function, however, limits JICS’ ability to monitor human rights abuses in correctional centres because it is often not possible to separate the conditions in correctional centres (and the treatment of inmates) from underlying issues of corruption. For instance, some inmates are forced to pay DCS members for basic necessities such as food or bedding.⁴¹

While the object of investigating corruption was removed from Section 85(2), it was retained in Section 90(1) describing the powers, functions, and duties of the Inspecting Judge. One interpretation of this is that where corruption and dishonesty impact conditions in correctional centres, this is still part of JICS’ mandate. An alternative interpretation is that it was clearly intended that the office of the Inspecting Judge should not have the power to investigate corruption, but theoretically, if the Inspecting Judge does happen to come across any corruption, he could report on it. This serves to illustrate the lack of clarity of JICS’ powers and functions.

3.3. Inefficiencies within JICS

There also appear to be internal challenges facing JICS. Some researchers have noted a lack of a critical understanding of the underlying purposes of dealing with complaints and of the “systemic issues pertaining to correctional centre reform for them to be able to intervene and report effectively.”⁴² Researchers who conducted interviews with ICCVs noted that some ICCVs thought their training was not practical and did not adequately prepare them for the reality of working in correctional centres on a daily basis.⁴³ Specialised training on the known challenges inmates face,

³⁹ Jali *Commission of inquiry into alleged incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services*, 23 October 2006 (hereinafter the “Jali Report”). Available at: http://www.gov.za/sites/www.gov.za/files/jali_comm_full_0.pdf [accessed 8 Sept 2016].

⁴⁰ *Ibid* at 569-571.

⁴¹ Jagwanth S., *A Review of the Judicial Inspectorate of Prisons in South Africa*, CSPRI Research Paper Series No 7., May 2004, at at 40-41.

⁴² Gallinetti J., *Report on the Evaluation of the Independent Prison Visitors System*, CSPRI Research Paper Series No 5, May 2004, at 17.

⁴³ *Id* at 50.

using a human rights framework, could improve ICCVs' preparedness and the quality of their reporting.

Further, noting the difficulties associated with daily work in correctional centres, including dealing with lengthy security procedures and having to meet with thousands of inmates, there are insufficient numbers of ICCVs to accomplish these burdensome tasks.

Finally, there have been concerns that JICS' reports do not identify broader problematic trends across the correctional system as well as they could. For example, known challenges, such as TB, HIV, and sexual abuse, are not being adequately captured by JICS' reports. This may be due to a lack of understanding by ICCVs regarding these issues, which could be addressed through specialised training.

4. Recommendations to strengthen JICS

4.1. Strengthening JICS's independence

1) *Amend the CSA to provide for JICS' structural independence from DCS.*

In order to enhance the structural independence of JICS, it is recommended that its governing legislation be reviewed. Whether it is best suited for JICS' structural independence to be obtained through the amendment of the CSA or through the creation of a separate founding statute should be reviewed.

2) *JICS should be allocated its budget from the Treasury rather than receiving it from DCS.*

Financial independence is a cornerstone of an independent oversight body, so JICS should not be required to rely upon the DCS for its budget. Instead JICS' budget could be allocated directly from the Treasury as is the case with the IPID and the Chapter 9 institutions.

3) *JICS' governing statute should remove any ability for DCS leadership to exert political influence over appointments.*

JICS' governing statute should clarify that all JICS appointments be made independently. Although consultation with the National Commissioner is permissible, the National Commissioner ought not to have veto power; the ultimate decision should be solely the responsibility of the Office of the Inspecting Judge.

4) JICS should have exclusive control over its operations.

JICS should have separate employment systems in place and its own infrastructure. It should not be dependent on DCS for the creation of posts, payment of salaries, office space, or access to telephones, computers, printers or the internet.

5) Measures must be put in place to ensure the institutional independence of JICS and its employees.

Employees, including ICCVs, should be trained on and reminded of the importance of their independence from DCS, and their role as advocates for inmates. Other measures include: an oath to “faithfully and impartially to the best of their abilities perform the duties required of them”, and a register of declarations of interest.

4.2. Strengthening JICS’s mandate

6) JICS’ governing statute should make it a criminal offence for anyone to hinder or obstruct the work of the JICS, or to fail to make mandatory reports to the Office of the Inspecting Judge.

In order to ensure compliance and cooperation with JICS, it is recommended that the CSA be amended to make it a criminal offence for anyone to hinder or obstruct the work of the JICS, or to fail to make mandatory reports to the Office of the Inspecting Judge.

7) JICS should be required to provide mandatory reports upon all systemic challenges within DCS facilities – including cases of inmate rape and medicine stock-outs

At present, the CSA requires JICS to report on inmate deaths, inmate segregation, unauthorised use of force, the use of mechanical restraints, and cases of solitary confinement. This list should be expanded to include other known serious rights abuses such as prisoner rape and sexual assault. Prisoner rape is a widely known challenge, and DCS staff are aware of it. Sometimes, prisoner rape takes place with the complicity or acquiescence of DCS staff, or is perpetrated by them. DCS should make mandatory reports to JICS on all incidents of sexual abuse of inmates, and JICS should mandatorily report and

investigate such cases. Cases of assault and torture should also be added to the list.

JICS should also make mandatory reports on known health challenges that are contributing to the number of 'natural deaths' in DCS facilities. Specifically, HIV and AIDS and TB are known to be serious challenges. JICS should conduct mandatory investigations on the delivery of health services for inmates who have died from HIV and AIDS and/or TB, as well as complaints of medicine stock-outs.

- 8) Similar to other human rights bodies, JICS should be given clear investigative powers with regard to specific circumstances, and other departments such as the DCS, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) should be required to cooperate with it.

Under the present legal dispensation, JICS has very few powers in comparison to other human rights oversight bodies such as the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE), which at least have the power of subpoena, the power to institute legal proceedings, and the clear mandate to refer cases to the NPA or other commissioners. Cooperation with investigations conducted by these institutions is also required by law. The SAHRC and CGE make decisions that are binding and enforceable, and the SAHRC even has the right to enter and search premises, and seize and attach articles relevant to their investigations, where it is in possession of a warrant.

In contrast, JICS can inspect and report on the treatment of inmates in DCS centres. It can call for hearings, and enter DCS facilities and access records, and indeed JICS' legal unit does conduct more in-depth investigations into specific unresolved cases. However, there is no sanction against or penalty for DCS' failure to comply, besides reporting up to regional and national head offices and/or to the Portfolio Committee.

JICS should be mandated to investigate specific serious issues, including unnatural deaths, torture, assault, or rape involving DCS staff, and where the facts reveal criminal conduct on the part of DCS staff, it should have a clear mandate to refer cases to SAPS or the NPA.

The Portfolio Committee should consider whether JICS should be given comparable investigative powers to the SAHRC – powers of subpoena, search and seizure (with a warrant), and the power to make binding decisions from its investigations.

9) JICS should be empowered to make disciplinary recommendations to DCS, and DCS should be obligated to act on and report back on these recommendations.

Similar to the IPID, and as a result of conducting its investigations, JICS should be empowered to make disciplinary recommendations that mandate action on the part of DCS. JICS should not be empowered to determine the process or outcome of such disciplinary proceedings, but its recommendations to institute disciplinary proceedings should have binding effect.

As in Section 30 of the IPID Act, the CSA should be amended to empower JICS to make recommendations regarding disciplinary matters, and it should require DCS to:

- i. Acknowledge receipt of the recommendation and initiate disciplinary proceedings in terms of the recommendations and inform JICS, the National Commissioner, and Minister of such proceedings;
- ii. Periodically provide feedback to the Minister on the progress of the proceedings; and
- iii. Inform JICS and the Minister immediately upon the finalisation of such proceedings.

10) The CSA should be amended to clarify that the Minister of Correctional Services does not have the authority to unilaterally make regulations about JICS, and that the Inspecting Judge and JICS have the right to consult with the Minister when the latter is making regulations.

At present, under section 134 of the CSA, the Minister of Correctional Services may make regulations unilaterally on issues such as visitation to correctional centres, proceedings following the death of an inmate, the manner in which inmates make requests and complaints and how they are dealt with by DCS officials, the searching of people entering DCS facilities, and the reporting procedures where force is used. All of these can potentially directly impact on JICS' ability to conduct its own affairs. Thus, the CSA should be amended to clarify that the Minister must consult with the Inspecting Judge when making regulations that impact on the affairs of JICS.

11) JICS must make public its findings following its inspections or investigations.

As with other important watchdog bodies, alerting the public and key stakeholders to its findings is core to JICS' mandate. JICS must be expressly mandated to have its own communications staff that is required to ensure the

widespread dissemination of its reports and findings, including through press statements.

12) The role of JICS in preventing human rights violations in DCS facilities should be made clear in its governing legislation.

At present, JICS' mandate is to inspect and report on correctional centre conditions and the treatment of inmates. That the objectives of JICS are to not only report on the ill treatment of inmates after abuses take place, but to actively prevent rights violations from occurring in the first place, should be made clear in the CSA.

13) JICS must be adequately resourced to achieve its mandate.

It is clear that a drastic expansion of JICS' mandate and powers would require considerable additional capacity in JICS, and thus it must be adequately resourced in terms of its budget and personnel.

4.3. Improving the quality of reports, complaints and research

14) The CSA should be amended to mandate JICS to conduct thematic research on key challenges facing DCS facilities.

JICS has unprecedented access to DCS facilities and inmates, bringing vital transparency to a historically inaccessible department. Civil society actors attempt to conduct important research, but must go through highly protracted approval processes and are granted only tenuous access when it is granted. The CSA should be amended to mandate JICS to conduct thematic research on key challenges, and to make such research publically available.

15) The CSA should be amended to ensure that all inmates are informed about JICS and access to ICCVs.

Noting that inmates often are unaware about JICS, the CSA should be amended to require all inmates – sentenced and unsentenced – to be informed about JICS and access to ICCVs.

16) Training of ICCVs should be strengthened to address key challenges.

In order to improve the effectiveness of ICCVs and ensure they have a critical understanding of the purpose of their work, it is suggested that training for ICCVs include a substantial component on human rights in correctional centres and on the systemic issues related to correctional centre reform. This training should be provided to new ICCVs as well as on a regular basis thereafter.

17) Issues that hinder inmates from reporting to JICS should be examined, and measures should be put in place to protect inmates from potential retaliation, where they make complaints to JICS about DCS members.

Inmates must feel free and unhindered from making complaints to JICS. Measures that protect inmates from retaliation may help improve their ability to do so.

18) The Inspecting Judge's mandate should be extended to allow them to act as a complaints mechanism.

Although inmates, their families or their representatives are able to make complaints to JICS, other stakeholders such as NGOs providing services in prisons have no recourse should the DCS abuse its powers or fail in its obligations. The Inspecting Judge should therefore be given the mandate to receive and address complaints from NGOs and other interested civil society organisations.

4.4. Improved response by the Portfolio Committee and DCS

We are concerned that past submissions to the Portfolio Committee by organisations concerned about the effectiveness of JICS have fallen on deaf ears. Sonke, together with Just Detention International SA and the Wits Justice Project, made a submission to the Committee in 2012 on 'recommendations for enhancing the independence and effectiveness of the Judicial Inspectorate for Correctional Services'. However, there have not been any visible or tangible effects of this or other past submissions on the issue. We sincerely hope that this time the Portfolio Committee will implement the recommendations set forth above.

5. Conclusion

We thank the Portfolio Committee for the opportunity to make this submission.

End.

