

SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE (CSPRI) ON THE RECOMMENDATIONS OF THE JALI COMMISSION OF INQUIRY¹

24 AUGUST 2011

Introduction

1. The Civil Society Prison Reform Initiative (CSPRI) is grateful to the Portfolio Committee on Correctional Services for the opportunity to make a submission in respect of the recommendations of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services (hereafter Jali Commission). The final report of the Jali Commission became available to the public in November 2006, nearly a year after it was handed to then President Mbeki.
2. When debating the Jali Commission, it is necessary to briefly pause at the historical context. In September 1996, the Parliamentary Portfolio Committees on Correctional Services requested an independent national investigation into corruption. The Committee raised concerns regarding allegations of corruption from the then Victor Verster (later renamed as Drakenstein), Pollsmoor and Johannesburg prisons. Two reports, released in 1998 and 1999 respectively, by the Auditor General raised further concerns in respect of corruption. Late in 1999, the Minister of Public Service and Administration ordered a management audit of the DCS, the findings of which were presented to the Portfolio Committee on Correctional Services. Upon reading the damning findings of the audit, Members of the Portfolio Committee on Correctional Services expressed concern that the State had indeed lost control over the DCS.² The appointment of the Jali Commission was immediately preceded by the assassination of the assistant commissioner in KwaZulu-Natal by a colleague.³ This was a clear indication that corruption in the DCS was out of hand, hence the request from the then Minister of Correctional Services, Mr. Ben Skosana, that President Mbeki appoint a judicial commission of inquiry.
3. The terms of reference for the Jali Commission defined the problem at hand in a particular manner, locating the problem of corruption, maladministration and rights

¹ This submission relies in part on earlier research commissioned by CSPRI and published as Van den Berg (2007) *Summary and comment on the Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services - "the Jali Commission"*, CSPRI Research Report No. 13. Bellville: Community Law Centre.

² PMG Minutes of the Parliamentary Portfolio Committee on Correctional Services, 14 March 2000.

³ Sloth-Nielsen J (2007) "The State of the nation's prisons" in Buhlungu S, Daniel, J, Southall R and Lutchman J (eds) *State of the Nation – South Africa 2007*, HSRC Press, Cape Town, p. 380.

violations at management area level.⁴ It is thus important to note that the Jali Commission did not investigate the entire DCS but focussed on a sample of nine management areas of the total of more than 50 management areas. Importantly, the Head Office was not specifically named in the Commission's terms of reference, but its interpretation of its mandate was that it was to investigate the Department generally and therefore also the Head Office.⁵ The Commission's report does, however, not contain a specific chapter on the Head Office, as is the case with the management areas it investigated, nor a general chapter on this office. Numerous references are made to the role of the Head Office, for example, when it did or did not fulfil its senior leadership function, or when it was complicit in the destabilisation of the Department. It has to be accepted therefore that the Commission's findings do not provide a clear, comprehensive and coherent view of the Head Office; instead, its views on the Head Office are found in its commentaries on other matters, primarily relating to events at the management area level. Historically, it should also be emphasised that the officials at the helm of the Department in the mid- to late 1990s are not the same officials who were in control when the Commission conducted its work.

4. It should furthermore be emphasised that the terms of reference for the Jali Commission covered not only corruption, although this is the focus it is frequently associated with. The terms of reference covered the following:
 1. To inquire into and report on –
 - (a) alleged incidents, of corruption relating to –
 - (i) the procurement of goods and services for the Department of Correctional Services;
 - (ii) recruitment and appointment, promotion and dismissal of employees for the Department of Correctional Services;
 - (iii) the treatment of prisoners;
 - (iv) dishonest practices and illicit relationships between employees and prisoners leading to unlawful activities;
 - (b) alleged incidents of non-adherence to departmental policy and deviation from national norms and standards;
 - (c) alleged incidents of violence or intimidation against employees of the Department which affect the proper functioning of the Department;
 - (d) the extent of implementation of recommendations of past investigations relating to the Department.
 5. This submission will deal briefly with a description of corruption and the requirements of an effective response. The bulk of the submission deals with a limited number of core indicators aimed at assessing if the DCS had made headway in improving the situation in the prison system. The emphasis is placed here not so much on what the DCS has done to address problems (in-put indicators) but rather on what

⁴ The following management areas were targeted by the Commission: Durban-Westville; Pietermaritzburg; Bloemfontein (Grootvlei); St Albans; Pollsmoor ; Leeuwkop; Johannesburg; Pretoria; and Ncome.

⁵ The Jali Commission Report p. 10

have been the results (the outcome indicators). It has been nearly six years since the final report of the Jali Commission was submitted to the then President and probably close on nine years since the first interim report was submitted to the DCS. There has thus been a considerable time lapse and it would therefore not be unreasonable to expect some visible improvements based on the recommendations from the Jali Commission.

6. Lastly, the Jali Commission was not entirely satisfied with the way in which the DCS had responded to its recommendations and concluded that the general attitude of members of the Department to be self-defeating in that they believed that outsiders could not tell them how to run their prisons.⁶ It concluded that this in itself was not conducive to ensuring that corruption was taken seriously or dealt with appropriately by the Department:

This is a sad state of affairs because it is this very attitude that discourages any input from people who might be experts in other areas, which would be of assistance to the Department. The Department cannot operate in isolation. It is not an island but an integral part of the South African society. The manner in which it conducts its affairs has a bearing on the lives of all South Africans, who expect the Department to consult and interact with experts and relevant stakeholders to ensure that correctional facilities in our country are competently run so that they compare with the best in the world.⁷

7. Attempts by the DCS to consult with stakeholders since the Jali Commission has been sporadic, isolated and frequently at short notice. There does not exist at present a forum for sustained and engaged interaction between the DCS and civil society stakeholders. This has undoubtedly impoverished the discourse on imprisonment in South Africa, adding to a lack of transparency and accountability.

Understanding corruption

8. The question may be posed: What conditions allowed corruption to flourish in the Department of Correctional Service? To answer this, it is necessary to reflect briefly on the extant literature. Kaufmann argues that it is important to understand the linkages between corruption and governance and that corruption is only one factor undermining governance; others include poor leadership, non-adherence to procedure and incompetence.⁸ Looking more closely at how corruption is possible in any organisation, accountability emerges as the key variable, which can be presented as a formula:

$$\text{Corruption} = (\text{Monopoly} + \text{Discretion}) - \text{Accountability}$$

⁶ The Jali Commission Report p. 944 -945

⁷ The Jali Commission Report p. 945

⁸ Kaufmann D (2004) *Corruption Matters: Evidence-Based Challenge to Orthodoxy*, Journal of Development Policy and Practice, Volume 1, Number 1, December 2004, p.3.

9. Corruption occurs when officials have monopoly over something (e.g. appointments, procurement) and the discretion to use it in an environment where accountability is lacking or absent. In the prison context, corrupt factions were able to build monopolies. Within this environment, officials were able to exercise their discretion liberally. They were able to ignore the laws and procedures with which they were familiar with by engaging in illegal and unauthorised activities. Given the virtual collapse of the disciplinary system and senior management's disregard for investigative reports and their recommendations, accountability was nearly impossible to maintain. Prior to the Jali Commission there had already been 20 investigations into the DCS. This evidently did not have the desired effect.
10. After 1994, with the onset of democracy, there was macro-level transformation within the DCS that, according to the Commission, would fundamentally change the DCS. Transformation occurred with the introduction of trade unionism, the demilitarisation of the DCS and the implementation of affirmative action. The problem was not with the substantive focus of these transformation aims but rather the poor manner in which they were managed, if managed at all.
11. An effective national anti-corruption strategy must aim to address corruption holistically and not be narrow in its focus and application. The strategy needs to concentrate, at least, on prevention, law enforcement, public awareness, and institution building.⁹ The extent to which the DCS has been able to strike an appropriate balance between these four dimensions requires closer scrutiny. At face value it appears that much effort and energy has been invested in investigations and building capacity internally to conduct investigations, but it remains uncertain what efforts have been undertaken by the Department to prevent corruption and human rights violations.

Treatment of prisoners

12. The treatment of prisoners formed an important focus of the Jali Commission's final report. Of particular concern to the Commission was the moral and physical integrity of prisoners. Despite these prescripts, the Commission found ample evidence of officials treating prisoners as though they had no rights. While the Commission acknowledged that overcrowding in prisons compounds the problem, it did not accept this as an excuse for torture and the ill-treatment of prisoners. The Commission found that prisoners were subjected to torture, assault, and abuse and made to perform duties that infringed upon their dignity. It appeared to the Commission that warders' general opinion was that prisoners were in prison 'for punishment' and not 'as punishment'. In addition, prisoners expressed dissatisfaction with the manner in which the Office of the Inspecting Judge dealt with their complaints. According to the Commission, prisoners had lost faith in the Judicial Inspectorate and Independent Visitors

⁹ Pope J (1999) "Elements of a successful anti-corruption strategy" in R Staphenurst and SJ Kpundeh Curbing corruption – toward a model for building national integrity, Economic Development Institute of The World Bank, Washington.

complaints system, as their complaints were not dealt with effectively and offending warders remained on duty without being punished.

13. Shortly after the Commission completed its work a mass assault took place at St Alban's prison in Port Elizabeth and the following excerpt describes in part the July 2005 incident as reported to the UN Human Rights Committee (HRC):

On 17 July 2005, the author [McCullum], together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author's shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them.¹⁰

14. The events described above form part of an individual communication to the HRC submitted by Mr. B. McCullum, a former prisoner at St Alban's. The HRC found that the DCS had violated the absolute prohibition of torture.¹¹ The government of South Africa did not contest the facts presented by McCullum despite numerous invitations by the HRC to present its version of events. In the aftermath of the assault prisoners were denied medical attention and access to legal representation. These were recognised by the HRC as gross violations of prisoners' rights and as far as could be established, no DCS officials were held accountable.
15. The most recent annual report of the Judicial Inspectorate detail 55 unnatural deaths in prisons during the 2009/10 financial year. In ten of these deaths officials of the DCS were directly implicated. However, in none of these cases have there been any prosecutions at the time of publication.
16. Table 1 below provides data on unnatural deaths in prisons for the period 2004/5 to 2008/9. From this it is clear that, with the exception of 2005/6, unnatural deaths have remained relatively stable at 3.7 to 4.0 /10 000.¹² If the Department had initiated any measures to make prisons safer, as recommended by the Jali Commission, these have not had a sustained impact and for the last three years there have been a slight but steady increase in the rate of unnatural deaths.

¹⁰ CCPR/C/100/D/1818/2008 para 2.2

¹¹ Para 6.4 The Committee notes the author's detailed description of the incident of 17 July 2005, during which he was allegedly subjected to ill-treatment, as well as his identification by name of five warders who allegedly participated in the incident. It also notes the author's medical history and press clippings on the incident of 17 July 2005. The Committee observes that in the present case the arguments provided by the author necessitated at the very minimum an independent investigation of the potential involvement of the State party's warders in the author's ill-treatment. The Committee considers, therefore, that the author's allegations not having been addressed by the State party warrant the finding that there has been a violation of article 7, of the Covenant. CCPR/C/100/D/1818/2008

¹² Data obtained from relevant DCS Annual Reports.

Table 1

Unnatural deaths per 10 000			
Year	Nr	Ratio per 10 000	Prison population
2004/5	75	4.0	187394
2005/6	30	1.9	159318
2006/7	62	3.8	161661
2007/8	62	3.7	165837
2008/9	64	3.9	165230

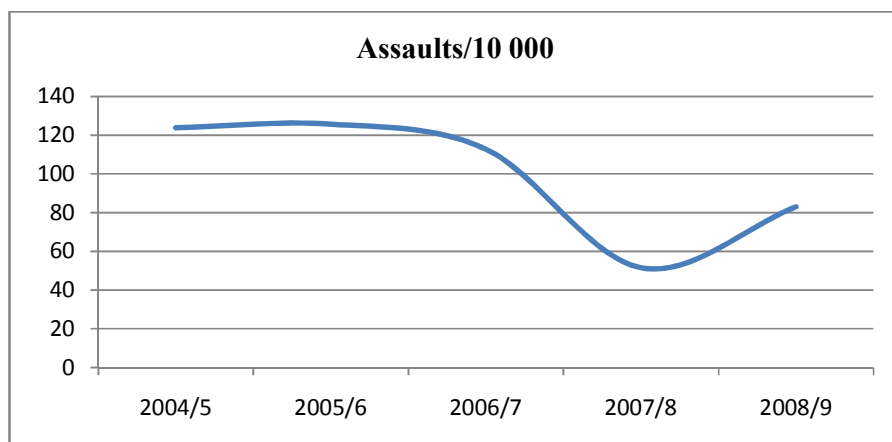
17. The number of assaults reported per year calculated as a per 10 000 ratio is presented in Table 2. The data indicates that the number of reported assaults declined drastically in 2007/8 but increased substantially in the following year; from 52/10 000 to 83/10 000. Assuming that not all assaults are reported, the overall impression gained is that South Africa's prisons are not safe. The number of assaults recorded by DCS and reflected in the departmental annual reports is by all accounts an undercount and the Judicial Inspectorate for Correctional Services (JICS) recorded a total of 2189 complaints on assaults of official-on-inmate in 2009.¹³

Table 2

Assaults per 10 000			
Year	Nr	Ratio per 10 000	Prison population
2004/5	2320	123.8	187394
2005/6	2001	125.6	159318
2006/7	1822	112.7	161661
2007/8	855	51.6	165837
2008/9	1372	83.0	165230

¹³ Office of the Inspecting Judge (2010) Annual report of the Judicial Inspectorate for Correctional Services 2009/10. Cape Town.

Figure 1



18. Unnatural deaths and assaults are core indicators in respect of the personal safety of prisoners. In respect of both these indicators the results are unconvincing and it remains uncertain what steps the DCS has taken to make prisons safer and reduce the number of violent incidents. In this regard specific attention should be paid to the training of staff and the actions taken by management to ensure a human rights-based approach to prison management.
19. The UN Convention against Torture requires in Article 10 that South Africa, as a state party to the Convention, “ [1] . . . shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”
20. It remains unknown whether the DCS has incorporated training on the absolute prohibition of torture and ill treatment into its basic and supplementary training, or whether the DCS has developed a policy on the prevention and eradication of torture.
21. The lack of prosecutions foster a culture of impunity for the simple reason that it in effect communicates to officials that nothing will happen if prisoners’ rights are violated. The utter lack of transparency in respect of human rights violations, especially in respect of serious violations (ie. assault, torture and deaths), is unacceptable and need to be addressed as a matter of urgency. It is therefore submitted that the DCS and the JICS in their respective annual reports provide detailed information in respect of the following:
 - a. The number and nature of allegations of assaults
 - b. The steps taken and progress to date in respect of investigating allegations of assault
 - c. The number and nature of alleged unnatural deaths in custody

- d. The steps taken and progress to date in respect of investigating unnatural deaths
- e. The steps taken to prevent and eradicate torture and other ill treatment of all prisoners with specific reference to Articles 10 – 14 of the UN Convention Torture.

Oversight and monitoring

22. Given the findings of the Jali Commission and the work of the Special Investigations Unit (SIU) one would have expected a consistent, if not growing, trend in disciplinary actions against DCS officials, resulting in a significant proportion of dismissals. It should furthermore be borne in mind that DCS staff (actual posts filled) increased from 30 199 in 1998¹⁴ to 40 985 in 2009/10¹⁵; an increase of 36%. Trends in disciplinary sanctions imposed, however, point in a different direction as shown in Table 3 (see also Figure 2 below).¹⁶ The most obvious trend is the see-saw figure in total disciplinary sanctions imposed, from more than 2700 in 1998, dropping to 1061 in the following year but climbing to just above 3000 in 2008/9. The high number of disciplinary actions during 1997 and 1998 were the result of the investigations undertaken by the Public Service Commission (PSC) and the Department of Public Service and Administration (DPSA). The spike in 2001-3 can be attributed to the early work of the Jali Commission and the SIU. During the first three years of the SIU’s involvement in the DCS (2002-2005), the total number of disciplinary actions did, however, drop to a meagre 224 cases in 2004/5. The fruits were, however, harvested the following year when disciplinary sanctions imposed climbed to 1850, the highest level since 1998. These were cases primarily related to medical aid and social grant fraud. Dismissals, however, remain a rare event in the DCS. The highest number of dismissals was 264 in 2005/6, or 14% of total disciplinary sanctions imposed. In the following year, 2006/7, the total number of disciplinary actions dropped to 367 with only 33 dismissals. In the next two years disciplinary actions increased substantially with 144 dismissals in each year.

Table 3

Year	Dismissals	Other Sanctions	Total	Dismissals as percentage of total disciplinary sanctions
1997	5	1435	1440	0.3
1998	163	2541	2704	6.0
1999	81	980	1061	7.6
2000/1	241	2251	2492	9.7

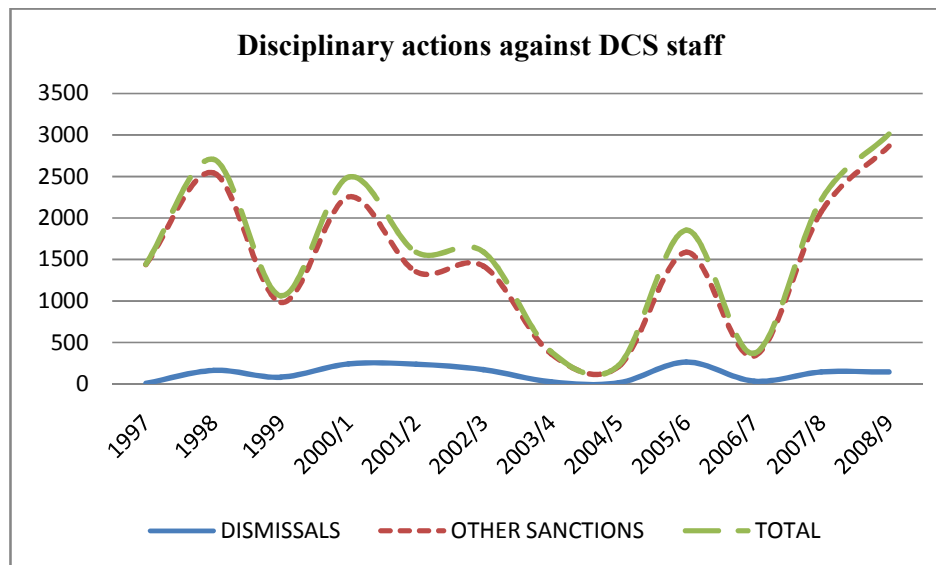
¹⁴ Department of Correctional Services (1999) *Annual Report 1998*, p.39

¹⁵ Department of Correctional Services (2007) *Annual Report 2009/10*, p. 198

¹⁶ The data used in Table 3 and Figure 1 was extracted from the various annual reports of the DCS of the period covered. It should be noted that the report for 2000/1 covers a 15-month period when the Department changed its reporting period from a calendar year to a financial year.

2001/2	236	1351	1587	14.9
2002/3	171	1418	1589	10.8
2003/4	25	362	387	6.5
2004/5	14	210	224	6.3
2005/6	264	1586	1850	14.3
2006/7	33	334	367	9.0
2007/8	144	2074	2218	6.5
2008/9	144	2864	3008	4.8

Figure 2



23. The see-sawing in the number of disciplinary actions taken against employees of the Department, may reflect an attitude by DCS management, or even a decision, that the 'SIU and DIU will take care of discipline'. If this is indeed the case, it is extremely unfortunate. The two investigating units are there to support the DCS with specialist skills and knowledge and to provide comprehensive forensic solutions, but they do not replace the day-to-day duty of every manager in the Department to enforce the disciplinary code and promote good performance. Enforcement of the disciplinary code by every operational manager also lends sustainability to the achievements of the investigations in addressing corruption, maladministration and rights violations by making compliance with prescripts and codes part of organisational culture.
24. Reporting on the investigation of corruption in the DCS has been scant and the most comprehensive report remains that of the Jali Commission. Even the SIU reports only provide cursory details, leaving many questions unanswered as to the exact facts of the cases handled. Apart from holding offenders accountable, investigations into

corruption should contribute to the broader process of prevention in a number of ways:

- Investigations should contribute to knowledge-building by improving understanding of how a particular crime was committed, how it was detected, and what effect it had and indicate systemic weaknesses.
- Investigations should inform the risk assessment with reference to type of risk and the extent of the risk.
- The results of investigations, successful or not, should be made available to stakeholders from government or civil society with the aim to improve insight into the problem and to demonstrate that effective action can and will be taken against corrupt officials.

25. On 20 March 2011 City Press reported that the Special Investigations Unit (SIU) submitted its report on investigating large tender contracts to the Minister of Correctional Services in September 2009.¹⁷ The report makes a number of serious allegations, amongst which are:

- The Department of Correctional Services (DCS), under Mti (former Commissioner), used savings from the fund for the compensation of prison staff to pay for the Bosasa tenders;
- Gillingham (Former Chief Financial Officer) received cash, cars, a kitchen and payments towards a house from Bosasa;
- Gillingham carried business cards indicating he was a “consultant” to a Bosasa affiliate while he was working for the DCS;
- Bosasa was involved in drafting tender documents for contracts it won in a way that gave it a clear advantage in the awarding of these tenders; and
- The SIU concludes that there was an “improper and corrupt relationship” between Gillingham, Mti and the Bosasa group of companies.

26. It has now been nearly two years since the SIU report was submitted to the Minister of Correctional Services and, as far as could be established no action has been taken to the criminally prosecute the implicated officials. The efforts of the Jali Commission to rid the DCS of corruption will amount to little if the findings of the SIU investigation are not used to call officials to account. In a matter as serious as this, it is not within the discretion of the Minister to decide whether a criminal prosecution will indeed take place. In this regard attention is drawn to section 34 of the Prevention and Combating of Corrupt Activities Act (No. 12 of 2004):

(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed (a) an offence under Part 1, 2,3 or 4, or section 20 or 21 (in so far as it relates to (6) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. (2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.

¹⁷ <http://www.citypress.co.za/SouthAfrica/Prison-boss-bribed-20110320>

27. The findings of the SIU are serious not only because of the amounts of money involved but because it is Head Office staff implicated. Moreover, the alleged crimes took place in the immediate aftermath of the Jali Commission submitting its final report.

Conclusion

28. The Jali Commission made numerous and detailed recommendations to the DCS and these need to be actively monitored. Unless it has been communicated otherwise, it remains unknown which of the recommendations made by the Jali Commission have been accepted by the DCS and which have not. There may indeed be valid reasons why certain recommendations have not been accepted, but this needs to be communicated to Parliament and the public. It should furthermore be noted that the Jali Commission was not satisfied with the Department's response to the 8th, 9th, 10th and 11th interim reports which were submitted to the Department in February 2004. The Commission found that the Department had failed to fulfil its recommendations, because members who were guilty of criminal offences had not been disciplined and continued to be employed by the Department under the protection of senior officials.
29. Much attention has in recent years been paid to investigating grand corruption cases in the DCS (e.g. cases investigated by the SIU) and while this is crucially important, petty corruption affecting the daily lives of prisoners remain apparently neglected. It is equally important that rights violations against prisoners are properly investigated but also that the necessary actions be implemented by the DCS to prevent violations. In this regard the JICS should play a proactive role.
30. The above submission raised a number of issues aimed at assessing the performance of the Department according to a number of core indicators (e.g. assaults, deaths and disciplinary actions). This is not an exhaustive list and needs to be expanded on. Nonetheless, the central issue remains that the Jali Commission's recommendations require active monitoring and continued debate.

Prepared by:

L Muntingh

Project coordinator

CSPRI

021-959 2950

lmuntingh@uwc.ac.za

19 August 2011.