



## SUBMISSION TO THE PORTFOLIO COMMITTEE FOR CORRECTIONAL SERVICES

### Recommendations for Enhancing the Independence and Effectiveness of the Judicial Inspectorate for Correctional Services

For meeting on 31<sup>st</sup> October, 2012

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## I. Executive Summary

The Judicial Inspectorate of Correctional Services (JICS) is a vital watchdog body that oversees South Africa's correctional system and is mandated to inspect and report on the treatment of inmates. To be an effective independent oversight mechanism for a correctional system that is mired with challenges, JICS needs strong institutional independence as well as support and cooperation from other departments such as the Department of Correctional Services (DCS), the National Prosecuting Authority (NPA), and the South African Police Service (SAPS). Just Detention International (JDI), Sonke Gender Justice Network (Sonke), and the Wits Justice Project (WJP) are concerned that JICS lacks adequate independence (including operational, financial, and perceived independence) from DCS, and that it is not sufficiently empowered to carry out its mandate to help protect inmates' human rights. While the full submission outlines a number of important challenges facing JICS, our key recommendations are summarised here.

- a. JICS's governing legislation should be reviewed to enhance its structural independence from DCS. It must be administratively and financially separate from DCS.

Noting that the administrative intertwining of JICS and DCS has created operational challenges for JICS in the past, the Correctional Services Act (CSA) should be amended to make JICS administratively independent of DCS. The CSA should also be amended to remove any possibility for DCS leadership to exert political influence over JICS's appointments. As financial independence is a hallmark of an independent oversight body, JICS should also have a separate budget to that of the DCS, and its funding should be allocated directly from the Treasury.

- b. The process to appoint the Inspecting Judge should be reviewed to enable stakeholder consultation, enable more rigorous vetting, and remove the Minister of Correctional Services from the process.

At present, the Minister of Correctional Services nominates the Inspecting Judge, who is then appointed by the President. This is inappropriate for an independent oversight body. The Minister should be removed from the appointment process.

- c. JICS should be given enhanced powers to have clear investigative powers comparable to the South African Human Rights Commission and the Commission for Gender Equality, to have the power to make binding decisions regarding the referral of criminal cases to the SAPS and NPA, and to make recommendations on the instituting of internal disciplinary proceedings.

JICS is weaker than other human rights oversight bodies such as the South African Human Rights Commission and the Commission for Gender Equality, as it is not mandated to investigate cases of abuse but rather is required to seek resolution internally within DCS, and can only make non-enforceable recommendations. The Portfolio Committee on Correctional Services should review and consider enhancing JICS's mandate to investigate serious cases such as DCS staff involvement in alleged torture, assault, sexual abuse, and unnatural deaths. DCS must not be allowed to conduct internal investigations on these cases until JICS makes a binding decision regarding their referral to SAPS and NPA, and until the JICS, SAPS and/or NPA have completed their investigations. Cooperation with JICS's inspections and investigations should also be required in law.

- d. The items on which JICS makes mandatory reports should be expanded to include other serious issues that are known to be systemic challenges within DCS facilities.

The list of issues that require mandatory reports should include sexual abuse, tuberculosis, and HIV and AIDS. JICS must be specifically mandated to address these widely acknowledged challenges that it is currently failing adequately to identify in its reports.

- e. Inmate awareness of, and training of, Independent Correctional Centre Visitors (ICCVs) should be strengthened.

Noting that inmates often are unaware of JICS, all inmates – sentenced and unsentenced – must be informed about JICS and about their right to have access to ICCVs. JICS should identify and examine issues that are blocking or hindering inmates from accessing ICCVs. The ICCV training should include a substantial component on human rights in correctional centres and on known systemic correctional centre problems, including those that are currently not adequately captured by ICCVs, such as prisoner rape, and high rates of TB and HIV.

- f. JICS should better leverage its access to DCS centres, be mandated to conduct thematic research on challenges in correctional centres, and make public reports on its investigative findings.

JICS has unprecedented access to DCS facilities and inmates, bringing vital transparency to a historically opaque department. JICS should take advantage of its unique positioning by conducting thematic research on challenges facing DCS facilities, and by making such research publically available. Also, JICS is not barred from making media statements or ensuring widespread dissemination and comment on its public documents and reports. Yet, to date, it has not made any such statements or publically released its reports, aside from tabling them in Parliament and posting them on its website. As with other important watchdog bodies, alerting the public and key stakeholders to its findings is core to JICS's mandate. While JICS's visitors committees provide a forum for community engagement, there is little public awareness about JICS as an institution and about the vital information on which it reports. JICS should ensure the widespread dissemination of its reports and findings, including through press statements.

- g. Lastly, JICS must be adequately resourced to fulfil its mandate.

It is clear that a drastic expansion of JICS's mandate and powers would require considerable additional capacity within JICS, which, in turn, would require a substantial increase to its budget and personnel.

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

## II. Introduction

Sonke Gender Justice Network, Wits Justice Project, and Just Detention International welcome this opportunity to make a submission on how to strengthen the Judicial Inspectorate for Correctional Services (JICS). JICS is a vital watchdog body that seeks to ensure that inmates' rights – as contained in the Constitution and relevant legislation and policy – are respected, protected, promoted, and fulfilled. While JICS has, in many respects, been effective in increasing the transparency of DCS facilities, it faces fundamental challenges to its own independence and effectiveness. Some of these challenges are inherent in its structure as established by the Correctional Services Act of 1998, while others stem from external forces. Fundamentally, JICS is not independent from the Department of Correctional Services (DCS) – the institution it is required to oversee – and therefore faces many challenges as it attempts to preserve an independent stance in relation to DCS.

This submission is based on an analysis of challenges facing JICS and comparisons between JICS and similar institutions both in South Africa and in other countries.<sup>1</sup> It touches on a number of themes that emerged from this analysis and presents ways in which JICS could become more independent and, as such, increasingly successful in fulfilling its mandate as the watchdog body for DCS.

## III. Insufficient Independence and Challenges Facing JICS

### a. Defining Independence

To assess JICS's independence, it is necessary first to define independence. Independence is widely recognised to be a vital element for the effectiveness of prison oversight.<sup>2</sup> To penetrate correctional centres, which are inherently "closed worlds", oversight bodies must formally establish and maintain an arms-length relationship between themselves and correctional services.

Of relevance to this analysis is that the Optional Protocol to the Convention Against Torture (OPCAT) has been signed by South Africa but yet to be ratified. Once it has been ratified, JICS may have a role to play as part of the National Preventive Mechanism required by the protocol. In order to play that role, however, JICS will have to be significantly more independent than it is today.

The OPCAT provides guidance on how to define independence of an oversight body such as JICS. Article 18 of OPCAT calls for "functional independence", which has been interpreted to mean that:

- (a) there are limited opportunities for political interference in regards to an institution's legal basis for existence, administration and procedures, and funding, and
- (b) that an institution is credible and effective in practice. Thus the actual **structural** (financial and

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<sup>1</sup> This submission draws on analysis of independence in the following institutions in addition to JICS: the Independent Police Investigative Directorate, the South African Human Rights Commission, Her Majesty's Chief Inspector of Prisons for England and Wales, the Canadian Correctional Investigator, the Inspectors of Corrections for New Zealand and the Human Rights Commissions of Mauritius, Zambia, and Tanzania.

<sup>2</sup> Michael Mushlin & Michele Deitch, "Opening Up a Closed World: What Constitutes Effective Prison Oversight?" 30 Pace L. Review 1383 (2010), at 1402.

operational) and *perceived* independence of an institution make up “functional independence”.

The United Nations’ Principles relating to the Status of National Institutions (Paris Principles), which provide guidance on the role, composition, status, and functions of national human rights institutions, states that financial autonomy is a fundamental requirement of independence (article 2 and 3 of Paris Principles). Without financial autonomy, an institution cannot exercise operational autonomy or independence in decision-making. Key to this independence is an institution’s ability to draft its own annual budget, and to decide how to use its resources. Such decisions must be free from control by and the need for authorisation or approval from the institution and associated political processes that the oversight body is tasked with overseeing. Independence requires that other institutions or funding sources cannot compromise an oversight body’s ability to report freely on its observations and recommendations.

The Constitutional Court came to similar conclusions regarding the definition of independence in relation to a government oversight body, in the 2011 case *Glenister v. President of the Republic of South Africa and Others*. This case concerned the Directorate for Priority Crime Investigation (DPCI), located under the administration of SAPS as an independent corruption-fighting unit. While the facts of the case are not directly analogous to the relationship between DCS and JICS, the majority’s analysis concerning the adequacy of DPCI’s independence are informative.<sup>3</sup> The Court determined that the legislative provisions creating DPCI failed to afford the institution with an adequate measure of autonomy because it was “**insufficiently insulated from political influence in its structure and functioning as well as the conditions of service that pertain to its members.**” The Court also indicated that the appearance and perception of independence is important to determining whether independence exists or not. Thus, public perception of independence is one of the benchmarks for independence of an institution. Where financial independence is lacking, a public perception is created that the watchdog body is answerable to the body it watches. This perception of a lack of independence is an indicator of actual lack of independence.

## **b. JICS’s Insufficient Independence**

As outlined above, an independent oversight body requires both structural (operational and financial) independence and perceived independence. Based on this definition, it can be argued that JICS faces challenges to its independence and ability to function at its highest potential. JICS faces a lack of cooperation from DCS members, poor public awareness of its work and mandate, and negative perceptions by inmates and the public. The removal of its mandate to investigate corrupt and dishonest practices also limits JICS.

### **i. Structural Independence**

Some of the most glaring challenges to JICS’s independence are administrative. Firstly, JICS staff, except for the Inspecting Judge (IJ), are administratively part of DCS, (and some are former DCS officials).<sup>4</sup> The drafters of the

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<sup>3</sup> Freddie Khunou, “Judgment in defence of constitutional democracy and rule of law: The robust approach of the Constitutional Court in the *Glenister* case”, *De Rebus*, June 2011.

<sup>4</sup> Jali Comisson, Page 582-3; Jagwanth, *supra* note 32, at Page 36; Wood, *supra* note 120, at Page 55.

Correctional Services Act, 1998 viewed the independence of the IJ as critical and sufficient to preserve the independence of the institution. However, the administrative inter-linkages between JICS and DCS have compromised and delayed JICS's operations in the past. Having to appoint staff under section 89(1) can be a long and frustrating process, "and in the past had included delays on the part of the DCS in processing appointments for staff and Special Assistants. This made it difficult to get projects off the ground . . ."5. Additionally, the appointment of staff must be done in consultation with the National Commissioner of Correctional Services ("Commissioner"), which can lend itself to the interpretation that the Commissioner can veto the appointment of staff, or at least exert political influence over these processes.

In March 2011, JICS reported to the Portfolio Committee on Correctional Services that administrative interlinkages with DCS caused delays in paying salaries for JICS staff, including that of the Inspecting Judge, clearly undermining JICS's operations.<sup>6</sup>

A 2004 Civil Society Prison Reform Initiative (CSPRI) report noted that the appointment of former DCS members to JICS positions may be viewed as further undermining the independence of JICS. On the other hand, some JICS members seem more aware of their moral imperative as part of the JICS due to their experience as former DCS members, which could also conceivably make them more nimble in navigating DCS bureaucracy and red tape.

Financial independence is a cornerstone of an effective oversight body. JICS receives its budget from DCS, thereby compromising its ability to be fully independent, and to be publically critical of DCS. As noted by the Constitutional Court, "the arrangement whereby a department makes funds available from its own budget to a public entity for the performance of certain functions is fundamentally unsuited to independent institutions."<sup>7</sup>

JICS's financial dependence of DCS has "from time to time, caused serious operational challenges to the JICS inasmuch as the DCS has at times imposed, or attempted to impose, its internal financial and administrative policies and procedures on the JICS. In the past, this has led to delays in service delivery."<sup>8</sup> The existing financial dependence also raises the concern that DCS might reduce JICS's funding, or may give a lower priority to the funding needs of JICS.

Due to these challenges, in March 2011, the CEO of JICS asserted that it should receive a fixed percentage of the budget of DCS and that this should be separated from the DCS budget, with JICS accountable directly to the National Treasury.

## ii. Conflicts of Interest

Independent Correctional Centre Visitors (ICCVs) face conflicts of interest in their daily work. They are

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<sup>5</sup> Jagwanth, *supra* note 32, at Page 37.

<sup>6</sup> [www.pmg.org.za/report/20110302-correctional-matters-amendment-bill-committee-deliberations](http://www.pmg.org.za/report/20110302-correctional-matters-amendment-bill-committee-deliberations)

<sup>7</sup> *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>

<sup>8</sup> JICS Report on its Independence, *supra* note 41, at Page 2.

dependent on DCS members for cooperation and security, which makes some ICCVs reluctant to antagonise the members.<sup>9</sup> In addition to relying on DCS for their personal safety, many ICCVs pursue careers within DCS at the completion of their contract with JICS, which may compromise their willingness to follow up fully on inmate complaints.<sup>10</sup> (Due to the pressures and hardship they witness, ICCVs can also be susceptible to attempting to support inmates on issues that require the services of psychologists or social workers).

Limiting ICCVs' tenure to two years may contribute to some ICCVs seeing the DCS as an inevitable part of their career path. Indeed, the limitation on tenure of DPIC staff was one of the reasons the Constitutional Court found the DPIC to be lacking independence from SAPS, in the *Glenister* case. Although it should be noted that JICS has discretion to deviate from this two-year limit and it frequently does execute longer contracts, most contracts are for two years only. While a limited contract period was intended to preserve independence and prevent the institutionalisation of ICCVs to their assigned correctional centres, it may actually diminish independence because ICCVs may start pursuing long-term jobs with DCS while they remain ICCVs.

Having a longer tenure for ICCVs may also reduce the substantial transaction costs of frequently hiring and training new ICCVs, improve institutional memory of JICS, and provide the opportunity for greater skill building of ICCVs who hold their positions for longer periods of time.<sup>11</sup> Alternative measures to prevent the institutionalisation of ICCVs inside specific correctional centres should also be put in place.

### **iii. Challenges Between JICS and DCS**

There are major tensions between JICS and DCS members, as well as a lack of clarity regarding their respective roles. Some DCS members are suspicious of ICCVs, act with hostility towards them, and feel threatened by them. There are reports that DCS members frequently fail to cooperate with ICCVs, for example by denying them access to the correctional centre or resources, such as telephones and computers. Some ICCVs have reported that DCS members do not provide security arrangements for them during site visits. For example, DCS members have prevented access to inmate cells by not unlocking the doors or have left ICCVs locked in cells with awaiting trial inmates. Assaults on ICCVs by DCS members have also been recorded.<sup>12</sup>

DCS members also sometimes hinder the ability of inmates to lodge complaints with ICCVs. For instance, in the Pretoria and other management areas, there was evidence that JICS complaints boxes were installed in "inconvenient spots and within the view of warders. Thus inmates putting letters into the box are visible to the warders and may be subjected to immediate harassment."<sup>13</sup> Some inmates are also unaware of their right to submit certain complaints to ICCVs because DCS members failed to inform them of their rights.

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<sup>9</sup> Gallinetti, *supra* note 61, at Pages 41-2; Wood, *supra* note 120, at Page 50.

<sup>10</sup> *Id.* at Page 55; Meeting with Adam Carelse, CEO, Judicial Inspectorate for Correctional Services on 21 May 2012.

<sup>11</sup> Wood, *supra* note 120, at Page 54.

<sup>12</sup> Gallinetti, *supra* note 61, at Pages 37, 41-2, 56.

<sup>13</sup> Jali Commission, *supra* note 20, at Page 576.

Another example of the lack of independence of ICCVs is of a public stakeholder meeting hosted by ICCVs (as required by their mandate) being summarily cancelled by DCS because requisite permissions had not been sought from DCS hierarchy and “proper protocol” had not been observed.

#### **iv. Inmate Perceptions about JICS’s Lack of Independence and Ineffectiveness**

ICCVs face challenges in communicating with inmates and gaining their trust. One major reason for this challenge is that while ICCVs meet with inmates, DCS members must be nearby for security reasons (though out of earshot for privacy). Some inmates doubt the existence of confidentiality and feel uncomfortable sharing their complaints with ICCVs. Such doubts and discomfort hinder the ability of ICCVs to respond to and resolve inmate complaints and negatively affect the credibility of ICCVs among inmates. The inmates’ perceived lack of confidentiality also speaks to their perception of JICS as lacking independence from DCS.

Furthermore, since JICS does not have binding decision-making powers, it is difficult for JICS to resolve complaints or enforce its recommendations. Even when complaints are resolved, the process tends to be lengthy and complex, contributing to a loss of confidence in the JICS among inmates. This is particularly true when the complaint relates to immediate or urgent concerns such as access to medical treatment or food. The protracted complaints system also results in slow feedback, which may cause inmates to believe ICCVs are not doing anything to resolve their complaints. Since JICS lacks binding decision-making powers, some inmates also perceive that ICCVs do not have the authority to help resolve their complaints.

#### **v. Inefficiencies Within JICS**

In addition to questions of independence, JICS is also faced with several internal challenges. For example, the training of ICCVs is in need of significant improvement. Some researchers have noted a lack of understanding among ICCVs of the underlying purposes of dealing with inmate complaints and of the “systemic issues pertaining to correctional centre reform for them to be able to intervene and report effectively.”<sup>14</sup> 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.<sup>15</sup> Specialised training on the known challenges inmates face, using a human rights framework, could improve ICCVs’ preparedness and the quality of their reporting. On a positive note, last year JICS began providing paralegal training to ICCVs, which has the potential to help improve the quality of ICCVs’ complaints.

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 heavy tasks.

There have also been concerns that JICS’s reports do not identify broader problem trends across the correctional system as well as they could. The quarterly reports to the Portfolio Committee on Correctional Services are a

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<sup>14</sup> *Id.* at Page 17; Gallinetti, *supra* note 61, at Page 17.

<sup>15</sup> Gallinetti, *supra* note 61, at Page 50.



welcome addition and improve JICS's reporting and accountability to Parliament and the public, but a number of concerns remain. Sometimes JICS's reports lack thorough and critical analyses, other times they fail to identify systemic problems in correctional centres. For example, known challenges, such as TB, HIV, and sexual abuse, are not being adequately highlighted in JICS reports. The absence of a thorough discussion of these issues may partly stem from a lack of understanding by ICCVs about these issues – a problem that could be addressed through specialised training.

JICS reports also lack clear standards for evaluating and measuring conditions in correctional centres. The classification system JICS currently uses for complaints has been criticised as not practicable.<sup>16</sup> JICS's Annual Report for 2011/2012 categorised 24% (102 851 out of 424 717) of all complaints as "other," providing little or no indication as to the trends that might underlie these complaints. Key categories such as sexual abuse, TB and HIV, and other well-known challenges are not systematically picked up or categorised but rather concealed within the "other" category.

#### **vi. Weak Public Awareness of JICS**

Current public awareness about JICS and its work remains weak. The weakness of JICS's reputation may be compounded by the fact that, until recently, JICS had few regional offices outside the Western Cape, and hence its work was less visible to people in other provinces. JICS recently restructured and now has regional offices in George, Bloemfontein, Durban, Pretoria, and Cape Town.

A lack of public awareness impedes the purpose of JICS, particularly because visitor's committees<sup>17</sup> are open to the public. Individuals as well as community organisations will only become fully involved with JICS if there is increased awareness of its work. The fact that JICS is now reporting to the Portfolio Committee on Correctional Services on a quarterly basis, and that these reports are publically available, should help address this challenge.

JICS does not make statements in the media or issue press releases based on its findings, even though it is within its mandate to do so. Highlighting key issues through the media would help spread awareness of challenges inside correctional centres. The fact that JICS receives its funds from DCS and reports to the Minister may impede its willingness to assert itself publically and use media advocacy to advance inmates' rights.

#### **vii. Limited Scope of JICS's Inspection Powers**

The work of JICS has been limited by the fact that the Correctional Services Amendment Act of 2001 removed from the office of the IJ the function of investigating corruption and dishonest practices. Section 85(2) was amended to remove the investigation of "[any] corrupt or dishonest practices" from the objectives of JICS.<sup>18</sup> This change was made because the then IJ specifically requested to be relieved of this duty as he felt it would

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<sup>16</sup> JICS Quarterly Report for period 1 January to 31 March 2012 (9 May 2012).

<sup>17</sup> These are committees comprised of the JICS ICCV's for a particular area.

<sup>18</sup> Jali Commission, *supra* note 20, at Page 564.

compromise the relationship between JICS and DCS and because DCS already had an Anti-Corruption Unit, among other reasons.

The removal of this function, however, limits JICS's ability to monitor human rights abuses in correctional centres, as it often is 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.<sup>19</sup>

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 IJ. One interpretation of the current policy is that where corruption and dishonesty affect conditions in correctional centres, it is still part of the JICS's mandate to address such problems. An alternative interpretation is that it was clearly intended that the office of the IJ should not have the power to investigate corruption, but theoretically, if the IJ does happen to come across any corruption, he could still report on it.

### **c. Lessons Learnt from the IPID**

As an oversight body that was created to address the structural flaws of its predecessor, the Independent Police Investigative Directorate (IPID) offers lessons for strengthening JICS's independence and enforcement powers.

#### **i. IPID has Greater Independence than JICS**

The IPID is the independent watchdog body of the Department of Safety and Security, responsible for overseeing SAPS and the Municipal Police Services (MPS).<sup>20</sup> The IPID is mandated by national legislation to monitor and conduct investigations of criminal offences allegedly committed by SAPS and MPS members, and make appropriate recommendations toward their redress.<sup>21</sup>

In terms of its statutorily determined structure, IPID is substantially more independent than JICS, both administratively and financially. Unlike JICS, which receives funding from the institution that it is mandated to monitor, IPID is independent of SAPS administratively, and receives its funding from Parliament directly.<sup>22</sup>

Section 4 of the IPID Act states that IPID "functions independently from the South African Police Service" and obliges all offices of the state to maintain impartiality. While section 85 of the CSA does state that JICS is an independent office (under the control of the IJ)<sup>23</sup> it does not explicitly state that it is independent of the institution that it is mandated to investigate; nor does the CSA oblige all organs of the state to ensuring the impartiality of JICS. However, the CSA does state that JICS is under the control of the IJ, who, incidentally, is

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<sup>19</sup> Jagwanth, *supra* note 32, at Page 40, 41.

<sup>20</sup> IPID Act of 2011, Section 2(b).

<sup>21</sup> IPID Annual Report 2010/2011, Pages 13-4.

<sup>22</sup> IPID Act, Section 3(3).

<sup>23</sup> CSA section 85(1).

appointed by the President, following only nomination by the Minister of Correctional Services.<sup>24</sup> In contrast, the IPID Act compels the Minister of Police to nominate the Executive Director, and tasks the Parliamentary Portfolio Committee on Police to make a final recommendation on the nominee before the President appoints the Executive Director.<sup>25</sup>

The Executive Director of the IPID also has the right to refer criminal offences to the National Prosecuting Authority for criminal prosecution and need only inform the Minister of such<sup>26</sup> and may where appropriate refer the investigation of a complaint to the National or Provincial Commissioner concerned.<sup>27</sup> Conversely, JICS must submit a report to the Minister and the Parliamentary Portfolio Committee on Correctional Services.<sup>28</sup> Even more limited are the rights of the ICCVs in relation to complaints by inmates. ICCV are required by the CSA to consult with the Head of the Correctional Centre (or the relevant subordinate correctional official) with the view of addressing the complaint internally within the administrative system of the correctional centre in which the complaining inmate is housed.<sup>29</sup>

As mentioned above, ICCVs may feel conflicted in such circumstances: because their term of office within JICS is limited, their career path often leads to employment by the DCS. Also, ICCVs are part-time employees of JICS and often not paid for all the hours they work. IPID investigators' salary and allowances, on the other hand, must be on par with SAPS detectives;<sup>30</sup> and IPID investigators may not conduct investigations on matters in which they have a financial or other interest that might preclude them from exercising or performing their functions in an objective manner.<sup>31</sup> According to IPID policy, such interest should be disclosed and the investigators concerned should withdraw from any involvement in the investigation,<sup>32</sup> and measures have been put in place to ensure the impartiality and integrity of investigators.<sup>33</sup> IPID investigators are also insulated from liability that does not arise from grossly negligent acts or omissions.<sup>34</sup> Many of these policies would be directly transferable to JICS, vastly strengthening the role of ICCVs.

In addition, the undersigned organisations have received anecdotal reports of inmates reporting to ICCVs that they have been tortured or abused by DCS staff, but pleading with the ICCV not to take these reports further for fear of further victimisation, leaving the ICCVs feeling hamstrung as a result. These situations highlight the inappropriateness of expecting such serious complaints to be dealt with internally, and the immensely challenging situations that ICCVs may encounter, further highlighting the need for improved policies.

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<sup>24</sup> CSA section 86(1)(a)

<sup>25</sup> IPID Act, section 6

<sup>26</sup> IPID Act, section 7(4);

<sup>27</sup> IPID Act, section 7(9)

<sup>28</sup> CSA, section 90(3).

<sup>29</sup> CSA, section 93(1)(d)

<sup>30</sup> IPID Act, section 23

<sup>31</sup> IPID Act, section 24(1)

<sup>32</sup> IPID Act, section 25(2)

<sup>33</sup> IPID Act, section 26

<sup>34</sup> IPID Act, section 27

## ii. IPID Has Investigative, Enforcement and Disciplinary powers; JICS Needs Additional Powers

Although the CSA does not explicitly state in the JICS establishment clause that JICS has investigative authority,<sup>35</sup> it is implied as a power of the IJ in a clause that reads as follows: “For the purpose of conducting an investigation, the Inspecting Judge may make any enquiry and hold hearings”.<sup>36</sup> It appears, therefore, that the IJ’s power to investigate is limited to the fora of enquiries and hearings. JICS and the IJ’s jurisdiction is limited to complaints lodged and issues witnessed in correctional centres on visitation inspections.<sup>37</sup> IPID investigators, in contrast, have the right to investigate, “deaths in police custody or as a result of police action, complaints on police firearm discharge, rape by police officers or in police custody, complaints of torture or assault against police officers, police corruption, or matters referred to them by the Executive Director, Minister or Secretary of Police”.<sup>38</sup>

The IPID Act explicitly states that the Minister may make regulations on the procedures to be undertaken by IPID, in accordance with the Act. The Minister of Police must, however, consult with the Executive Director before he makes the regulations.<sup>39</sup> On the contrary, the IJ (and JICS) does not have the right to consult with the Minister of Correctional Services when the latter makes regulations.

The Minister of Correctional Services may make regulations unilaterally on the following actions:

- visitation to correctional centres,<sup>40</sup>
- death of an inmate,<sup>41</sup>
- the manner in which an inmate may make requests and complaints and how they are dealt with by correctional officials and custody officials,<sup>42</sup>
- an inmate’s appeal, review, and pardon procedure,<sup>43</sup>
- the searching of people entering correctional centres CSA, section 134(1)(v), and
- the reporting procedures where force is used.<sup>44</sup>

Similarly the National Commissioner has the right, without consulting with the IJ (or JICS) to issue orders related to the manner in which statistical information and research is obtained and the manner in which certain persons are allowed access to a correctional centre.<sup>45</sup> It should be noted, however, that the Minister of Correctional Services must refer proposed regulations to the Parliamentary Portfolio Committee on Correctional Services.<sup>46</sup>

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<sup>35</sup> CSA, section 85(2).

<sup>36</sup> CSA, section 90(5).

<sup>37</sup> CSA sections 85, 90(1), 90(2) and 93(1)(c).

<sup>38</sup> IPID Act, section 28.

<sup>39</sup> IPID Act, section 34.

<sup>40</sup> CSA, section 134(1)(l).

<sup>41</sup> CSA, section 134(1)(n).

<sup>42</sup> CSA, section 134(1)(r).

<sup>43</sup> CSA, section 134(1)(t).

<sup>44</sup> CSA, section 134(1)(aa).

<sup>45</sup> CSA, section 134(2)(nn) and (oo) respectively.

<sup>46</sup> CSA, section 134(5).

The IPID also has greater enforcement and disciplinary powers than JICS. IPID’s Executive Director must refer identified criminal offences to the National Prosecuting Authority.<sup>47</sup> Furthermore, upon IPID’s recommendation for disciplinary proceedings of police officers who are found to have committed criminal offences, the relevant Police Commissioner must “initiate disciplinary steps in response” on the progress of those disciplinary proceedings.<sup>48</sup> Most importantly, it is a criminal offence for members of SAPS or MPS to fail to report criminal offences under IPID’s jurisdiction, and to interfere, hinder or obstruct the Executive Director or any member of IPID in the exercise of their duty.<sup>49</sup>

In comparison, the IJ (or JICS) is neither obligated to report criminal offences to the NPA nor to recommend disciplinary action against correctional officials. As a matter of fact, ICCVs are required to reach a solution on an inmate’s complaint internally with the correctional centre and the officials concerned. DCS is also not obligated to report back on JICS’s recommendations. These issues fundamentally reduce the power of JICS to adequately address complaints levied against correctional officials.

#### **IV. Recommendations to Strengthen JICS**

##### **a. Recommendations to Increase JICS’s Independence**

1. Amend the CSA to provide for JICS’s structural independence from DCS.

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

2. JICS’s annual funding should be allocated directly from the Treasury rather than through the DCS.

As financial independence is a hallmark of an independent oversight body, JICS must have a separate budget from DCS. This budget could be allocated directly from the Treasury as is the case with the IPID and Chapter 9 institutions.

3. JICS’s governing statute should remove any ability for DCS leadership to exert political influence over appointments.

JICS’s governing statute should clarify that all JICS appointments can be made independently – that they do not need to be made in consultation with the National Commissioner of Correctional Services. It should be clear that the National Commissioner does not have veto power, but rather that appointments should be the sole responsibility of the Office of the Inspecting Judge (OIJ).

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<sup>47</sup> IPID Act, section 7(4).

<sup>48</sup> IPID Act, section 29(1).

<sup>49</sup> IPID Act, section 33(1), (3); section 29(1).

4. The appointment process for the Inspecting Judge should be reviewed to enable stakeholder consultation, enable more rigorous vetting, and remove the Minister of Correctional Services from the process.

At present, the Minister of Correctional Services nominates the Inspecting Judge, who is then appointed by the President. This is inappropriate for an independent oversight body for DCS. The Minister should be removed from the appointment process.

However, as with commissioners for the South African Human Rights Commission and the Commission for Gender Equality, the appointment of the Inspecting Judge should also not be made unilaterally by the President. Whether the Judicial Services Commission should be involved in the nomination, vetting, and appointment process must be reviewed. In addition, there should be space for civil society stakeholders who are interested in the effective functioning of JICS and OIJ to participate in the nomination and review process.

#### **b. Strengthening JICS's Mandate**

5. JICS's 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 OIJ.

In order to ensure compliance and cooperation with JICS, the undersigned organisations recommend that the CSA be amended to make it a criminal offence for anyone to hinder or obstruct the work of JICS, or to fail to make mandatory reports to the OIJ.

6. The list of items on which JICS makes mandatory reports should be expanded to include known systemic challenges within DCS facilities – such as prisoner rape and HIV-related health challenges that contribute to inmate deaths.

At present, the CSA requires JICS to report on inmate deaths, inmate segregation, unauthorised use of force, the use of mechanical restraints, and the use of solitary confinement. This list should be expanded to include other known rights abuses, including prisoner rape and other forms of sexual assault. Prisoner rape is a widely known problem plaguing DCS centres. Sometimes, prisoner rape takes place with the complicity or acquiescence of DCS staff members, or is perpetrated by them. It should be made mandatory for DCS to make reports to JICS on all incidents of sexual abuse of inmates, and JICS should mandatorily report and investigate all such cases. Assault and torture should also be added to the list of incidents that require a report.

JICS should 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 in correctional centres. JICS should conduct mandatory investigations on the delivery of health services for inmates who have died from HIV and AIDS and/or TB.

7. JICS should be given clear investigative powers, similar to other human rights oversight bodies, though not police-investigative powers like IPID.

At this time, JICS is weaker than other human rights oversight bodies such as the South African Human Rights Commission and the Commission for Gender Equality, which have the power of subpoena, the power to institute legal proceedings, and a 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, whenever it is in possession of a warrant.

JICS's powers pale in comparison to these institutions, as it can only 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's legal unit does conduct more in-depth investigations into specific unresolved cases. However, failure by DCS to comply with JICS recommendations does not result in penalties, other than reporting to regional and national head offices and/or to the Portfolio Committee. These investigations are also not systemic or mandated for specific serious issues, such as unnatural deaths, torture, assault, or rape involving DCS staff, and there is no clear mandate to refer cases to SAPS or the NPA when the facts reveal criminal conduct by DCS staff.

The Portfolio Committee should examine 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.

8. JICS should be empowered to make disciplinary recommendations to DCS, and DCS should be mandated 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 offer feedback to the Minister on the progress of such proceedings; and
- iii) inform JICS and the Minister immediately upon finalisation of such proceedings.

9. For investigations into certain issues – such as DCS staff involvement in unnatural deaths, torture, assault and rape – DCS should be barred from instituting internal proceedings until JICS's investigations

are completed. As a result of such investigations, JICS should be given the power to make binding decisions regarding the subsequent referral of cases to SAPS and NPA, as well as regarding DCS's internal disciplinary proceedings. The CSA should be amended to mandate the development of policy or regulations to guide these processes.

As noted in CSPRI's submission to this committee on JICS's Annual Report for 2011/2012, SAPS closed the files in the majority of homicide cases from DCS, while NPA declined to prosecute on the cases referred to them. The fact that there is virtual impunity in cases where DCS staff are involved in homicides requires urgent attention. Taking this current apparent impunity into consideration, it is vital for JICS to be mandated to refer certain cases to the SAPS and NPA for investigation and prosecution. Such referrals should be a result of JICS's own investigations into cases pertaining to torture, assault, rape and sexual assault, and unauthorised use of force against inmates. DCS should be barred from conducting internal investigations until JICS's investigations are complete. It is a conflict of interest for DCS to conduct such investigations as it has a vested interest in their outcome. As an impartial oversight body, JICS must be given the power to conduct its own investigations first.

At present, there is no policy or regulation guiding the referral of cases by JICS to SAPS and NPA. These agencies need enforceable policy or regulations to guide their actions pertaining to criminal cases involving DCS staff.

10. The CSA should be amended to clarify that the Minister of Correctional Services does not have the authority to make regulations about JICS, and that the IJ 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, procedures in the aftermath of a death of an inmate, the manner in which inmates make requests and complaints and how they're dealt with by DCS officials, the search of people entering DCS facilities, and the reporting procedures where force is used. All of these situations have the potential to affect JICS's ability to conduct its own affairs. Thus, the CSA should be amended to clarify that the Minister must consult with the IJ when making regulations that affect the work of JICS.

11. JICS must make public reports on its findings concerning its investigations.

JICS is not barred from making media statements or ensuring widespread dissemination and comment on its public documents and reports. Yet, to date, it has not made any such statements, nor publically released its reports, aside from tabling them in Parliament and posting them on its website. As with other watchdog bodies, alerting the public and key stakeholders to its findings must be essential to JICS's mandate. JICS should be mandated to have its own communications staff who are 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's mandate is to inspect and report on correctional centre conditions and the treatment of inmates. It should be made clear in the CSA that the objective of JICS is to not only report on the ill-treatment of inmates in the aftermath of abuses, but to proactively prevent human rights violations from occurring in the first place.

13. JICS must be adequately resourced to fulfil its mandate.

It is clear that a drastic expansion of JICS's mandate and powers would require considerable additional capacity within JICS, which, in turn, would require a substantial increase to its budget and personnel.

### **c. 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 opaque department. JICS should take advantage of this unique position and conduct thematic research to better access challenges facing DCS facilities. At present, civil society actors are attempting to conduct such research, but often in futility due to protracted DCS approval processes and tenuous access even in cases where such access officially 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 about their right to have access to ICCVs.

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

16. Training of ICCVs should be strengthened.

In order to improve the effectiveness of ICCVs and to ensure that they have sufficient understanding of the purpose of their work, the undersigned organisations suggest that training for ICCVs include a substantial component on human rights in correctional centres. Such training should be provided to new ICCVs as well as on a regular basis thereafter.

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

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

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

**END**