



SUBMISSION BY THE CIVIL SOCIETY  
PRISON REFORM INITIATIVE (CSPRI) TO  
THE PORTFOLIO COMMITTEE ON  
CORRECTIONAL SERVICES ON THE  
JUDICIAL INSPECTORATE FOR  
CORRECTIONAL SERVICES ANNUAL  
REPORT 2008/9

**22 October 2009**

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## Introduction

The Judicial Inspectorate (JI) plays a vital role in protecting prisoners' rights and contributing to the transformation of the South African prison system towards one that is compatible with a constitutional democracy. There are indeed many challenges and CSPRI is grateful for the efforts made by the JI to advance human rights in our prison system. The success of the JI is highly dependent on its perceived and substantive independence. If the independence of the JI and the Inspecting Judge is called into question, this will be a severe blow to the advancement of prison reform and prisoners' rights in South Africa. It is therefore of the utmost importance that the independence of this institution is fiercely protected by Parliament and civil society.

## Research and information

Prisons are by their very nature closed institutions and transparency is often difficult to achieve. It is for this reason that the Inspectorate makes an invaluable contribution to protecting prisoners' rights. Visits by independent persons and bodies remain the most effective way to prevent torture and other ill treatment.<sup>1</sup> An important strategy to promote transparency is to make information available to stakeholders about prisons and the treatment of prisoners. The Judicial Inspectorate's annual reports make a substantive contribution in this regard.

There is, however, a need for more information in order to strengthen transparency and ultimately oversight. Of particular importance in this regard are:

- The interpretation and application of the Correctional Services Act (111 of 1998), subordinate legislation and other applicable legislation to the prison system.
- The application of international human rights law to the prison system
- Quantitative information on the prison population
- Examples of good practice in the prison system
- Effective handling of complaints.

The above list is not exhaustive and merely highlights issues that CSPRI believes are important. CSPRI wishes to emphasise the importance of the first item listed above, namely the interpretation and application of the Correctional Services Act (111 of 1998), subordinate legislation and other applicable legislation to the prison system. It is CSPRI's observation that there remains much uncertainty and confusion about the interpretation of the Correctional Services Act on key issues and this result in different practices at different prisons. The JI can play a valuable role in developing and widely disseminating user-friendly guidance notes on how it interprets and applies particular aspects of the Correctional Services Act. For example, guidance notes on issues such as health care and children in prisons will greatly assist in promoting consistency in the prison system. While the Correctional Services Act guarantees the right to primary health care, there may indeed be different applications of this right in practice, but also different interpretations of this right

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<sup>1</sup> Ludwidge, F. (2006). The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture. *Helsinki Monitor*, 1, p.70.

between the JI, Parliament, civil society and the academic community. The JI is ideally placed to build consensus between stakeholders about the interpretation and application of key human rights issues.

It is also submitted that the JI can follow the practice of the UN treaty monitoring bodies by issuing what is known as “General Comments”. Each of the six UN human rights treaty-monitoring bodies periodically publishes documents known as General Comments or General Recommendations, which provide guidelines for States Parties on the interpretation of specific aspects of the human rights treaty of concern to the particular committee. General Comments clarify the content of Covenant rights in more detail, may outline potential violations of those rights and offer advice to states parties on how best to comply with their obligations under the treaties.<sup>2</sup> A particular example of this applicable to the prison system is General Comment No. 2 by the UN Committee against Torture.<sup>3</sup>

The JI collects vast quantities of information every year in the course of recording complaints and conducting inspections. This information can be utilised through further research and information dissemination to promote consistency and strengthen oversight over the prison system.

**In view of the above, CSPRI requests the Committee to establish from the JI the following:**

- **The intentions of the JI to develop research capacity?**
- **What it regards as information and research priorities?**

## **Dealing with complaints**

The Annual Report (pp. 32 – 34) describes how the JI deals with complaints received from inmates. It is noted that the JI received a total of 260 268 complaints; this is by all measures a sizeable number. The report does, however, not provide information on what the JI did with these complaints and how successful or not it has been in resolving the complaints. While it would be unrealistic to expect that the JI reports on each of the 260 268 complaints, it is submitted that more description and analysis of complaints recorded and their handling will be valuable in bringing about a better understanding of the JI’s work.

**In view of this CSPRI submits that the Committee requests the judicial Inspectorate to submit in its next annual report:**

- **More detail on how it has resolved complaints, e.g. number of complaints resolved, unresolved, referred to Visitors’ Committees, referred to Inspecting Judge, referred to SAPS etc.**
- **What are the challenges experienced in resolving complaints**
- **A detailed analysis of a representative sample on how complaints were dealt with.**

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<sup>2</sup> [http://www.righttowater.info/code/no15\\_1.asp](http://www.righttowater.info/code/no15_1.asp)

<sup>3</sup> UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008 <http://daccessdds.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>

## Torture and ill treatment

South Africa ratified the UN Convention against Torture (CAT) on 10 December 1998 committing itself to implementing measures giving effect to the objectives of CAT. It is regrettably the case that South Africa has not yet criminalised torture as required by Article 4 of CAT.

CAT defines torture in Article 1 as follows: *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*<sup>4</sup>

Based on this definition, four conditions are required for an action or inaction to qualify as torture:

- It must result in severe mental and/or physical suffering;
- It must be inflicted intentionally;
- It must be committed by or with the consent or acquiescence of a public official;
- It excludes pain and suffering as a result of lawful actions.

Very simply put, and by way of example, this means that if a DCS official assaults a prisoner and it results in severe mental and/or physical harm this would amount to torture, unless it can be shown that the assault was or formed part of a lawful action. Both the DCS annual report and the JI annual report reflect on thousands of assaults recorded or alleged.

It is often the view that torture must be perpetrated with the purpose of extracting information or obtaining a confession. While this may be two purposes of perpetrating torture, the definition in Article 1 of CAT is clear that these are only examples of why torture may be committed by using the wording "for such purposes as". Furthermore, Article 1 proceeds to identify other common aims of torture being "*punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*". The assault of a prisoner(s) by warders as punishment (e.g. an assault of another warder) would then meet the requirements of Article 1 of CAT.

Article 1 of CAT provides the current definition of torture under international law and this should be the basis for adoption in domestic law. The Convention does not, however, provide a definition of cruel, inhuman, and degrading treatment or punishment; often

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<sup>4</sup> Article 1

referred to as “other ill treatment”. Whether a particular act or actions or even conditions constitute cruel, inhuman, degrading treatment or punishment are left to courts to decide.<sup>5</sup> There have also been a number of South African decisions on this issue, such as *Whittaker and Morant v Roos and Bateman*,<sup>6</sup> *Stanfield v Minister of Correctional Services*<sup>7</sup> and *Strydom v Minister of Correctional Services*.<sup>8</sup> There is also growing international case law on this issue as well.<sup>9</sup> Scholars have also spent many hours questioning the relationship between torture on the one hand, and cruel, inhuman, or degrading treatment or punishment on the other hand. Can acts that do not in themselves constitute torture, amount to torture when applied over a prolonged period? These are vexing questions that will keep courts and scholars occupied for decades to come. Despite these challenges, it should be noted that both torture and cruel, inhuman, or degrading treatment or punishments are prohibited under CAT (see Articles 1 and 16), and that the protection against cruel, inhuman, or degrading treatment or punishment is also guaranteed in Section 12 (e) of the South African Constitution. There is an obligation on states to prevent both torture and cruel, inhuman and degrading treatment or punishment. Experience has also demonstrated that the conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment.<sup>10</sup>

**In view of the above, CSPRI submits that the Committee seeks clarification from the JI on the following:**

- **What measures it has taken to promote the absolute prohibition of torture and ill treatment in South Africa’s prison system as required by Article 2 of CAT** <sup>11</sup>
- **What measures it has taken to promote CAT as required by Article 10**<sup>12</sup>

<sup>5</sup> See *Ireland v UK* 1976 2 EHRR 25; Rodley N.S. (2002) ‘The Definition of Torture under International Law’ *Current Legal Problems*, Oxford University Press, 467-493.

<sup>6</sup> 1912 AD 92

<sup>7</sup> 2003 (12) BCLR 1384 (C)

<sup>8</sup> 1999 (3) BCLR 342 (W)

<sup>9</sup> See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002.

<sup>10</sup> UN Committee Against Torture (2007) *Draft General Comment - Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties*, Thirty-eighth session, 30 April – 18 May 2007, para 3.

<sup>11</sup> Article 2: 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

<sup>12</sup> Article 10: 1. Each State Party 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.

- **What measures it has taken to ensure that all allegations of torture made by prisoners are thoroughly investigated by competent, independent and impartial authorities as required by Article 12 and Article 13 of CAT<sup>13</sup>**

## **Deaths in custody**

CSPRI notes the detailed description of deaths in custody in Chapter 2 of the annual report. This has been a persistent problem in the prison system, but it appears that little has been done by the Department of Correctional Services to reduce the number of deaths, and particularly unnatural deaths. We note the concerns raised by the JI in respect of definitional issues and agree that many “natural” deaths may indeed be “unnatural”.

**The scale and persistence of deaths in custody requires a thorough and systematic investigation to seek systemic solutions. We submit that the Committee requests:**

- (a) Conducts through research on deaths in custody and make public a report in this regard**
- (b) The Inspecting Judge to use his powers under section 90(6) of the Correctional Services Act to hold public hearings on deaths in custody.**
- (c) The Inspecting Judge to use his powers under section 90(6) of the Correctional Services Act to hold commissions of inquiry in respect of all cases of unnatural deaths.**
- (d) The Inspecting Judge makes recommendations to the DCS on measures to be implemented to reduce the number of deaths in custody.**

## **Clear recommendations**

The Annual Report is dense with useful observations and recommendations from the JI, but these are part of the text and thus not easy to extract.

**In view of this CSPRI submits that the Committee requests the JI to adjust the format of its next and subsequent annual reports to clearly reflect its recommendations to the DCS and other departments, where applicable. This will enable more accurate monitoring and, we believe, strengthen the ability of the Portfolio Committee to exercise oversight over the DCS.**

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<sup>13</sup> Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13: Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

## Indicators for centre-level monitoring

The annual report provides a wealth of information and highlights many problematic aspects of the prison system. It should also be acknowledged that the information provided is often aggregated and does not necessarily provide a view of performance at individual centre level. In view of this, it becomes difficult to compare different centres and to monitor progress or otherwise. It will be an extremely helpful contribution if the JI is able to develop a set of core indicators, derived from its mandate, to monitor all prisons in respect of key performance outputs in relation to the treatment of prisoners.

**In view of this, CSPRI submits that the Committee seeks clarification from the JI in respect of:**

- **The development of a set of key performance indicators to monitor individual prisons in respect of the treatment of prisoners and compliance with the Correctional Services Act as it pertains to the relationship and obligations towards the JI.**

End