# SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE TO THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT ON THE PREVENTION OF AND TREATMENT FOR SUBSTANCE ABUSE BILL [B12-2008]

**MAY 2008**

## Introduction

The Civil Society Prison Reform Initiative (CSPRI) is a project of the Community Law Centre at the University of the Western Cape and was established in 2003 to address prison reform in South Africa. It engages in research and advocacy focusing on promoting prisoners' rights and building capacity amongst civil society organizations in the field.

In recent years, the work of CSPRI increasingly focused on the prevention of torture, cruel, inhuman and degrading treatment or punishment.[1] This was motivated, firstly, by South Africa's ratification of the UN Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (CAT) in December 1998 and further by South Africa's subsequent submission, in 2005, of an Initial Report[2] to the UN Committee against Torture. In November 2006 the Committee assessed South Africa's report and released its Concluding Remarks[3] shortly thereafter. Secondly, in June 2006 South Africa signed, but not ratified, the Optional Protocol to the UN Convention against Torture (OPCAT). OPCAT requires, amongst others, States Parties to the Protocol to establish a system of regular visits to places where people are deprived of their liberty by means of an independent mechanism known as the National Preventive Mechanism (NPM). State Parties to the Protocol also open all places of detention to the UN Sub-committee on the Prevention of Torture (SPT) consisting of international experts in the prevention of torture. Both

[1] In this regard, CSPRI has made written and oral submissions to the UN Committee against Torture in response to South Africa's Initial Report. It was also part of joint Community Law Centre submissions to the UN Human Rights Council under the Universal Periodic Review Mechanism and the African Commission on Human and People's Rights. A number of research reports have also been released dealing with the prevention and combating of torture and cruel inhuman and degrading treatment or punishment.

[2] *South Africa Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005

[3] UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.

CAT and OPCAT have significant implications for South Africa and should be seen as resources in the quest to give effect to section 12 of the Constitution and eradicate torture.[4]

This submission will therefore focus on the prevention and combating of torture, cruel, inhuman or degrading treatment within the context of the Prevention of and Treatment for Substance Abuse Bill [B12-2008] (the Bill hereafter). The overall objective is to promote the use of these two international instruments and, more specifically, to assist in creating the enabling legislation to give effect to section 12 of the Constitution.

## Background

In 2004 the Department of Social Development conducted an investigation into allegations of abuse at the Noupoort Christian Care Centre, a centre located in a small Northern Cape Town that purported to provide drug rehabilitation services.[5] This investigation was prompted by persistent complaints about how the centre was being operated and ultimately the death of two residents at the Centre. The report found evidence of significant human rights violations relating to torture and cruel, inhuman and degrading treatment or punishment. Solitary confinement, assaults, deprivation of family contact, lack of a complaints mechanism and arbitrary punishment were some of the violations uncovered by the Task Team who conducted the investigation. The Task Team also identified substantial problems with the treatment regime in place in the centre.

On 22 October 2007 *The Cape Times* reported on the death of a young man two weeks earlier, Mr. Sieraaj Charles, while he was in the care of a "spiritual upliftment centre" used to rehabilitate drug users and known as "The Chambers". According to police reports, Mr. Charles's body showed bruises on his hands and legs as if to shield himself from blows. The head of the centre, Amien Williams, explained that the centre uses "a form of Muslim punishment known as *falaka*" – this involves beating a person on their feet soles and hand palms with a cane or similar instrument.

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[4] 12. Freedom and security of the person
1. Everyone has the right to freedom and security of the person, which includes the right
   a. not to be deprived of freedom arbitrarily or without just cause;
   b. not to be detained without trial;
   c. to be free from all forms of violence from either public or private sources;
   d. not to be tortured in any way; and
   e. not to be treated or punished in a cruel, inhuman or degrading way.

[5] Department of Social Development (undated) *Report of the Inspection conducted at the Noupoort Christian Care Centre on 17 and 18 June 2004*. www.info.gov.za/otherdocs/2004/**noupoort**.pdf

The above two cases illustrate that people in drug treatment centres are extremely vulnerable to human rights violations and in particular to violations amounting to torture, cruel, inhumane or degrading treatment or punishment. 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.'

Based on this definition, four conditions are required for an act 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.

Today, the international ban on the use of torture has the enhanced status of a peremptory norm of general international law.[6] This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated[7] from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[8]

This prohibition of torture imposes on states obligations owed to all other members of the international community, each of which has a correlative right.[9] It signals to all states and people under their authority that

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[6] See the recent House of Lords decision in *A (FC) and others (FC) v Secretary of State for the Home Department* (2004); *A and others (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71 at 33. See also *R v Bow Street Metropolitan Stipendiary Magistrate*, *Ex parte* Pinochet Ugarte (No 3) [2000] 1 AC 147, 197-199; *Prosecutor v Furundzija* ICTY (Trial Chamber) judgment of 10 December 1998 at Paras 147-157.

[7] When states become parties to international human rights treaties, they are allowed to 'suspend' some of the rights under those treaties in certain situations or circumstances until the situation or circumstance that gave rise to the 'suspension' has come to an end. This is called derogation. For example, a state may ban people from travelling to some parts of the country during an outbreak of an epidemic. This may be interpreted by some people to means that their right to freedom of movement has been infringed. International and national human rights law permit such derogations.

[8] *Prosecutor v Furundzija* op cit Para 153.

[9] Ibid at Para 151. In other words, all countries of the world are 'hurt' when a person is subjected to torture by another country. It does not matter whether the person tortured is a citizen of country A or B. All countries have a duty to ensure that torture is not committed by their officials and also that it is not committed by other countries.

"the prohibition of torture is an absolute value from which nobody must deviate."[10] At the national level it de-legitimates any law, administrative or judicial act authorising torture.[11]

Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. The absoluteness of the ban means that it applies regardless of the status of the victim and the circumstances, be it a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind",[12] and torture itself as an act of barbarity which "no civilized society condones,"[13] "one of the most evil practices known to man"[14] and "an unqualified evil".[15]

Following from torture's status as peremptory norm, it means that any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution".[16] The CAT therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, CAT places the obligation on states to either prosecute or extradite any person suspected of committing a single act of torture. Doing nothing is not an option.

Article 2(1) of CAT requires state parties to 'take effective legislative, administrative, judicial or other measures to prevent act of torture in any territory under its jurisdiction'. Since South Africa has ratified CAT it is bound by the requirements of Article 2(1) and this Bill presents an opportunity to fulfil its obligations in respect of preventing and combating torture and ill treatment at centres falling within its scope.

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. Whether a particular act or actions or even conditions

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[10] Ibid at Para 154.
[11] Ibid at Para 155.
[12] *Filartiga v Pena-Irala* [1980] 630f (2nd Series) 876 US Court of Appeals 2nd Circuit at 890.
[13] *A (FC) and others v Secretary for the State for the Home Department* op cit at Para 67. Even states that use torture never say that they have a right to torture people. They either deny the allegations of torture or they try to justify it by calling it different names such as 'enhanced interrogation techniques' or 'intensive interrogation.' They know that torture should not be used in all circumstances.
[14] Ibid at Para 101.
[15] Ibid at Para 160.
[16] *Ex parte Pinochet* (no. 3), 2 All ER 97, pp 108-109 (Lord Browne-Wilkinson) citing *Extradition of Demjanjuk* (1985), 776 F2d 571 in Robertson, G. (2006) *Crimes against Humanity – the struggle for global justice*, Penguin, London, p. 267.

constitute cruel, inhuman, degrading treatment or punishment are left to courts to decide.[17] There have also been a number of South African decisions on this issue, such as *Whittaker and Morant v Roos and Bateman,*[18] *Stanfield v Minister of Correctional Services*[19] and *Strydom v Minister of Correctional Services*.[20] There is growing international case law on this issue as well.[21] 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? When does cruel, inhuman or degrading treatment become torture? 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 punishment are prohibited under CAT (see Articles 1 and 16), and that 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 parties to prevent both torture and cruel, inhuman or 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.[22]

The last issue to note under this section is the definition of 'deprivation of liberty' as noted in OPCAT. People deprived of their liberty are particularly vulnerable to torture, abuse and ill-treatment for the simple reason that they are dependent on officials or other persons for access to basic services and assistance. The second paragraph of Article 4 of OPCAT defines the deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'. Importantly, it is not restricted to government operated facilities and makes specific mention of privately operated facilities. The test, however, is whether people in such a facility[23] can leave it at free will or not, regardless of whether the deprivation of liberty is intended to be temporary or of a longer nature.

In the context of this Bill four key issues emerge from the above:

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[17] 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.
[18] 1912 AD 92
[19] 2003 (12) BCLR 1384 (C)
[20] 1999 (3) BCLR 342 (W)
[21] See *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002.
[22] 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.
[23] 'Facility' is used here in the broadest possible sense of the word and refers to both traditional places of detention such as prisons and police cell, as well as non-traditional places such as airport transit areas.

- People in drug treatment centres are vulnerable to human rights abuses and in particular to torture and other forms of ill treatment
- South Africa has an obligation under the Constitution and under international law to take all measures to prevent and combat torture, as well as the ill-treatment of people deprived of their liberty
- Many drug treatment centres keep people under conditions that would meet the definitional requirement of deprivation of liberty.
- The Bill presents an opportunity to meet the requirements under CAT and OPCAT in respect of drug treatment centres.

The submission will now deal with substantive issues in the Bill with reference to the relevant clauses.

## Clause 4

CSPRI supports the development of Minimum Norms and Standards as proposed in clause 4. Such norms and standards will assist greatly in providing clarity on operational issues and with the appropriate monitoring mechanism ensure that a preventive approach is followed in the protection of people residing at drug treatment centres. We also note the *Minimum Norms and Standards for Inpatient Treatment Centres*[24] adopted by the Department of Social Development in 2005. More detailed commentary on these standards has been made elsewhere and need not be repeated here.[25]

Two issues arise from clause 4. Firstly, whether the 2005 minimum norms and standards adopted by the Department of Social Development, as referred to above, meet the requirements of clause 4 and will therefore continue to exist as the applicable standards? In view of this we respectfully submit that the Committee requests clarification from the Department of Social Development on the Minimum Norms and Standards and what progress has been made towards implementation as well as whether they are in line with what is generally regarded as good practice internationally in this regard.

Secondly, clause 4 lists the scope of the minimum norms and standards in 4(1)(a-h). Clause 4(1)(b) makes specific reference to children and this is supported. However, it should be emphasised that all people in treatment centres are vulnerable to exploitation and abuse as a consequence of their substance abuse and addiction. While children may occupy a special position, the same can be said for women, the disabled or

[24] National Department of Social Development *Minimum norms and standards for inpatient treatment centres* (2005).
[25] Muntingh L and Fernandez L (forthcoming) A review of measures in place to affect the prevention and combating of torture with specific reference to places of detention in South Africa, *SA Journal of Human Rights*.

persons living with HIV/Aids. It is therefore not proposed that all categories of vulnerable and potentially vulnerable people should be listed, but rather than an inclusive formulation is used emphasising the protection of rights and setting out procedures to deal with rights violations.

It is therefore submitted that clause 4(1)(b) be amended to read:

> (b) relating to the protection of the rights of all people in treatment centres and halfway house with specific reference to the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

As noted above, many people in treatment centres will be deprived of their liberty and this creates a number of risks. Some treatment centres may, to a greater or lesser extent, function as a custodial setting and thus not unlike a prison. In view of this it is important to set minimum standards in law. It is with good reason that the Correctional Services Act (111 of 1998) describes these standards for prisons in unusual detail in Chapter 3 of the Act under the heading "Custody of all prisoners under conditions of human dignity". These are further developed in the Regulations to the Act. It is, however, not only the drafters of the Correctional Services Act that were mindful of the importance of setting such standards in law, but also the drafters of the Immigration Act and its Regulations. Foreign nationals are detained in terms of Section 34 of the Immigration Act (13 of 2003) as amended by the Immigration Amendment Act (19 of 2004).[26] Such detention must be in compliance with the 'minimum prescribed standards protecting his or her dignity and relevant human rights.'[27] Regulation 39 of the Immigration Regulations,[28] states that the minimum standards referred to in section 34(1)(e) of the Immigration Act 'shall conform to those prescribed in the Correctional Services Act.'

In view of the above, we submit that the minimum standards to be maintained regarding the accommodation, and safe and humane custody of all persons in treatment centres be described in the legislation. We draw the Committee's attention to Chapter 3 of the Correctional Services Act for guidance in this regard. It is furthermore noted that clause 4(1) does not make explicit reference to minimum norms and standards dealing with accommodation, and safe and humane custody.

## Clause 17

Clause 17 deals with the monitoring and assessment of treatment centres and halfway houses and proposes a visiting mechanism. Places of detention, such as drug treatment centres and halfway houses, are usually not

[26] S 13 of 2002 as amended by the Immigration Amendment Act, 19 of 2004.
[27] S 34(1)(e)
[28] Immigration Regulations, Vol. 452, No. 24952.

open to public scrutiny and what happens there remains hidden from the public view. The public also often chooses not to know what is happening in such places. In situations where people are deprived of their liberty they are extremely vulnerable to human rights violations and ill-treatment as they have no voice. To prevent violations it is of critical importance that places of detention function in a transparent manner. This means that officials and people who operate such facilities have a duty to act **visibly**, **predictably** and **understandably**.[29] Nothing must be hidden from public scrutiny, especially when human rights concerns are at stake. The actions of officials and people who operate such facilities must be predictable as guided by policy, legislation, regulations, standing orders and good practice. Without transparency there can be no accountability.

Regular, announced and unannounced, visits by independent bodies or individuals promote transparency in four ways:

- **Prevention:** The simple fact that an outside person enters a place of detention contributes to the protection of people detained there.
- **Direct protection**: Site visits make it possible to react immediately to problems affecting detainees.
- **Documentation**: Information collected during visits is documented and a historical record is developed based on facts to motivate recommendations for improvement.
- **Basis for dialogue**: Visits make it possible to develop a process of dialogue with authorities and officials in charge. This dialogue is based on mutual respect and aimed at developing a constructive working relationship.[30]

In view of this, the submission focuses on two issues: (1) the scope of the proposed monitoring mechanism, and (2) the monitoring mechanism itself and the need for independent oversight.

*Scope of the proposed monitoring mechanism*

The proposed monitoring mechanism described in clause 17 has the mandate to 'enter any private or public treatment centre or private or public halfway house and assess and monitor compliance with any prescribed requirements and applicable minimum norms and standards in relation to -

(a) the records and documents of such centre or house;

(b) any service users admitted or accommodated in such centre or house; and

(c) the programmes provided by such centre or house.'

[29] Transparency International "*What is transparency*?" http://www.transparency.org/news_room/faq/corruption_faq
[30] Schaufelberger, E. and Bernath, B. (2004) *Monitoring places of detention*, Association for the Prevention of Torture, Geneva, p. 26.

Clause 17(1)(a-c) is restrictive in nature as it narrows the inclusive wording of the first part of clause 17 ("any prescribed requirements and applicable minimum norms and standards") to only the three issues listed. The phrasing "any prescribed requirements and applicable minimum norms and standards" would in essence refer to binding international law as well as all domestic law. From a rights perspective there is little reason to find fault in this phrasing. The specific focus areas listed in clause 17(1)(a-c) is therefore unfortunate as it excludes important aspects of treatment centre operations, such as rights violations.

Furthermore, the intended purpose of clause 17(1)(b) is also unclear and seems to indicate an assessment and monitoring of the people accommodated in a centre or halfway house but does not spell out with what purpose in mind.

*The monitoring mechanism and the need for independent oversight*

The need for independent oversight when people are deprived of their liberty is accepted in both international and domestic good practice. For example, the Correctional Services Act provides for the Judicial Inspectorate and its system of Independent Prison Visitors. Although not with the same powers, the Independent Complaints Directorate (ICD) provides oversight over the South African Police Services (SAPS). On the other hand, independent oversight over the Lindela Repatriation Centre for illegal immigrants had not been established, an issue that the UN Committee against Torture expressed grave concerns about:

> 'The State party should take all necessary measures to prevent and combat ill-treatment of non-citizens detained in repatriation centres, especially in the Lindela Repatriation Centre, provide non-citizens with adequate information about their rights and the legal remedies available against any violation of these rights and continue to accelerate its measures to reduce the backlog of asylum applications. Prompt, thorough and independent investigation of all allegations of ill-treatment of non-citizens should also be ensured and an effective monitoring mechanism should be established for those centres.'[31]

Article 11 of CAT makes it clear that states parties to the Convention must keep under constant review the 'methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment'.[32] The most effective way to achieve this is through independent oversight and monitoring.[33] It is towards this objective that OPCAT is aimed. Since South Africa is a

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[31] UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006, Para 16

[32] Article 11: Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

[33] Ludwidge F (2006) The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture, *Helsinki Monitor* No. 1, p. 70

signatory to OPCAT and has made its intentions to ratify the Protocol clear at the UN Human Rights Council clear[34], it would therefore be wise to reflect on these requirements in reviewing this Bill.

Article 17 of OPCAT reads: 'Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.'

The purposes and mandate of the NPM is explained in Article 19 of OPCAT:

> 'The national preventive mechanisms shall be granted at a minimum the power:
> (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
> (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
> (c) To submit proposals and observations concerning existing or draft legislation.'

Article 18 of OPCAT further requires that the NPM:

- Is functionally independent;
- Uses the services of persons with the necessary expertise and knowledge, with reference to representivity;
- Shall receive the necessary resources to operate effectively, and
- Shall comply with the Paris Principles in relation to national human rights institutions

Against these requirements, the mandate of the monitoring mechanism proposed in clause 17 exhibits a number of shortcomings. Firstly, the wording of clause 17 does not explicitly establish the monitoring mechanism as an independent structure since it operates under the instruction of the Director General or Minister. The wording of the Correctional Services Act is instructive in this regard as it establishes the Judicial Inspectorate as 'an independent office under the control of the Inspecting Judge'.[35] The ICD enjoys similar

[34] At the Universal Periodic Review mechanism South Africa was reviewed on 15 April 2008. The South African representative stated that there were no political hurdles to ratifying OPCAT.
[35] Section 85(1)

independence and section 50(2) of the South African Police Service Act (68 of 1995) reads: 'The directorate shall function independently from the service', referring to SAPS.

Secondly, from the wording of clause 17 it is also apparent that the envisaged monitoring mechanism will only visit a treatment centre or halfway house when directed to do so by the Director General or the Minister. The wording of clause 17(3) gives further restrictive effect to this by requiring a certificate to be obtained from the Director General prior to a visit being conducted. An effective monitoring mechanism needs to be able to conduct visits without restriction and such visits may be announced or unannounced. The relevant articles of OPCAT place no restrictions on when and how a visit to a place of detention should take place.[36]

Thirdly, clause 17(2) allows the monitoring mechanism to interview any system user. While the intention of this provision is supported, it is also noted that it does not afford the necessary protection to people who have communicated with and/or supplied information to the monitoring mechanism. Article 21 of OPCAT requires such protection and we submit that a similar provision is included in the Bill:

> '1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
> 2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.'

Fourthly, clause 17(4) states that a certificate issued by the Director General authorizing a visit by the monitoring mechanism is not required when there is reason to believe that a person's life is in danger or under threat. Two limitations emerge from this wording. The first is the high threshold that it sets for the monitoring mechanism to conduct an unannounced visit, namely that a person's life must be under threat or in danger. Article 12 of CAT provides guidance in this regard and states that a prompt and impartial investigation by competent authorities must be undertaken 'whenever there is reasonable ground to believe that an act of torture has been committed'.[37] Moreover, Article 16[38] clearly states that this provision extends

[36] See Articles 17, 18, 19 and 20.
[37] 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.
[38] Article 16: 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

to acts that may not amount to torture, as defined in Article 1, but may amount to cruel, inhuman and degrading treatment or punishment. CAT is therefore lucid in this regard: an investigation must be conducted whenever there is reasonable ground to believe that torture or cruel, inhuman and degrading treatment had happened and that such suspected acts need not be life threatening. The second limitation emerging from the wording of clause 17(4) is that it effectively prevents unannounced visits of a preventive nature and this goes to the heart of OPCAT. Research and practice by the European Committee for the Prevention of Torture (CPT) have shown that announced and unannounced visits to places of detention is the most effective method of preventing torture and the ill treatment of persons in such facilities. It is also visits of this nature that have been conducted by the International Committee for the Red Cross for many decades. The CPT describes it as follows:

> 'The Committee's purpose is to strengthen the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment. It seeks to achieve this goal through visits to places of detention and the subsequent establishment of an "on-going dialogue" with States, based on CPT reports and State responses.'[39]

In view of this we submit that the monitoring mechanism's mandate be extended to allow for announced and unannounced visits of a preventive nature and without the requirement that there needs to be a suspicion of torture or ill treatment taking place.

The fifth limitation emerging from clause 17 regards the reporting of the findings of the monitoring mechanism. Clause 17 is silent on how the monitoring mechanism reports its findings. Presumably it will submit its findings to the Director General and Minister, but this does not meet the objective of promoting transparency. Both the Judicial Inspectorate and the ICD publish annual reports that are public documents. It is submitted that this Bill should enable a similar approach. This would also be in line with Article 23 of OPCAT.[40]

## Clause 24

The obligations and duties of the management structure of treatment centres and halfway houses are described in clause 24(3) and we support this. However, the duties set out in clause 24(3)(a-f) does not give recognition to the duty of the management structure to ensure that the rights of persons at that centre are

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2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

[39] Council of Europe (2002) *Preventing ill treatment – an introduction to the CPT,* p. 5, http://www.cpt.coe.int/en/documents/ENG-booklet-scr.pdf

[40] Article 23 The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

protected. Instead the emphasis is placed on issues relating to good governance. It is our submission that the centre management structure has a positive duty to adopt and implement all such measures to ensure that the rights of all system users at the centre or halfway house are protected. Ensuring compliance with the minimum norms and standards, referred to in clause 4, as well as the overall provisions of this Bill would therefore be of the utmost importance.

It is therefore submitted that clause 24(3) is amended as follows:

> (3) The management structure established in terms of subsection (1) must ensure that the treatment centre or halfway house -
> (a) does not violate the rights of any person in the care of the treatment centre or halfway house
> (b) complies with the requirements of this Bill and any other applicable legislation
> (c) provides a quality service;
> *(c)* provides opportunities for the training of staff;
> *(e)* applies principles of sound financial management;
> *(f)* if it is a treatment centre or a halfway house registered in terms of the Non-Profit Organisation Act, 1997 (Act No. 71 of 1997), complies with section 18 of that Act;
> *(e)* if it is a company registered in terms Companies Act, 1973 (Act No 61 of 1973), complies with section 302 of that Act; and
> *(f)* functions effectively.

## Conclusion

The above submission has focussed on the protection of human rights when people are placed in the care of a treatment centre or halfway house. It is furthermore our submission that developments in international law and in particular South Africa's obligations under CAT and OPCAT, require that this Bill needs to be assessed from this perspective. There is ample evidence indicating that rights violations have taken place and in all likelihood continue to take place in treatment centres. Independent oversight and regular monitoring by suitably mandated visiting mechanisms will assist in the prevention of torture and ill-treatment of people placed such facilities. This Bill further provides the timely opportunity to set in law the standards and mechanisms that will meet the requirements of OPCAT as South Africa has made its intentions to ratify OPCAT clear.

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