



**SUBMISSION TO THE PORTFOLIO
COMMITTEE ON CORRECTIONAL
SERVICES BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE
(CSPRI) IN RESPONSE TO THE DEPARTMENT OF
CORRECTIONAL SERVICES ANNUAL REPORT 2006/7, 31 October
2007**

Introduction

1. 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 focussing on promoting prisoners' rights and building capacity amongst civil society organisations in the field.
2. The 2006/7 Annual Report of the Department of Correctional Services (DCS) gives reason for optimism as it illustrates, in many regards, significant advances made during the period under review. We wish to congratulate the Department on its efforts.

Areas of concern

3. The safety of prisoners does, however, remain cause for concern and the Committee's attention is drawn to Section 12(1)(d) and (e) of the Constitution¹ as well as Section 2(b) of the Correctional Services Act.² These provisions, which are non-derogable in the Constitution, require that prisoners must at all times be detained under conditions of human dignity and that they are protected from torture, cruel, inhuman and degrading treatment. By its very nature, imprisonment places the right to dignity at

¹ S 12(1)(d) provides protection against torture and S 12(1)(e) provides protection against cruel, inhuman and degrading treatment or punishment.

² Section 2(b) requires that all prisoners must be detained in safe custody whilst ensuring their human dignity.

risk and the right to freedom from torture and protection against cruel, inhuman and degrading treatment are therefore all the more important to uphold.

4. It is therefore reason for deep concern that the number of unnatural deaths rose from 30 to 62 in the past two years. This is more than double the target the Department set for itself, which were 29 unnatural deaths. The annual report unfortunately does not disaggregate this data in respect of the exact cause of death.
5. Of equal concern is the number of assaults reported; 1822 in the 2006/7 year which was slightly higher than the target the Department set for itself.³ It should further be borne in mind that previous annual reports by the Office of the Inspecting Judge usually report that on average 2500 complaints regarding assaults are lodged by prisoners with IPVs. In respect of assaults, it is noted that these include prisoner on prisoner, staff on prisoner, and prisoner on staff. The number of assaults should therefore be seen as an overall measure of safety in the prison system. Whereas previous annual reports provided a breakdown in this regard, the 2006/7 Annual Report does not.⁴
6. The Committee's attention is also drawn to the fact that South Africa ratified the UN Convention against Torture (CAT) in 1998 but has failed in substantive ways to meet its obligations. The Committee against Torture in its *Concluding Remarks* on South Africa's *Initial Report* lamented the fact that the country has not yet criminalised the act of torture as is required by Article 4 of CAT.⁵ It is of critical importance for South Africa, in its efforts to prevent and combat torture, to criminalise torture. The use of common law to prosecute perpetrators of torture is regarded by the Committee against Torture as insufficient.
7. For the purposes of this submission and in line with South Africa's obligations under CAT, the definition of torture in Article 1 of CAT applies:
 - it must result in severe physical or mental suffering;
 - it must be inflicted intentionally;

³ Department of Correctional Services (2007) *Annual Report 2006/7*, Pretoria, p. 38.

⁴ Based on the 2001/2 and 2002/3 annual reports it is estimated that officials are reportedly responsible for just over 20% of reported assaults. See 2002/3 Annual Report p. 45.

⁵ Committee against Torture *Consideration of reports submitted by states parties under Article 19 of the convention - Conclusions And Recommendations of the Committee Against Torture – South Africa* (Advanced Unedited Version) CAT/C/ZAF/CO/1, 37th Session, 6 – 24 November 2006, 23 November 2006, Geneva, Para 13

- it must be committed by a public official or at the behest or acquiescence of a public official, and
- it excludes pain or suffering arising from or inherent in or incidental to lawful actions.

The international ban on the use of torture also has the enhanced status of a peremptory norm of general international law,⁶ meaning 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 from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”*⁷

The prohibition of torture imposes obligations on states owed to the other members of the international community, each of which then has a correlative right.⁸ It signals to all states and people in their respective jurisdictions that “the prohibition of torture is an absolute value from which nobody must deviate.”⁹ At national level, it delegitimizes any law, or administrative or judicial act authorising torture.^{10 11} Also, no state may excuse itself from the application of the peremptory norm. The revulsion with which the torturer is regarded is demonstrated by the 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

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 para 33. See also *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p 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 cited in Fernandez L and Muntingh L (forthcoming) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.

⁷ *Prosecutor v. Furundzija* ICTY (Trial Chamber) Judgment of 10 December 1998 at para 153 (Case no. IT/95-17/1/T) cited in Fernandez L and Muntingh L (forthcoming)

⁸ *Prosecutor v. Furundzija* Para 151 The violation of such an obligation constitutes a “breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued”.

⁹ *Prosecutor v. Furundzija* Para 154

¹⁰ *Prosecutor v. Furundzija* Para 155

¹¹ See Fernandez and Muntingh (forthcoming).

¹² *Filartiga v. Pena-Irala* [1980] 630 F (2nd Series) 876 US Court of Appeals 2nd Circuit 890, cited in Fernandez L and Muntingh L (forthcoming) Note 3.

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 16}

8. It was therefore with good reason that in 2006 the UN Committee against Torture expressed its concern about the high number of deaths of persons in custody in South Africa and the lack of investigation thereof:

The Committee is concerned at the high number of deaths in detention and with the fact that this number has been rising. The Committee is also concerned at the lack of investigation of alleged ill-treatment of detainees and with the apparent impunity of law enforcement personnel (art. 12).

The State party should promptly, thoroughly and impartially investigate all deaths in detention and all allegations of acts of torture or cruel, inhuman or degrading treatment committed by law enforcement personnel and bring the perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention.¹⁷

In view of these requirements this submission will focus on the safety of prisoners and pay particular attention to deaths and assaults in prisons.

9. Deaths in custody have been a persistent problem in the South African prison system. The deaths being referred to here are the so-called unnatural deaths and refer to murder, accidents and suicides. Chart 1 provides an overview of statistics collated from DCS annual reports for the period 2000/1 to 2006/7. In order to make figures comparable, these are expressed as a per-100 000-in-custody-ratio for the relevant year. Due to significant fluctuations in the total prison population over this period, the number of actual deaths will not provide an accurate picture, but these are also provided in the same chart.
10. The most obvious trend is that the number of unnatural deaths has been fluctuating significantly over the seven-year period; rising from less than 10 per 100 000 to 40 per 100 000 and dropping again to 20 and climbing up to 38 in the last year. The reasons for these fluctuations are not clear and there does not appear to be relationship with the size of the prison population and thus overcrowding.

¹³ *A (FC) and others v. Secretary of State for the Home Department* para 67, cited in Fernandez L and Muntingh L (forthcoming).

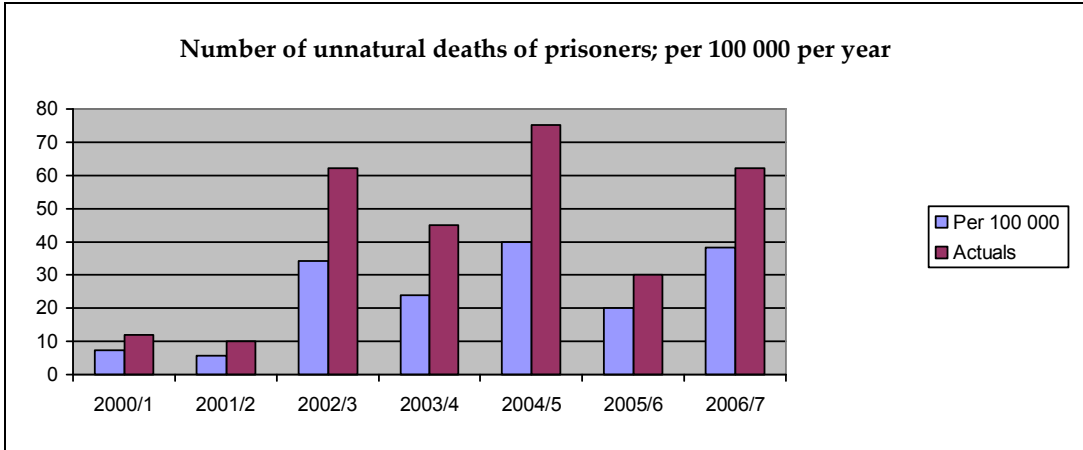
¹⁴ Para 101.

¹⁵ *Ibid* at Para 160.

¹⁶ See Fernandez and Muntingh (forthcoming).

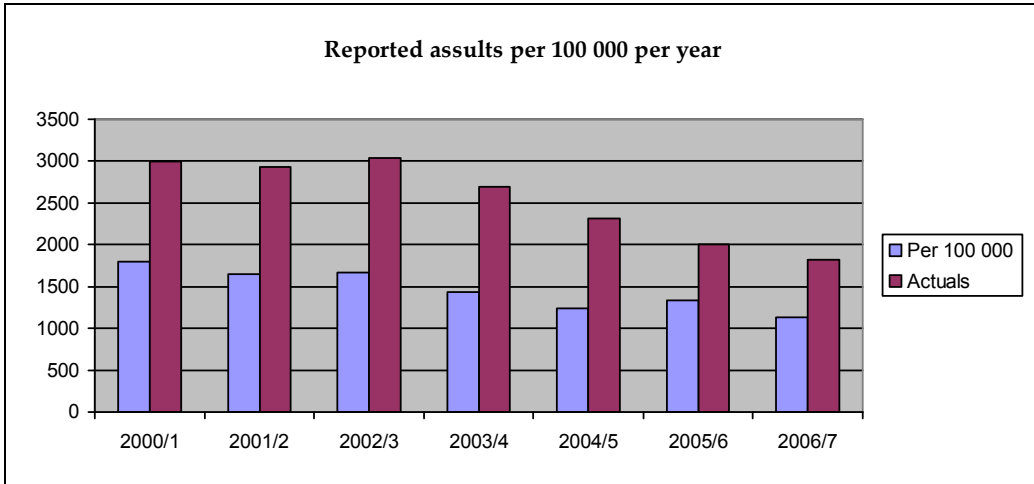
¹⁷ Committee against Torture *Consideration of reports submitted by states parties under Article 19 of the convention - Conclusions And Recommendations of the Committee Against Torture – South Africa* (Advanced Unedited Version) CAT/C/ZAF/CO/1, 37th Session, 6 – 24 November 2006, 23 November 2006, Geneva, Para 20

Chart 1



11. The safety situation in prisons can also be measured by the number of assaults reported by prisoners and reflected in DCS annual reports. Chart 2 presents this data; again expressed as a per-100 000-ratio as well as the actual figures. Similar to the figures presented above in Chart 1, the number assaults also appear to see-saw from one year to the next, although not as pronounced as the data in Chart 1. The general decline in the number of assaults is noted, although this may be a function of the accessibility and perceived effectiveness of the complaints mechanism. Again there does not appear to be relationship with the size of the prison population and overcrowding.

Chart 2



12. It is of critical importance to see this data not for bland statistics but that it directly relate to the rights and dignity of prisoners. The numbers are at levels indicating that a significant number of prisoners die annually due to unnatural causes and that

assaults are common. In the last year there was an average five such deaths and 152 assaults reported per month. This cannot be regarded as satisfactory or reflective of a prison system able to guarantee the safety of prisoners and staff.

13. It should furthermore be recalled that the state has a duty to investigate all deaths and assaults taking place in prisons. This duty is succinctly summarised in Article 12 of the CAT: *'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'*. The requirement in Article 12 is clear in that the victim does not need to lay a complaint; there only needs to be reasonable ground to believe that an act of torture had taken place.
14. Problems with investigations have been reported on several occasions and there is substantial evidence indicating that the police seldom follow through on criminal cases made by prisoners against officials of the Department.¹⁸ This situation perpetuates a culture of impunity; a situation that actively undermines the objectives of the DCS.
15. Against this background the Committee's attention is drawn to the following cases illustrating the lack or at least slow progress in respect of investigations:
 - Pollsmoor prison: the deaths of Bayanda Nethi, Christopher Sibidla and Trevor Petersen on or about 24 August 2004. It is not known if any officials have been prosecuted, and if not, the reasons for such a decision.
 - Pollsmoor prison: the deaths of Jonathan Davids, Vincent Carelse and Kevin Van Rooyen on or about 29 October 2004. It is not known if any officials have been prosecuted, and if not, the reasons for such a decision.
 - St Alban's prison: the mass assault of prisoners, denied access to medical care, and denied access to legal representation during June 2005. A senior DCS official admitted to the UN Committee against Torture in November 2006 that the assaults did in fact take place. However, to date only one official has been prosecuted and acquitted. A civil matter is in progress.¹⁹

¹⁸ Muntingh L and Fernandez I (2006) *Civil Society Prison Reform Initiative (CSPRI) Submission To The Un Committee Against Torture In Response To "Republic Of South Africa – First Country Report On The Implementation Of The Convention Against Torture, And Other Cruel, Inhuman And Degrading Treatment Of Punishment, CSPRI, para 67.*

¹⁹ Correspondence with legal representative on file with author.

- Pollsmoor prison: the death of female prisoner Marilyn Syfers on 4 April 2006. While a Departmental disciplinary enquiry found the official in charge at the time guilty, she received a written warning but no criminal charges were laid.
 - Waterval prison: the deaths of 6 prisoners between December 2006 and July 2007.²⁰ Subsequent to initial media reports regarding the incident, no further information were available at the time of writing.
 - Krugersdorp prison: the deaths of Simphiwe Tshabalala, Patrick Nxumalo, and Dudu Maqhiwa on or about 14-15 April 2007. Subsequent to initial media reports regarding the incident, no further information were available at the time of writing.
 - Modderbee prison: the death of Schalk Willem O'Callaghan in May 2007.
16. The above cases reflect a considerable time lapse since the incidents took place and it is uncertain what progress has been with these investigations. It also appears that the National Prosecuting Authority (NPA) has on a number of occasions declined to prosecute without explaining the reasons for such a decision. This is an issue that the UN Committee against Torture expressed deep concern about: *The Committee is concerned about the wide discretionary powers available to the National Prosecuting Authority with regard to criminal justice (art. 12).*²¹ Given the gravity of the offence of torture, it would not be unreasonable of Parliament to expect an explanation from the NPA when it declines to prosecute in these matters.

Recommendations

17. In view of the above, CSPRI submits the following as recommendations to strengthen measures to combat and prevent torture, cruel, inhuman and degrading treatment or punishment in South Africa's prison system.
18. We respectfully submit that this Committee liaises with its counterpart for Justice and Constitutional Development regarding progress made towards legislation

²⁰ The names of prisoners were not released to the media and are not known to the author.

²¹ Committee against Torture *Consideration of reports submitted by states parties under Article 19 of the convention - Conclusions And Recommendations of the Committee Against Torture – South Africa* (Advanced Unedited Version) CAT/C/ZAF/CO/1, 37th Session, 6 – 24 November 2006, 23 November 2006, Geneva, Para 19.

criminalising torture. Two earlier drafts of such a Bill were circulated by the Department of Justice and Constitutional Development in 2005 and 2006, but no progress has been apparent subsequently.

19. Given the high number of unnatural deaths in prison, as well as the high number of reported assaults, we propose that a thorough investigation be conducted by the Office of the Inspecting Judge of Prisons into the underlying and direct causes for these deaths, as well as the findings of investigations conducted by SAPS. Such an investigation also needs to address the actions that have been taken by the Department to deal with offending staff members. The value of such an investigation will lie in bringing greater transparency and being able to make recommendations on the prevention of deaths and assaults in prisons.
20. Staff of the DCS needs to be thoroughly trained on the Act and in particular on the minimum use of force. In line with Article 10 of CAT it is important that the training of staff includes the absolute prohibition of torture and that this prohibition is included in the rules of instruction.²²
21. The DCS needs to implement a general programme raising awareness on the absolute prohibition of torture, cruel, inhuman, degrading treatment or punishment. In this regard it is important to disseminate the CAT and the UN Committee against Torture's *Concluding Remarks on South Africa's Initial Report*, as was recommended by the Committee.²³
22. In order to prevent torture, cruel, inhuman, degrading treatment or punishment, prisoners must upon admission be informed of their rights and in particular the absolute prohibition of torture. It is furthermore important that this information be reinforced on a continuous basis.

²² 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.

²³ Para 30: The Committee requests the State party to disseminate its report, with the written answers to the Committee's oral questions, and the conclusions and recommendations of the Committee widely, in all appropriate languages, through official websites, the media and non-governmental organizations.

23. Given the problems and general delays in investigations, it is recommended that progress on investigations dealing with assaults and deaths be monitored by the Judicial Inspectorate of Prisons to ensure that they are conducted in a prompt and impartial manner.
24. In order to promote transparency and accountability, it is recommended that the results of investigations into assaults and unnatural deaths be made public by the DCS and the Judicial Inspectorate of Prisons in their respective annual reports.

End

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