Submission by the Civil Society Prison Reform Initiative to the Department of Justice and Constitutional Development on Implementation Plans for the Victim's Charter

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Introduction

1. The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 and is a project of the Community Law Centre at the University of the Western Cape. CSPRI was established in response to the limited civil society participation in the discourse on prison and penal reform in South Africa. To address this, four broad focus areas were developed:
    - Developing and strengthening civil society involvement and oversight over corrections
    - Promotion of non-custodial sentencing and penal reform
    - Improving prison governance
    - Improving offender reintegration services
3. We welcome this opportunity to provide in-put on this important document aimed at improving services to victims of crime. It is noted that the request for submissions refers specifically to the following issues:
    - What services are offered to victims of crime
    - What services government should offer victims of crime
    - How to strengthen government and civil society partnerships to support victims of crime
    - Proposals on how civil society should monitor implementation of the Victims Charter
    - Any other issues related to the Victims Charter that you believe the Justice Department should be informed about
4. In view of these guidelines this submission will focus on the status of, and services to victims of torture. CSPRI is particularly concerned about the status of prisoners and other detainees when subjected to torture, cruel, inhuman of degrading treatment of punishment. We are similarly concerned about services for such victims and the possibilities of them receiving appropriate redress. These issues will be the focus of

this submission. The submission also deals briefly with the victim participation in parole board hearings.

UN Convention against Torture

5. South Africa ratified the UN Convention against Torture (CAT)[1] on 10 December 1998 and thus signified to the international community that it subscribes to the international ban on torture and that it will put in place measures in its jurisdiction to give effect to the objectives of CAT. The international ban on the use of torture also has the enhanced status of a peremptory norm of general international law, [2] meaning that as a peremptory norm, 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*."[3]

6. The prohibition of torture imposes on states obligations owed to the other members of the international community, each of which has a correlative right.[4] It signals to all states and people under their authority that "the prohibition of torture is an absolute value from which nobody must deviate."[5] At national level, it de-legitimates any law, or administrative or judicial act authorising torture.[6] [7] No state may also 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",[8] and torture itself as an act of barbarity

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[1] Please see Appendix 1 for a copy of the Convention
[2] 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.
[3] *Prosecutor v. Furundzija* ICTY (Trial Chamber) Judgment of 10 December 1998 at para 153 cited in Fernandez L and Muntingh L (forthcoming) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.
[4] *Prosecutor v. Furundz* Para 151.
[5] *Prosecutor v. Furundz* Para 154.
[6] *Prosecutor v. Furundz* Para 155.
[7] See Fernandez and Muntingh (forthcoming) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.
[8] *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) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.

which "no civilized society condones,"[9] "one of the most evil practices known to man"[10] and "an unqualified evil".[11] [12] There is little doubt that torture is still taking place in South Africa, especially where people are deprived of their liberty and has been commented on by several researchers and oversight structures, and it is not necessary to motivate this here.[13]

Criminalisation of Torture

7. Despite the requirement of Articles 2 and 4 of the CAT[14], South Africa is yet to criminalise the Act of torture and the UN Committee against Torture lamented this situation in its recent *Concluding Remarks* on South Africa's *Initial Report* submitted under Article 19 of the CAT:

   The State party should enact legislation with a specific offence of torture under its criminal law, with a definition fully consistent with Article 1 of the Convention, which should include appropriate penalties that take into account the grave nature of the offence, in order to fulfill its obligations under the Convention to prevent and eliminate torture and combat impunity.[15]

8. Critical to the issue of criminalising torture is that the State Party should adopt at least (it may add but not detract) from the definition of torture in Article 1 of the CAT:

   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

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[9] *A (FC) and others v. Secretary of State for the Home Department* para 67, cited in Fernandez L and Muntingh L (forthcoming) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.
[10] Para 101.
[11] Ibid at Para 160.
[12] See Fernandez and Muntingh (forthcoming) *The Criminalisation of Torture in South Africa*, CSPRI Research Report.
[13] See Bruce D, Newham and Masuku T (2007) *In Service of the People's Democracy – an assessment of the South African Police Service*, CSVR, Johannesburg; 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;* L Muntingh & L Fernandez *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 or Punishment"* (2006), Civil Society Prison Reform Initiative, Cape Town.
[14] *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.*
Article 4 (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
(2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.
[15] See Appendix 2 for a copy of the Committee's *Concluding Remarks.*

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.

9. The protection of victims of torture and assisting their appropriate redress is thus rooted in acknowledging that the crime of torture is an extremely serious one and has the status of peremptory norm. It is also based on the acceptance of the inadequacy of common law to prosecute perpetrators of torture. This can only be achieved by criminalising torture in South African law and prescribing the appropriate punishments for perpetrators of torture, reflecting the gravity of the offence of torture.

Prompt and impartial investigations

10. Article 12 of the CAT reads: *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.*
11. Article 12 obliges states parties to investigate cases of alleged torture in a prompt and impartial manner and this duty is not qualified by the discretion of the authorities. The Article does not require a formal complaint to have been lodged but '*wherever there is reasonable ground to believe that an act of torture has been committed*.' [16] There are no international guidelines as to what 'prompt' means.[17] Perhaps the most concrete meaning was given by the European Court of Human Rights in its decision in *Assenov and Others* vs *Bulgaria,* suggesting that 'prompt' means 'in the immediate aftermath of the incident, when memories are fresh.'[18] The Committee against Torture has, however, found individual breaches of Article 12 due to the excessive delay before the commencement of an investigation; in one case 15 months.[19] A high premium is furthermore placed on the *impartiality* of the investigation, as this is central to its credibility remaining intact. The term 'impartiality' means free from undue bias and is

[16] The European Committee for the Prevention of Torture's (ECPT) view is that even if there has been no formal complaint but that 'credible information' has come to light regarding the-ill treatment of people deprived of their liberty '*such authorities should be under legal obligation to undertake an investigation*' .(The ECPT Standards: "Substantive sections of the ECPT's General Reports",(2004) Council of Europe. 75.)
[17] For an overview of international statements, declarations, reports, and case law on the elusive meaning of 'prompt', see Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, http://www.redress.org/publications/PoliceComplaints.pdf , Accessed 5 February 2006 pp. 15-17.
[18] *Assenov and Others vs Bulgaria* (1999) 28 EHRR 652.
[19] *Halimi-Nedzibi v Austria*, complaint 8/1991, A/49/44, Annex V, p. 40, § 15, 356.

conceptually different from 'independence', which suggests that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators. The two notions are, however, closely interlinked, as a lack of independence is commonly seen as an indicator of partiality.[20] The European Court of Human Rights has stated that 'independence' not only means a lack of hierarchical or institutional connection, but also practical independence.[21] The Court has also stressed the need for the investigation to be open to public scrutiny to ensure its legitimacy and to secure accountability in practice as well as in theory, to maintain public confidence in the adherence to the rule of law by the authorities, and to prevent any appearance of collusion in or tolerance of unlawful acts.[22]

12. International case law is vague on precisely what should give rise to an investigation. There is also no uniformity on this issue in the *Standard Minimum Rules for the Treatment of Prisoners*[23] on the one hand, and the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* on the other.[24] The former obliges the State to deal with any complaint '[u]nless it is evidently frivolous or groundless'[25], whereas the latter does not qualify this obligation, providing simply that 'every request shall be promptly dealt with and replied to without delay.'[26] Research by the Redress Trust suggests that a state will have violated a victim's rights by failing to investigate despite the existence of an 'arguable claim' – the merits of which are determined on a case-by-case-basis.[27] An allegation is 'arguable', it seems, when it is supported 'by at least some other evidence, be this witness testimonies or medical evidence or through the demonstrated persistence of the complainant.'[28] European courts have also come up with the notion that an investigation should be triggered by a 'reasonable suspicion.'[29]

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[20] Redress Trust *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities* (2004) The Redress Trust, London, http://www.redress.org/publications/PoliceComplaints.pdf , Accessed 5 February 2006, p. 17.
[21] *Finucane vs United Kingdom* (2003) 22 EHRR 29 para 68.
[22] *Assenov and Others v Bulgaria* (n 125) para 140.
[23] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
[24] Adopted by General Assembly resolution 43/173 of 9 December 1988.
[25] Rule 36 (4).
[26] Principle 33 (4).
[27] See Redress Trust (note 20) 13.
[28] Redress Trust (note 20) 13
[29] Redress trust (note 20) 13

13. South Africa has introduced piecemeal measures to criminalise the harassment and intimidation of victims and witnesses. The witness protection programme[30] has no doubt helped to increase conviction rates in criminal trials that could possibly have come to nothing for want of a credible witness. But, the thrust of the witness protection programme is directed principally against interference with victims and witnesses in criminal proceedings related to organised crime and sexual offences. The programme therefore is not tailored to deal with the personal safety problems of persons who allege that they have been tortured or subjected to inhumane or degrading treatment by law enforcement officials.[31]
14. That a large number of complaints possibly involving torture are received by designated oversight structures such as the ICD and the Judicial Inspectorate of Prisons is evidenced by statistics in their annual reports. According to the 2004/05 Annual Report of the Independent Complaints Directorate (ICD), 5 790 complaints were lodged against the SAPS, of which 652 pertained to deaths; it is compelled to investigate these.[32] Similarly, the Judicial Inspectorate of Prisons reports for the same period that 3 722 complaints regarding assault by warders on prisoners were lodged with Independent Prison Visitors during 2004/5. A further 6 056 complaints of 'inhumane treatment' were lodged.[33] Unfortunately the annual reports of both these institutions do not report on the outcome of these investigations, nor whether any prosecutions were instituted against officials.[34]
15. The ICD is the only specialised agency tasked to investigate, in the proper sense of the word, complaints of torture and ill treatment and regard these as Class 3 complaint unless the incident resulted in the death of the victim.[35] Due to capacity constraints it has chosen to focus its efforts on deaths in police custody. The Office of the Inspecting Judge of Prisons can investigate matters following a complaint from a prisoner, amongst others.[36] It may also sit as a commission of inquiry,[37] although this has not been done to date.[38] Its powers are, however, limited to making recommendations to

[30] Established under the Witness Protection Act 112 of 1998.
[31] See Redress (note 20 above) 36.
[32] Independent Complaints Directorate (2005) *Annual Report 2004/5* p.75.
[33] Judicial Inspectorate of Prisons, *Annual Report 2004/5* (2005) 10.
[34] A selection of cases reported in the ICD Annual Report illustrates trends and lists case examples.
[35] 'Lodging a complaint against the SAPS', Accessed at http://www.icd.gov.za/policies/complaint.htm
[36] Complaints can also be submitted to the Inspecting Judge by the National Council, the Minister, the Commissioner, a Visitors' Committee or an IPV. Correctional Services Act s 90(2).
[37] Correctional Services Act ss 90(5) and 90(6).
[38] Final Report of the Jali Commission p. 578

the Minister of Correctional Services.[39] It cannot make binding decisions on the Department of Correctional Services.[40] It furthermore has no mandate to monitor investigations conducted by SAPS, where the latter is investigating a complaint laid by a prisoner. Independent Prison Visitors, as appointed by the Office of the Inspecting Judge, are tasked to inspect prisons, hear complaints from prisoners, and discuss these with the Head of Prison with a view to resolution.[41] Their task is therefore not to investigate. It was in view of this that the Jali Commission expressed a number of concerns regarding the independence, impartiality and the intended 'watchdog function' of the Judicial Inspectorate of Prisons.[42]

16. Except for the ICD, all other investigations alleging torture and ill-treatment require that the victim lays a charge with SAPS. In the absence of legislation criminalising torture, such allegations will be defined according to common law crimes, such as assault or attempted murder.[43] Police officials are not specifically trained to investigate allegations of torture and there is every reason to believe that such cases will be investigated as any other matter. The independence and impartiality of the police conducting such investigations in the case of prisoners was seriously called into question by the Jali Commission.[44]
17. Seen against the requirements of Article 12, the current investigative regime exhibits a number of significant weaknesses preventing allegations of torture and ill treatment to be investigated thoroughly. The absence of legislation criminalising torture presents the first hurdle to effective investigations. In the absence of a clear definition, derived from Article 1 of CAT, little guidance is given on what to investigate. Moreover, the fact that the police are required to investigate all such cases without having received specialised training further diminishes the chances of effective investigations. The investigation of allegations of torture is a specialised field of forensic medicine and it is therefore with good reason that the UN High

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[39] Correctional Services Act s 90(3)
[40] Final Report of the Jali Commission p. 578
[41] Correctional Services Act s 93
[42] The Commission concluded on this issue as follows: 'Considering sections 85(2) and 90(1), one has to come to the conclusion that the Office of the Inspecting Judge is merely a reporting body vis-à-vis a disciplinary body. Internationally, however, it is accepted that an oversight body has much greater legitimacy if it also has decision-making powers.' p. 578
[43] The weakness of this has already been alluded to by the Committee against Torture in its Concluding Remarks on South Africa's Initial Report. p. 3
[44] Jali Commission Executive Summary pp. 31-32, see also L Muntingh & L Fernandez *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 or Punishment"* (2006), Civil Society Prison Reform Initiative, Cape Town, pp.12-13.

Commissioner for Human Rights developed the *Istanbul Protocol*[45] to guide investigators. There is thus a substantive competency concern here. There is furthermore no reason to believe that such cases will be prioritised by the police and whether a prompt investigation is possible, is doubtful. Perhaps the biggest concern is the independence and impartiality of investigators, as alluded to by the Jali Commission in respect of the Judicial Inspectorate. Investigating charges laid by persons deprived of their liberty, especially if they are in custody as a result of a criminal justice sanction, mental health, substance addiction or are illegal immigrants, are perhaps not one of the police's priorities amongst the many other cases they are required to investigate. There is also no monitoring mechanism in place to ensure that the police actively investigate allegations of torture and ill treatment, and that they are held accountable when cases do not show progress. Even if cases do progress as far as a court-ready docket, the prosecutor has the discretion not to prosecute and he or she does not have to explain the reasons for this decision to an external party. Last, the National Director of Public Prosecutions has the final say over prosecutions and can only be held to account by Parliament.[46] The lack of oversight over prosecutions is cause for concern as, for example, cases brought by prisoners against warders alleging assault, very seldom find their way into court.[47]

The Right to Complain

18. Article 13 of CAT reads: *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.*

19. Article 13 of CAT gives everyone who claims to have been tortured the right to complain and to have the case examined promptly and impartially by the competent

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[45] Office of the United Nations High Commissioner For Human Rights (2004) *Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* , Professional Training Series No. 8/Rev.1, United Nations, New York and Geneva. http://www.ohchr.org/english/about/publications/docs/8rev1.pdf

[46] J Redpath *The Scorpions – Analyzing the Directorate Special Operations*, ISS Monograph 96, (2004), Institute for Security Studies, Pretoria, pp. 69-71.

[47] L Muntingh & L Fernandez *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 or Punishment"* (2006), Civil Society Prison Reform Initiative, Cape Town.

authorities. Supported by Article 12, these are the essential requirements of a complaints and investigative regime envisaged by CAT. Any complaints mechanism should thus be accessible to victims and furthermore, protect victims from secondary victimisation. It should further be pointed out that the investigation of a complaint of torture is not subject to the lodging of a complaint, and an investigation should commence if there are reasonable grounds to believe that torture had taken place.[48] A further duty imposed by Article 13 is that such a complaints mechanism must be accessible in any territory and thus all facilities under its jurisdiction. There are therefore no territories or facilities that are excluded.

20. The findings of a study conducted by The Redress Trust[49] across many countries highlight a number of problems in connection with the lodging of complaints.[50] From the research, it is evident that even when survivors of torture know about the existence of complaints procedures, they seldom know how to go about lodging their complaints. Those survivors who do know how to go about lodging a complaint tend to refrain from doing so because of the number of hurdles, both physical and otherwise, that they are likely to encounter.[51] Once victims lodge their complaints, they are often forced to endure deliberately manufactured situations, the combined purpose of which is to undermine, if not to sabotage, a complaint. Perpetrators often pressurise the victim to withdraw the complaint, even to the point of offering them bribes.[52] Very often, victims do not pursue their complaints out of fear of suffering physical harm, threats to their lives, including those of their families, witnesses and

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[48] Ingelse C (2001) *The UN Committee against Torture* p. 336.

[49] Redress Trust (note 20 above).

[50] Redress Trust (note 20 above).

[51] These impediments are known to be the following:

- the geographic remoteness of the complaints office, which is a thoroughly bedevilling hurdle for people in rural areas;
- fears of personal safety on the part of the survivors, especially where a complaints-receiving office is located in the very same office where the torture took place;
- reluctance to bring a complaint because of a sense of shame resulting from what the victim endured (for example sexual assault); a real or perceived lack of openness and approachability in the people staffing the complaints office;
- officials having a rude and dismissive attitude;
- the need to appear in person, coupled with the intimidating formalities of making sworn written statements or affidavits accompanied by a raft of other documents to establish probable cause.(Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, http://www.redress.org/publications/PoliceComplaints.pdf , Accessed 5 February 2006, p. 17.)

[52] A UN Working Group on Pre-trial Detention reported in 2005 that in South Africa accused persons in police custody were vulnerable to being pressurised into renouncing their rights. See UN Working Group Police accountability- Promoting civilian oversight available at http://www.policeaccountability.co.za/Currentinfo/ci-detail.asp?art-ID=400

human rights lawyers.[53] Where complaints are lodged in good time, cases tend to drag on endlessly, resulting in proceedings being discontinued.[54] In many countries that lack such legislation dealing specifically with torture, the laws of prescription apply. This means that after a period of time a complaint prescribes or expires, which disregards the fact that, like rape, one of the traumatic effects of torture is that victims do not rush to lodge the complaint immediately after they have been tortured. In countries without clear-cut rules governing the reporting and recording of complaints, the authorities who are entitled to receive complaints tend to enjoy wide discretionary power in dealing with complaints. In such countries, complaints may be dismissed at the reporting stage simply because the complainant, for want of evidence, is unable to name the alleged torturer.[55] Such complaints are then considered incomplete. It also is not unusual in the case of an unregulated procedure for the complaints officer to take down the complaint, only to deny afterwards that it was ever lodged. And because the complainant is not given a copy of the complaint, the matter simply peters out.[56] But, even where complaints procedures exist, officials in some countries are known not only to refuse to receive complaints, but also to suppress or destroy whatever evidence there is that implicates alleged perpetrators.[57]

21. A review of sectors dealing with people deprived of their liberty in South Africa by Muntingh and Fernandez found that none of the complaints mechanisms in these sectors can be regarded as fully compliant with Article 13.[58] Even when complaints mechanisms are accessible, such as the Independent Prison Visitors, they themselves lack investigative powers and the authority to protect witnesses and victims. The impartiality of the police when investigating allegations of torture made by prisoners has also been called into question and IPVs have reported that these cases often 'disappear'.[59]
22. In the case of the police, SAPS Standing Order 101 provides for the procedures for a formal complaints mechanism, including the use of a telephone hotline. Essentially, a complaint, including one alleging torture, can be lodged at a police station or

[53] Redress Trust (note 20 above) 36.
[54] Redress Trust (note 20) 34.
[55] Redress Trust (note 20) 37.
[56] Redress Trust (note 20) 37.
[57] Redress Trust (note 20) 37-38.
[58] 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*
[59] Muntingh & Fernandez (note 44 above).

administrative level (region, province or national) or via the telephone hotline.[60] Whether the victims of torture will regard this as a legitimate and impartial complaints mechanism is unlikely. Bruce, Newham and Masuku report numerous problems with regard to the internal complaints mechanisms insofar as they relate to the overall management of and reporting on complaints, but also on the actual utilisation and manipulation of the complaints mechanisms by line commanders.[61]

23. The accessibility of the ICD has also been called into question and the need for 'a simple and accessible' complaints mechanism remains.[62] And since the ICD offices are located in the major metropolitan areas, this institution remains inaccessible to 'the rural people, who are the silent majority'.[63] Cooperation between the ICD and SAPS in investigating complaints also appears to be less than satisfactory, especially when the ICD refers complaints to the SAPS for investigation.[64] Apart from its accessibility, it has such an enormous case load that only Class 1 complaints can be investigated, and even these take extremely long to be attended to and thus not dealt with in a 'prompt manner.' This is evidenced by the fact that the length of investigations was one of the major reasons why 68.5% of a sample of ICD complainants surveyed expressed their dissatisfaction with the services rendered by the ICD.[65]
24. For the other sectors dealing with people deprived of their liberty (excluding police and prisons), complaints mechanisms appear to be weak and operating without oversight. In the case of psychiatric hospitals Section 11(2) of the of the Mental Health Care Act 17 of 2002 places an obligation on any person who witnesses the abuse of a mental health care system user to report this in the prescribed manner. [66] This procedure is dealt with in the regulations, which state that such alleged abuse must be reported to the Review Board[67] or to the SAPS.[68] If alleged abuse is reported to the

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[60] *South Africa Initial Report to the Committee against Torture*, CAT/C/52/Add.3, 25 August 2005, Para 134 p. 39 para 147-148

[61] D Bruce, G Newham & T Masuku *In Service of Peoples' Democracy – An Assessment of the South African Police Services*, (2007), Centre for the Study of Violence and Reconciliation, Johannesburg, p. 188.

[62] Ibid 82.

[63] Independent Complaints Directorate (2006) Complainants level of satisfaction, ICD report, p. 16, http://www.icd.gov.za/reports/index.html

[64] Bruce , Newham & Masuku (note 100 above) 200.

[65] Independent Complaints Directorate (2006) Complainants level of satisfaction, ICD report, p. 12, http://www.icd.gov.za/reports/index.html

[66] A person witnessing any form of abuse set out in subsection (1) against a mental health care user must report this fact in the prescribed manner.

[67] The Review Board is an oversight structure established by the Member of the Executive Council in a province in terms of S18 of the Mental Health Care Act 17 of 2002 and can be established for one mental care facility, a cluster of such facilities, or all such facilities in a province. S 19 of the Act sets out the powers and functions of the Review Board.

[68] Mental Health Care Act (17 of 2002) General Regulations, No. 7578, Vol 452, 14 February 2003, No. 24384, reg 7.

Review Board, it must investigate the claim and lay a charge with the SAPS if necessary. Despite this provision, it is not entirely clear how the SAPS and the Review Board should co-ordinate investigations and what the Review Board's duties are in the event of a criminal conviction. It is also not apparent from the legislation and regulations how mental health care system users would lodge complaints themselves, apart from reporting matters to the police.

25. In places where children are detained, there does not appear to be any formal complaints mechanism, especially one with the involvement from external parties. The current regulations provide that children can report a rights violation to any nurse, social worker, youth care worker, or any other authorised person when these persons are inspecting a place where children are kept.[69] Any dentist, medical practitioner, nurse, social worker, teacher, child and youth care worker, or person employed by or managing a facility where children are kept, is obliged to report to the Director General 'the suspicion that [that] child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease.'[70] The Director General may then issue a warrant to have the child removed from that place, but the legislation does not place any further duties in respect of investigation on the Director General.[71] The legislation does not make provision for a formal complaints mechanism that is always accessible to children and rather relies on the staff and other professionals to report suspicions of abuse and ill treatment. According to the National Association of Child Care Workers (NACCW) informal complaints mechanisms do exist in child and youth care centres and the Developmental Quality Assurance process have confirmed their existence as well as children's knowledge thereof.[72] The Children's Amendment Bill 19 of 2006 does make extensive provision for the development of regulations which could provide for a standardised complaints procedure, although it is not explicitly named as such.[73]
26. The *Minimum Norms and Standards for in-patient treatment centres*, accepted by the Department of Social Development in 2005, states that in respect of substance abuse

[69] S 31(1) of the Child Care Act, see also Regulation 31A(w)(i).
[70] S 41(1) of the Child Care Act, see also Regulation 31A(w)(ii).
[71] S 41(2) of the Child Care Act.
[72] Telephonic interview with NACCW representative, 25 April 2007.
[73] See for example in the case of Child and youth Care Centres s 212 (g), (l), (q), (r), (t) and (v)*(vi)* At the time of writing the Bill is still under discussion by the NCOP and amendments are expected to the version released in 2005.

treatment centres, there must be a complaints mechanism that is accessible and confidential, and able to support complainants.[74] The same document further recommends that a national, independent body should be established to monitor and investigate such complaints. The *Prevention of and Treatment for Substance Abuse Bill*[75] also refers to the development of and compliance with minimum norms and standards, and mandates the Minister to develop such norms and standards.[76] It further requires all facilities providing substance abuse rehabilitation service to comply with the norms and standards. The Bill, at the time of writing, was however silent on a complaints mechanisms and the establishment of such a structure on a national level.

27. Military prisons, military detention barracks, the Lindela Repatriation Centre[77] and the private security industry appear to be without a formal complaints mechanism, save that victims of torture can lay a charge with SAPS.

Right to redress

28. Article 14 of CAT reads: *1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*
29. "Redress" entails officially recognising that the victim has been harmed and "compensation" mostly means the payment of money. The latter also encompasses physical, mental, and social rehabilitation – the three M's, namely moral, monetary and medical.[78] Compensation does not mean a mere symbolic payment; it must be fair and adequate. It is up to the state to determine what is fair and adequate.
30. The Committee, when making its *Concluding Remarks* on South Africa's *Initial Report* was concerned about the means available to victims of torture to seek redress and commented as follows: *Noting the existence of legal-aid mechanisms, the Committee is*

[74] National Department of Social Development (2005) *Minimum norms and standards for inpatient treatment centres* Section 8.9
[75] At the time of writing the Bill was released by the Dept of Social Development for comment from stakeholders.
[76] Prevention of and Treatment for Substance Abuse Bill S 4
[77] Upon enquiry Lawyers for Human Rights confirmed that there is no complaints mechanism in place at Lindela Repatriation Centre (Telephonic interview with LHR Representative. (Johannesburg), 30 April 2007)
[78] UNCAT/SC/SR 36 Para 21; UNCAT/C/SR 197 para 32; UNCAT/C/SR 232 para 22.

concerned about the difficulties vulnerable persons or groups experience in efforts to exercise their right to complain, including for linguistic reasons, to obtain redress and fair and adequate compensation as victims of acts of torture. . . The State party should take the necessary measures to strengthen legal-aid mechanisms for vulnerable persons or groups, ensuring that all victims of acts of torture may exercise their rights under the Convention and disseminate the Convention in all appropriate languages, in particular to groups made vulnerable.[79]

31. Although Art 14 does not expressly apply in cases of cruel, inhuman, or degrading treatment or punishment, the Committee against Torture has considered it applicable in cases of disappearances.[80] This interpretation is in line with the more generally worded Art 7 (3) of the International Covenant on Civil and Political Rights (ICCPR) and the earlier practice of the Human Rights Committee. But, there is no reason why it cannot be extended to other cases of cruel, inhuman, or degrading treatment apart from disappearances.[81]
32. The question that begs asking though is who is responsible for paying compensation? This is a crucial issue given the fact that the perpetrator of torture usually does not have the means to pay compensation, especially if the conviction results in a prison sentence, which is what one expects. According to the Committee against Torture, it seems that the victim must first try to obtain compensation from the perpetrator and only in the event this fails should the state assume responsibility.[82]
33. The Committee against Torture has rejected the argument that the state's liability should depend on the perpetrator being held criminally liable. Similarly, the state does not escape liability merely because the suspect has not been charged or identified.[83] The state must accept responsibility for compensation if individual responsibility for torture cannot be established.[84] This follows from the fact that an act of torture violates the state's international law obligations, thus placing on it a duty

[79] 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 21.
[80] UNCAT/C/SR 294 ADD 1 para 23.
[81] Wendland L (2002) *A handbook on state oligations under the Convention against Torture*, p. 56.
[82] See UNCAT/C/SR 292 para 2.
[83] Ingelse (n 48) p.371
[84] Ingelse (n 48) p. 383.

not only to punish the offenders, but also to award the victim appropriate reparations. The right to an effective remedy is laid down in several international instruments.[85]

34. Practice shows that bringing a case of reparation for torture is not an easy matter. One reason for this is that many countries do not have the specific offence of torture which corresponds to the definition of Article 1 of UNCAT. The result is that the victim has to claim damages under the common law crime of assault, which carries a lesser penalty. Another reason is that where the suspected torturer has not been prosecuted in a criminal trial, the victim has difficulty securing evidence to substantiate a civil claim.[86] Also, in the case of South Africa and other common law countries, as opposed to France, for example, victims are not allowed to double as a civil claimant of damages in criminal proceedings. In South Africa, the criminal court may award compensation only where the offence causes damage to property.[87] It therefore does not address the 'severe mental and physical suffering' noted in Article 1 of the CAT.
35. Unfortunately, the Committee against Torture has not developed clear and comprehensive guidelines on the question of reparation. The prevailing position is that the victim of torture should be allowed to use the civil procedure to claim an award of damages, regardless of the outcome of the criminal proceedings against the alleged torturer.[88] It also has been suggested that it would be even better if the victim did not have to go through the courts and that instead they be given an automatic right to compensation, redress and rehabilitation by the authorities.[89]

Victim participation in Correctional Supervision and Parole Board (CSPB) hearings

36. The Judicial Matters Second Amendment Act (55 of 2003), effecting an amendment to S 299A of the Criminal Procedure Act, provides for the right of a complainant to make representation in certain matters relating to the placement on parole, on day parole, or under correctional supervision of an imprisoned offender. A complainant is understood to be the victim of the crime, or the immediate family, in the case of a murder. Not all crimes are covered by this provision and the emphasis is clearly

[85] See Art 8 of the Universal Declaration of Human Rights, Art 2(3) of the ICCPR, Art 13 of the ECHR; Art 25 Of the American Convention on Human Rights; and Art 7(1) of the 1981 African Charter on Human and People's Rights.
[86] See Redress Trust *Seeking reparation for torture survivors* at http://www.redress.org/local_remedies_torture.html
[87] Sec 300 of the Criminal Procedure Act 51 of 1977. See Du Toit et al *Commentary to the Criminal Procedure Act* (2004) 29-2 to 29-3.
[88] See, for example, Wendland (n 81) 55; Ingelse (n 48) 383.
[89] Ingelse (n 48) 383.

placed on serious crimes such as murder, rape, robbery, sexual assault and kidnapping. On 31 March 2005 the Judicial Matters Second Amendment Act (55 of 2003) came into effect. Directives to facilitate the participation of victims in parole board hearings were issued by the Commissioner of Correctional Services in April 2006.[90]

37. According to the Judicial Matters Second Amendment Act the procedure is at face value fairly uncomplicated. Firstly, the sentencing officer is required, at sentencing, to inform the complainant, if present at the court, that he or she has the right to make representation when the offender is considered for parole, day parole, or correctional supervision, and also to attend any relevant meeting of the parole board. Should the complainant wish to make representation, he or she has the duty to inform the Commissioner of Correctional Services thereof in writing, and to provide the commissioner with his or her contact details (to be updated as necessary). In turn, the Commissioner is required to inform the relevant parole board of the declared intention. The duty then rests on the Parole Board to inform the complainant when a meeting will take place with regard to the particular offender.
38. For this procedure to work, two immediate requirements need to be met. Firstly, the sentencing officer must inform the complainant of his or her right to make representation. Secondly, the complainant must be in court to receive this information. The legislation does not deal with the very likely scenario where the complainant is not at court but may wish to make representation if he or she was aware of this right.
39. There appear to be a number of points of incongruence between the provisions of S 299A of the Criminal Procedure Act and the *Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards* (the Directives). The most glaring of these is the shift in responsibility with regard to notification. Whereas in proceedings relating to parole, the Act is clear that the complainant must inform the Commissioner of his/her intention to make representation, as well to provide up to date contact details, with the latter then informing the relevant parole board, the Directives sets out a different procedure. Paragraph 3 of the Directives state that the complainant must ensure that the relevant Parole Board in whose area the offender is being detained, is informed of both the desire to make representation and to be

[90] *Directives regarding complainant participation in correctional supervision and parole boards*, Government Gazette No. 28646, 7 April 2006.

informed of relevant parole board meetings. In addition to this, the complainant must inform the Chairperson of the Parole Board of the following: name of the offender; offence committed; case number; the date and name of the court where the offender was convicted, and the physical and postal address of the complainant.

40. It is not clear how a complainant will know where any prisoner is being detained and there is no procedure set out that compels the Commissioner to keep the complainant informed of where an offender is being detained. There is no requirement in S 299A of the Criminal Procedure Act where the sentencing officer is instructed to give any information regarding the offender to the complainant.
41. The Directives also require a level of knowledge from the complainant about the offender's case that is perhaps at the level of engagement that most victims of murder, torture, rape, robbery, sexual assault and kidnapping would prefer to avoid. By implication it means that if the complainant is not able to furnish all this information and/or directs his or her notification to the wrong parole board, the right to make representation is effectively lost due to administrative concerns. Lack of information in this case can then result in secondary victimisation by a procedure that was presumably developed with the opposite intention.

Recommendations

42. In order to meet its obligations in respect of CAT, to combat impunity and to enable victims of torture to seek appropriate redress, legislation criminalising torture need to be enacted as a matter of urgency.
43. It is furthermore required that national standards be developed to regulate and give guidance to complaints mechanisms in places where people are deprived of their liberty in order to give effect to the right to complain. In particular complaints mechanism need to involve external oversight to ensure that all complaints are investigated.
44. Such legislation must create an appropriate framework, as required by CAT, to facilitate the prompt investigation of cases of alleged torture by competent, independent and impartial authorities. It is proposed that government adopts a universal protocol for the investigation of cases of alleged torture based on the Istanbul Protocol.

45. Moreover, such legislation must create a framework and procedure enabling victims of torture to find redress in a manner that prevent secondary victimisation. It is key to success in this regard that redress is not limited to loss or damage to property but that it acknowledges the definition of torture in Article 1 of CAT referring to 'severe mental and physical suffering'. Legal aid need to be available to victims of torture who wishes to institute civil claims against individual perpetrators and the state in order to seek redress.
46. Services to assist in the rehabilitation of torture need to be established and made accessible to victims and families of victims. This requires a measure of specialisation in victim trauma services and government should seek partnerships with civil society (domestic and internationally) to develop such services and expertise domestically.
47. There remains a need for government and civil society to engage in formal dialogue in respect of the prevention of torture and reporting requirements to the Committee against Torture. Such an opportunity for dialogue will present a good opportunity for closer cooperation between government and civil society to prevent and combat torture.
48. South Africa is due to submit its next Periodic Report in respect of Article 19(1) of CAT in November 2009. In its *Concluding Remarks* the Committee against Torture, at para 27, requests South Africa to provide at the next periodic report '*detailed disaggregated statistical data on complaints related to acts of torture, or cruel, inhuman or degrading treatment committed by law enforcement officials as well as of the investigations, prosecutions and convictions relating to such acts, including with regard to the abuses reportedly committed by South African peacekeepers. It further requests the State party to provide detailed information on compensation and rehabilitation provided to the victims*'. This appears to be an excellent opportunity and structure to monitor performance in respect of the Victims' Charter.
49. The Directives in respect of victim participation in Parole Board hearings need to be amended to reflect the original intentions of the legislature.

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