CSPRI Submission on the 2013/14 DCS Annual Report

Submission to the Portfolio Committee on Justice and Correctional Services
Oct 2014

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CIVIL SOCIETY PRISON REFORM INITIATIVE (CSPRI) SUBMISSION TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON DCS ANNUAL REPORT 2013/14

1. Introduction

We thank the Portfolio Committee on Justice and Correctional Services (the Committee) for the opportunity to make a number of overview comments on the Department of Correctional Services (DCS) Annual Report 2013/14 (the Annual Report) as well as overall performance. In preparing this submission, we reflected on the Legacy Report of the previous Portfolio Committee on Correctional Services and we agree with most of the issues raised in there as they have been long-standing concerns of successive Portfolio Committees of Correctional Services.[1]

CSPRI takes an integrated view of the prison system and sees an inextricable link between good governance and human rights. If it is accepted that good governance is essentially about the processes of government and how power is exercised, it follows that it is indivisible from, and an essential element in, the realisation of human rights. Within the context of prison reform this is critically important. In a 2000 resolution the then UN Human Rights Commission recognised that "transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights".[2] This link has been confirmed in subsequent resolutions by the Human Rights Commission (and its successor, the Human Rights Council)[3]. It is indeed difficult to conceive of a situation where human rights are upheld and even flourish that is not characterised by a substantive measure of compliance with good governance principles. Good governance and human rights are mutually reinforcing since human rights standards provide a set of values to guide government in its work and a set of standards for performance against which government can be held

[1] http://www.pmg.org.za/report/20140312-committee-report-judicial-inspectorate-for-correctional-services-committee-legacy-report
[2] E/CN.4/RES/2000/64 para 1.
[3] E/CN.4/RES/2005/68, A/HRC/RES/7/11.

accountable. Human rights principles also inform the substance of efforts aimed at improving good governance, such as the development of legislative frameworks, policies, programmes, budgetary allocations and other measures.[4]

This submission will focus on personal safety and rehabilitation, as requested by the Committee Chairperson. However, a number of additional issues will also be addressed as these stand central to the Department's performance.

2. Safe and secure detention

In 2011/12 the Judicial Inspectorate for Correctional Services (JICS) recorded a total 1945 complaints from prisoners alleging that they had been assaulted by officials. In the following year, this figure more than doubled to 3370[5] and in 2013/14 a total of 4203 complaints alleging assault by officials were recorded.[6] This represents an increase of 116% over a three-year period. Unfortunately the DCS Annual Report does not make a distinction between assaults committed by fellow prisoners and those committed by officials against prisoners.

JICS has also investigated seven deaths of prisoners following assaults by officials in the Durban management area and reported that

> "it seems as if SAPS is reluctant to investigate DCS officials who have been identified and implicated. . . . The NPA refused to prosecute 4 cases related to official on inmates."[7]

Two issues are thus central to the discussion on safe and secure custody, namely the scale of assaults perpetrated by officials against prisoners and the *de facto* impunity that DCS officials enjoy for these crimes.

2.1 Legislative and policy mandate

South Africa ratified the UN Convention against Torture (UNCAT) in 1998 and as a result enacted legislation criminalising torture in 2013; the Prevention and Combatting of Torture of Persons Act (13 of 2013). However, the Annual Report omits this legislation from the list of legislative mandates of the Department.[8] In respect of planned policy initiatives, policy and procedure emanating from the

[4] Office of the United Nations High Commissioner for Human Rights (2008) *Good governance practices for the protection of human rights*. United Nations: New York, pp. 1-2.
[5] JICS Annual Report 2012/13 p. 47.
[6] JICS Annial Report 2013/14, p. 82.
[7] JICS Annual Report 2012/13 p. 59.
[8] pp. 22-23.

UNCAT as well as the Prevention and Combatting of Torture of Persons Act (13 of 2013) are also not reflected in the Annual Report.[9] Attention is drawn specifically to section 9 of the legislation that obliges the state, and thus the DCS, to provide training to officials on the prohibition and prevention of torture and to render assistance to alleged victims of torture. [10] It is not clear why DCS does not see as part of its core mandate addressing torture and other ill treatment, especially in the light of the number of alleged assaults perpetrated by its officials.

Attention is also drawn to Articles 10 and 11 of UNCAT[11] which supports section 9 of the Act and further requires a regular and systematic review of policies and practices with a view to prevent torture and other ill treatment.

The Annual Report furthermore reflects on relevant court rulings, but fails to mention the *McCallum case* in which it was found by the UN Human Rights Committee that the applicant's right to be free from torture[12] was violated by DCS officials at St Alban's prison during a mass assault of prisoners in 2005.[13]

It is therefore submitted that DCS should brief the Committee on the steps it plans to take to fulfil its obligations under the Prevention and Combatting of Torture of Persons Act (13 of 2013) and more broadly under UNCAT.

2.2 Impunity

The UN Commission on Human Rights (UNCHR) defines impunity as:

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[9] p. 23.

[10] 9. (1) The State has a duty to promote awareness of the prohibition against torture, aimed at the prevention and combating of torture.
(2) Without derogating from the general nature of the duty referred to subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to—
(a) conduct education and information campaigns of the prohibition against torture aimed at the prevention and combating of torture;
(b) ensure that all public officials who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, are educated and informed of the prohibition against torture;
(c) provide assistance and advice to any person who wants to lodge a complaint of torture; and
(d) train public officials on the prohibition, prevention and combating of torture.

[11] 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.
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

[12] Article 7 of the ICCPR.

[13] CCPR/C/100/D/1818/2008.

> The impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[14]

Impunity therefore implies a political and social context in which laws against human rights violations are either ignored or perpetrators inadequately punished by the State.[15] The duty to combat impunity rests firmly with the State and impunity is a consequence of:

> The failure of States to meet their obligations under international law to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, ensure that they are prosecuted and tried and provide the victims with effective remedies.[16]

There thus rests an obligation on DCS to investigate allegations of assault and torture and support the investigations undertaken by JICS and SAPS in such instances. The figures on disciplinary actions instituted against DCS officials for assault pales in comparison to the volume of complaints lodged with JICS. A total of 4203 complaints were lodged with JICS in 2013/14 but only 130 internal disciplinary actions for assault were instituted against DCS officials. The Annual Report also does not state how many criminal prosecution were instituted against DCS officials. It should be noted that the figure given is not disaggregated and combines the assault of a fellow employee or another person; the latter would presumably include prisoners. Disciplinary actions for the assault of a prisoner by an official may therefore be substantially lower than 130.

As far as could be established, all the officials implicated in the mass assault of prisoners at St Alban's prison in 2005 (the *McCallum case*) are still in the employ of the DCS and none were dismissed for the incident. Recent media reports indicate that assaults similar to the 2005 mass assault at St Alban's continue to take place. For example, a mass assault allegedly took place again at St Alban's in March 2014.[17] This is a clear indication that the DCS does not take seriously its obligation under the Constitution, the Correctional Services Act and Prevention and Combatting of Torture of Persons Act to combat impunity and prevent torture and other ill treatment.

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[14] UNCHR *Updated Set of Principles to Combat Impunity* 6. This definition differs slightly from the one adopted in 1996 (UNCHR *Set of Principles to Combat Impunity* 9) by adding the words "if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".
[15] Jorgensen N "Impunity and Oversight: When do Governments Police Themselves" 2009 *Journal of Human Rights* 386.
[16] UNCHR *Set of Principles to Combat Impunity* 14.
[17] Prison assault complaint lodged, *ENCA*, 20 March 2014, http://www.enca.com/south-africa/prison-assault-complaint-lodged .

While the DCS evidently institutes disciplinary action against very few of its officials for assaults and torture, the National Prosecuting Authority (NPA) and SAPS are also part of the problem. As noted above, in four deaths in the Durban Management Area, the NPA declined to prosecute. UNCAT requires that the State Party in whose jurisdiction a person suspected of having committed torture is physically present has the choice of either to extradite or prosecute.[18] Article 7(1) of UNCAT places a strict obligation on States to hand the case to domestic prosecuting authorities if the State Party has either decided not to grant a request for extradition; or no request for extradition has been received from another State with jurisdiction to prosecute.[19]

While there may be legitimate reasons why the NPA declines to prosecute, these reasons are not known and therefore create the impression of *de facto* impunity. There is nonetheless a real possibility that investigations are deliberately frustrated and undermined as the Jali Commission found ample evidence of this during its investigation into the affairs of DCS.[20]

In view of this, it is submitted that the Committee: (1) requests a briefing from DCS on the steps it is taking or is planning to take to reduce the number of assaults on prisoners with specific reference to how the disciplinary system is utilised to hold perpetrating officials accountable (2) requests a briefing from the NPA on the low number of law enforcement officials, especially DCS officials, being prosecuted for the deaths and assault of prisoners[21] (3) instructs the DCS to present disaggregated figures on assaults perpetrated by officials and prisoners respectively.

The combined portfolio of Justice and Correctional Services presents the opportunity to address exactly these inter-sectoral issues, such as the low number of prosecutions of law enforcement officials for rights violations and the mandate of the JICS discussed in the following section.

2.3 Mandate of JICS

Article 12 of UNCAT requires State Parties to make sure that there is a prompt and impartial investigation when there are reasonable grounds to believe that someone has committed an act of

[18] See, Lord Browne-Wilkinson, Pinochet (3) '… it is clear that in all circumstances, if the Article 5(1) States do not choose to seek extradition or to prosecute the offender, other States must do so. The purpose of the [UNCAT] was to introduce the principle of *aut dedere aut punier* – either you extradite or you punish', [39].
[19] Nowak and McArthur (2008), pp. 363–364. The obligation to prosecute is limited to the submission of the case by the State to the prosecuting authorities. It is then a matter for the relevant authorities to decide whether to seek prosecution and, based on the available evidence, whether to convict and sentence the perpetrator in accordance with domestic criminal procedure legislation – see *Suleymane Guengueng et al. v. Senegal*, UN Committee against Torture, Communication No. 181/2001, [8].
[20] See for example Jali Commission Final Report pp. 24-25 and 87-88.
[21] Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre.

torture or other ill treatment in any territory under the State's jurisdiction. The purpose of investigation is to find evidence of torture and/or other ill treatment so that perpetrators can be held accountable for their actions and the interests of justice may be served. The obligation to investigate is linked to the duty to provide the right to access complaints mechanisms.[22]

In order to comply fully with this obligation, investigations need to be:

- prompt;
- impartial;
- thorough;
- able to lead to the identification of those responsible; and
- carried out by a competent authority.

UNCAT does not explain what 'reasonable grounds' are, but UN Committee against Torture (CAT) has interpreted this broadly, and information that could trigger an investigation could come from many sources.[23] Information that establishes reasonable grounds to initiate an investigation could also come from fellow or former detainees, family members, lawyers, medical staff and national human rights institutions.[24] Those responsible for places of detention should oversee the practices in these places by:

- making sure that there are regular inspections/oversight visits;
- talking to detainees; and
- inviting lawyers, medical staff and family members of detainees to report on possible acts of torture and ill treatment.[25]

UNCAT calls on investigations to be 'prompt and impartial', although these terms are not defined. CAT has stated that –

> promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment or punishment, soon disappear.[26]

An important part of the prison oversight architecture is JICS, but there is increasing agreement that the institution is not sufficiently independent from the DCS and further that its mandate is too limited, primarily because it does not have the same investigative powers as, for example, the Independent

[22] Nowak and McArthur (2008), p. 414.
[23] For example, CAT has clearly stated that detailed allegations from NGOs *are* reasonable grounds and should result in an investigation. (A/57/44, 58(i); CAT/C/XXVII/concl.2, para 5(i))
[24] Nowak and McArthur (2008), p. 431.
[25] Nowak and McArthur (2008), p. 431.
[26] *Blanco Abad v. Spain*, CAT/C/20/D/59/1996, para 8.2.

Police Investigate Directorate (IPID). The JICS mandate is essentially to inspect and report on the conditions of detention and treatment of prisoners and it is thus not focussed on investigations and to ultimately prepare a court-ready docket for the NPA. In this regard the previous Portfolio Committee noted the following in its Legacy Report:

> The Committee considered the effectiveness of the JICS in 2012 and 2013, and have reported that certain legislative amendments may be required to ensure the JICS's independence and effectiveness. The Committee's recommendations should be considered, and if necessary further consultation may be undertaken, and amendments to the legislation effected as soon as possible. The Report on the Strengthening of the Judicial Inspectorate for Correctional Services may be referred to for the detail of the Committee's observations, concerns and recommendations.[27]

A further limitation on the independence of JICS is that it receives its budget from the DCS, unlike IPID which receives its budget allocation through a parliamentary vote and not from SAPS.[28] While this has been a longstanding concern, it is with some alarm that it is noted that the allocation for JICS decreased by 0.52% from 2012/13 to 2013/14 whereas the DCS budget increased by 5.92%.[29]

CSPRI supports a process of law reform to strengthen the mandate of JICS and has made a submission to the Portfolio Committee in this regard in January 2013. It is therefore submitted that the Portfolio Committee builds on the work of the previous Committee and prioritises a process of law reform that will see JICS functioning independently from the DCS and with the necessary powers to be an effective investigative mechanism.

3. Rehabilitation and the review of the White Paper on Corrections

On 26 February 2014 the Portfolio Committee was briefed on progress made in the review of the White Paper on Corrections. The Committee expressed its concern with the lack of progress. Evidently the process has been delayed and at this stage it is unclear what has happened to it.[30] CSPRI has not been consulted in the White Paper review process and will make an in-put if the opportunity arises.

It is CSPRI's submission that the most meaningful contribution that the DCS can make to prepare offenders for release, is to ready them to engage constructively in the economy upon their release. To

[27] Portfolio Committee on Correctional Services Handover Report - May 2009 to March 2014 para 5.1.1.
[28] Section 3(3) IPID Act (1 of 2011).
[29] JICS Annual Report 2013/14 p. 27.
[30] http://www.pmg.org.za/report/20140226-department-correctional-services-progress-report-white-paper-corrections-review-process

this end they need to be provided with education and training on a wide scale. As has been reported in the past, the extent to which DCS is able to do this is less than encouraging as indicated below in Table 1, presenting figures on the participation of prisoners in educational programmes for 2013/14 from the Annual Report.

Table 1

Intervention	Achievement	Target	Percentage
Education programmes	10 779	56 495[31]	19%
FET	6875	28 972	24%

Given that the total sentenced population is approximately 115 000, it must be noted that the targets are indeed very modest. Although exact figures are not presented, the training of prisoners in technical skills also appears to have declined in recent years due to a shortage of artisans to provide such training.

The Correctional Services Act requires that all children of compulsory school-going age must be attending educational programmes.[32] This means that all sentenced and unsentenced children must have access to attend educational programmes up to the age of 15 years or upon attaining the ninth grade of education.[33] Earlier research undertaken by CSPRI found that many children of compulsory school-going age who are imprisoned are being denied this right.[34]

In overview it then appears as if the DCS does not have the capacity to meet the need for education and training. In view of the above, it is submitted that the education and training of prisoners be handed over to the Department of Basic Education.

4. SIU Investigation

On 16 November 2009 the Portfolio Committee was briefed by the SIU on a number of investigations undertaken in DCS.[35] Of particular importance were the high value contracts that were given to a particular group of companies which implicated a number of senior DCS officials in corruption. The SIU had completed its investigation and handed the docket over to the NPA. As far as could be established, the prosecution of the implicated officials and private sector individuals has not yet

[31] The two targets and achievements on p. 46 were combined.
[32] s 19(1)(a).
[33] s 3(1) South African Schools Act 84 of 1996.
[34] Muntingh, L. and Ballard, C. (2012) *Report on children in prison in South Africa*, Bellville: Community Law Centre.
[35] http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c

commenced. If this is indeed the case, CSPRI recommends that the Portfolio Committee calls on the NPA to brief it on the reason for this delays and what the plans are to commence with a prosecution.

5. Pre-trial detention and s 49G

It is hoped that the combined portfolio of Justice and Correctional services will see a rapid improvement in the situation of pre-trial detention in South Africa. It remains the situation that nearly 28% of prisoners are awaiting trial and the average duration of pre-trial detention is six months.[36]

The Correctional Matters Amendment Act (5 of 2011)[37] established a mechanism whereby the Head of Centre would notify the relevant court if a remand detainee had been in custody for longer than two years with a view to expedite the matter. The Annual Report reflects that the average duration of custody had been reduced by 13 days. At this stage it is not clear if this is direct result of the implementation section 49G of the Correctional Services Act or attributable to other trends in the criminal justice system. It remains CSPRI's position that as well-intentioned as section 49G may be, it will not have the desired effect as it does not regulate the criminal justice process. Indeed judicial review should be mandatory at a much earlier stage than after two years. It should furthermore not be assumed that if a Head of Centre brings the case of an unsentenced prisoner to court in terms of section 49G of the Correctional Services Act that the court will indeed undertake an investigation in terms of section 342A of the Criminal Procedure Act. Plainly put, the Correctional Services Act does not tell the court what to do with a section 49G case. It is our submission that a period of two years before a delayed matter is brought to the attention of the court renders the constitutional right to a speedy trial meaningless.[38]

In view of this, it is submitted that s 342 A of the Criminal Procedure Act dealing with unreasonable delays in trials be reviewed with the aim to establish an obligatory mechanism for courts to investigate delayed trials. Section 342 A provides clear guidance to the courts on the factors to be considered to establish if a trial has been delayed[39] and further more present clear options to the courts on the action to take if it is established that there had been an unreasonable delay.[40]

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[36] DCS Annual Report 2013/14, p. 9.
[37] Section 49G.
[38] Section 35(3)(d) Constitution.
[39] Section 342 A (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors: (a) The duration of the delay; (b) the reasons advanced for the delay; (c) whether any person can be blamed for the delay; (d) the effect of the delay on the personal circumstances of the accused and witnesses; (e) the seriousness, extent or complexity of the charge or charges; (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost; (g) the effect of the delay on the administration of justice; (h) the adverse

6. Leadership instability

Table 2 below lists the National Commissioners for DCS since 1994; a total of 13 Permanent and Acting Commissioners over a period of 20 years. Senior positions in DCS are also frequently filled by acting incumbents and at present the key positions of Chief Financial Officer and CDC Strategic Management are in this situation. This level of turnover and instability at the senior management level is not to the benefit of the Department.

Table 2

Name	Status	Start	End	Duration
General Henk Bruyn	Permanent	April 1994	? 1996	2 years
Mr. Khulekani Sithole	Permanent	?1996	Nov 1999	2 ½ years
Mr.Thami Nxumalo	Acting	Nov 1999	May 2000	7 months
Rev. Lulamile Mbete	Permanent	May 2000	March 2001	10 months
Mr. Watson Tshivase	Acting	April 2001	July 2001	3 months
Mr. Linda Mti	Permanent	Aug 2001	May 2007	6 years and 9 months
Ms Jabu Sishuba	Acting	May 2007	May 2007	1 month
Mr. Vernon Petersen	Permanent	May 2007	Oct 2008	1 year and 5 months
Ms Xoliswa Sibeko	Permanent	Oct 2008	Feb 2010	9 months active. She was suspended in mid-July 2009 and remained suspended until her contract was terminated in February 2010.
Ms Jenny Schreiner	Acting	Feb 2010	May 2010	3 months
Mr. Tom Moyane	Permanent	May 2010	Sep 2013	3 years and 3 months
Ms Nontsikelelo Jolingana	Acting	Sep 2013	Jun 2014	9 months
Mr Zach Modise	Acting	Jun 2014	Present	

7. Conclusion

CSPRI will continue to engage with the Portfolio Committee as it is founded on the belief that Parliament has a critical role to play in strengthening governance and human rights. In this regard we

effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; (i) any other factor which in the opinion of the court ought to be taken into account.

[40] These are refusing further postponement of the proceedings; granting a conditional postponement; where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general; where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed; and that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay. (Section 342 A (3))

wish to emphasise that combatting impunity stands central to our constitutional obligations as well as the country's obligations under international human rights law. Effective investigations into human rights violations and holding perpetrators accountable are essential to strengthening the prison system in a manner that is compliant with the Constitution.

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