



**CSPRI SUBMISSION:**

**STRENGTHENING THE INVESTIGATING, MONITORING  
AND OVERSIGHT OVER THE TREATMENT OF INMATES  
AND CONDITIONS OF INCARCERATION AND REMAND  
DETENTION**

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## Introduction

1) This submission is in response to a call from the Portfolio Committee on Justice and Correctional Services. In 2013 CSPRI submitted a report in response to a request from the Portfolio Committee on Correctional Services (the Committee) on how the Judicial Inspectorate for Correctional Services (JICS) could be reformed through legislative amendment so as to ensure the strengthening of its oversight and investigative mandate.<sup>1</sup> CSPRI is appreciative of this opportunity and looks forward to further engagement with the Committee. The current call for submissions on JICS is therefore welcomed as JICS is in urgent need of reform.

2) At the outset, we make a few preliminary points:

- In assessing whether and/or how the JICS should be reformed, it is important to have a clear sense of what it is the JICS, as an oversight structure, should ultimately aim to achieve.
- The high volume of complaints recorded by the Independent Correctional Centre Visitors (ICCVs), particularly those in relation to assaults, indicates that there are a number of fundamental problems with the prison system, ranging from the failure to protect inmates' rights to be detained in safe custody to governance and corruption within the Department's ranks.
- The persistence of these and other problems indicates that the Department has not been able to undertake systemic reforms that would see fundamental reform of the prison system. The Department has been insular in its approach to problem-solving and has lurched from one crisis to the next. Where assistance was offered, well-meaning agencies have found it difficult to engage constructively with the Department. This did not escape the Jali Commission as it noted:

“This is a sad state of affairs because it is this very attitude that discourages any input from people who might be experts in other areas, which would be of assistance to the Department. The Department cannot operate in isolation. It is not an island but an integral part of the South African society. The manner in which it conducts its affairs has a bearing on the lives of all South Africans, who expect the Department to consult and interact with experts and relevant stakeholders to ensure that correctional facilities in our country are competently run so

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<sup>1</sup> Muntingh, L. and Ballard, C. (2013) *Strengthening the investigating, monitoring and oversight over the treatment of inmates and conditions of incarceration and remand detention*, CSPRI report.

that they compare with the best in the world.”<sup>2</sup>

- A competent and effective prison oversight structure enhances the transparency and accountability of the prisons authority. It deals with inmate complaints promptly and in a manner that encourages and calls for their swift resolution, the goal being, to build a rights-based culture in our prison system reflecting the transformative ideals of the Constitution. Ultimately effective oversight should seek to prevent complaints from arising in the first instance by fostering a culture of legislative compliance.
  - The achievement of these objectives depends on the accountability relationship between the oversight agency and the Department with reference to the following:
    - the extent to which an oversight structure is independent - politically, financially, operationally and administratively;
    - the oversight institution’s ability to monitor prisons thoroughly and comprehensively and to call to account the Department and its officials where this is required;
    - sufficient legislative authority to investigate complaints independently;
    - sufficient legislative authority to make binding recommendations and decisions as well as monitor the progress in the carrying out of such recommendations and decisions by the department; and
    - consistent recording of the state’s progress in improving the treatment of inmates and resolving systemic issues and complaints in terms of objective indicators which themselves are based on constitutional and international standards and legislation.
- 3) It is necessary to reflect briefly on the major limitations of the Inspectorate. Two issues stand out in this regard. The first of these is the stark lack of impact that complaints lodged by prisoners with Independent Visitors make. The second is the poor relationship between the Inspectorate and the Minister and Department respectively. We also question whether the high number of complaints recorded has had any material and lasting impact on conditions of detention.
- 4) Firstly, the Inspectorate, does not, provide any further information in respect of the resolution of complaints, the monitoring of agreed-upon solutions, time duration for resolution or any other additional information on the handling of complaints. Other information presented by the Judicial Inspectorate in its Annual Reports since 2000,

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<sup>2</sup>The Jali Commission Report p. 945

research by other organisations, and DCS Annual Reports indicate that changes in conditions of detention, the treatment of prisoners and the protection of human rights have changed very slowly, if at all, since the establishment of the Inspectorate. The types of complaints and their proportional distribution have also remained very stable, indicating that the same problems persist and are of a systemic nature. While the lodging of complaints with an Independent Visitor may benefit the individual prisoner, it is concluded that these individual complaints have not resulted in large-scale systemic changes to the treatment of prisoners and prison conditions.

- 5) Second, and possibly the underlying reason for the stagnation in prison conditions, is the relationship that the Inspectorate has with the DCS senior management and Ministry of Justice and Correctional Services. The Correctional Services Act obligates the Inspecting Judge to submit an annual report as well as a report on each inspection undertaken to the Minister of Justice and Correctional Services and to Parliament.<sup>3</sup> This has been done duly and the Annual Reports of the Inspectorate are distributed widely as well as made available on its website. Since the 2000 Annual Report the Inspectorate has been critical of conditions of detention, the treatment of prisoners, and systemic failures of the DCS. As far as could be established there has been very little, if any, reaction from the DCS on these reports. The overall impression gained is that the DCS and the Minister had not given the necessary weight to the findings and recommendations of the Inspectorate as presented in its annual reports.
  
- 6) Following the release of the 2009/10 annual report of the JICS, the Department briefed the Portfolio Committee on its “high-level action plan” in respect of the Inspectorate’s Annual Reports.<sup>4</sup> The proposed measures were indeed telling of what the Department’s attitude and actions have been to date. A senior official explained that “the Judicial Inspectorate for Correctional Services (JICS) Annual Report would henceforth be taken as a guide to service delivery” and that management will address the “disregard by the Department of Judicial Inspectorate reports”. It remains to be seen whether the DCS will deliver on this plan and

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<sup>3</sup> S 90(3-4) of the Correctional Services Act (111 of 1998). The requirement that the inspection reports should also be submitted to Parliament was added through an amendment to the Act, the Correctional Services Amendment Act, 25 of 2008.

<sup>4</sup> PMG Report on meeting of the Portfolio Committee on 24 November 2010, <http://www.pmg.org.za/report/20101124-meeting-finalisation-department-public-works-department-correctional-> Accessed 22 October 2011.

if it does use the Inspectorate's reports as a guide to service delivery. However, the plan confirmed what has long been suspected, namely that the Department essentially ignored the recommendations made by the Inspectorate, especially when they were critical of how the Department and officials dealt with human rights issues.

- 7) The most recent JICS Annual Report describes an unchanged situation. It is reported that four high-level recommendations were made in the previous year relating to: a review of the Emergency Support Teams as they are frequently implicated in rights violations; that non-compliance with section 6(5)(b) of the Correctional Services Act (CSA) requiring a health status examination upon admission of all prisoner be addressed; a review of the Department's reporting obligations, and a review of the Department's Information Technology (IT) needs. In all four instances it is reported that this had not been addressed by the Department.<sup>5</sup> It is therefore evident that the Department effectively ignores recommendations from JICS.

## **Good governance and human rights**

- 8) Ultimately, the JICS should advance and contribute to the establishment of a prison system that is compliant with the requirements in the Constitution and the Correctional Services Act. Broadly this means that the prison system must operate in a manner that is compliant with human rights standards and the principles of good governance. These two spheres are inextricably linked. 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".<sup>6</sup> This link has been confirmed in subsequent resolutions by the Human Rights Commission (and its successor, the Human Rights Council)<sup>7</sup> and also reflected in the Millennium Development Goals. It is indeed difficult to conceive of a situation where

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<sup>5</sup> JICS Annual Report 2015/15, pp.40-41.

<sup>6</sup> E/CN.4/RES/2000/64 para 1.

<sup>7</sup> E/CN.4/RES/2005/68, A/HRC/RES/7/11.

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 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.<sup>8</sup>

- 9) Good governance and human rights are consequently linked in four ways.<sup>9</sup> First, good governance reforms of democratic institutions enable formal and informal public participation in policy-development, decision-making and service delivery. Second, good governance reforms advance human rights when they improve the state's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights. In particular this is advanced through improved transparency and accountability. Third, good governance reforms aimed at strengthening the rule of law afford better protection to citizens and increase the capacity of oversight institutions. Fourth, good governance reforms aimed at combating corruption rely on the principles of transparency and accountability to ensure that people are treated fairly and that state resources are used effectively and efficiently to promote a rights-based development agenda. Good governance and human rights converge through aspirations of legitimacy, transparency, accountability, adherence to the rule of law and the allocation and utilisation of resources to advance people's development and quality of life.
- 10) As noted by Tapscott, good governance in the prison system is requiring performance that goes beyond mere financial probity and administrative efficiency, but encompasses the extent to which prisoners' rights are recognised and the system able to deliver on its mandate.<sup>10</sup> It is in this sense that one can refer to the nexus between human rights and governance.

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<sup>8</sup> 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.

<sup>9</sup> Office of the United Nations High Commissioner for Human Rights (2008), pp. 1-2.

<sup>10</sup> 'Good prison governance is to a large extent determined by the existence of an enabling policy framework, necessary resources and the extent to which prison management has the ability to implement these policies on a day-to-day basis in a transparent, accountable and ethical manner. [In the context of this research, however,] the notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected. This relates both to the manner in which offenders are treated in the prison system and the opportunities which they are afforded to re-orientate their lives towards a more constructive future in society.' (Tapscott, C. (2005) *A*

11) This understanding of good governance emphasises the fact that, in the prison context, governance means adherence to human rights standards and compliance with legislative requirements, and that deviations from these have a direct impact on how prisoners experience imprisonment on a daily basis. Moreover, it requires from management a particular ambition to adhere to enumerated rights and legal prescripts and to achieve the best possible outcome for released offenders. The aim of good governance in the prison system therefore reaches beyond the prison walls into the community.

## Independence of the Inspectorate

12) If the JICS is to function effectively and with maximum impact, then it is important that steps be taken to safeguard its long-term independence. Meaningful independence is necessary not only to ensure that the JICS is in a position to freely disseminate its findings and cooperate with civil society for particular reforms, but to ensure public confidence and trust.<sup>11</sup> Corder points out that institutional independence has two facets:

“In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government. Approval by the executive of budgets, or other issues of staffing is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases”.<sup>12</sup>

13) It follows then that there must be distance between JICS and the DCS to ensure its independence. It is for the very reason that JICS should investigate, amongst others, serious human rights violations that it cannot be perceived, even in error, to be operating hand in glove with the Department. JICS must be both impartial and independent when

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*Study of Best Practice in Prison Governance*, CSPRI Research Paper No. 9, Bellville: Community Law Centre, p. 3.)

<sup>11</sup>Jagwanth S. (2004) *A Review of the Judicial Inspectorate of Prisons in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre, p. 38.

<sup>12</sup> H Corder, S Jagwanth and F Soltau (1999) *Report on Parliamentary Oversight and Accountability*, p. 56. Available at web at: <http://www.pmg.org.za/bills/oversight&account.htm> See also Jagwanth S. (2004) *A Review of the Judicial Inspectorate of Prisons in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre.



investigations are undertaken. Impartiality is the central pillar that holds institutional credibility intact. The term “impartiality” means free from undue bias. It is conceptually different from “independence” which denotes that an 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 the lack of independence is commonly seen as an indicator of partiality.<sup>13</sup> The European Court of Human Rights has stated that “independence” does not only mean a lack of hierarchical or institutional connection, but also practical independence.<sup>14</sup> 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.<sup>15</sup>

### Financial independence of the Inspectorate

14) Financial independence requires that an organisation be in a position to acquire funds whenever necessary in order to perform its statutory duties. Jagwanth notes that both the guarantee of and the source of funding are crucial. If funding is sourced from the same organ that is the object of oversight, the independence of the oversight body and the perception thereof may be compromised.<sup>16</sup> In *New National Party*, the Constitutional Court noted that an arrangement whereby a “government department makes funds available from its own budget to a public entity for the performance of certain functions...is fundamentally inappropriate when applied to independent institutions...”<sup>17</sup> Accordingly, the Court stated, it was for “parliament, and not the executive arm of government to provide for funding...”<sup>18</sup>

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<sup>13</sup> Redress Trust (2004) *Taking Complaints of Torture Seriously – Rights of Victims and responsibilities of Authorities*, The Redress Trust, London, p. 17.

<sup>14</sup> *Finucane v United Kingdom* (2003) 22 EHRR 29 at Para 68.

<sup>15</sup> *Assenov and others v Bulgaria* (1999) 28 EHRR 652 at Para 140.

<sup>16</sup> Jagwanth, p. 37-8.

<sup>17</sup> *The New National Party v Government of the RSA and others* 1999 (3) SA 191, para 89.

<sup>18</sup> *Id.*

- 15) The Correctional Services Act 111 of 1998 (the Act) states that the JICS is an “independent office under the control of the Inspecting Judge.”<sup>19</sup> However, section 91 of the Act stipulates, “the Department is responsible for all the expenses of the Judicial Inspectorate.”<sup>20</sup> This is precisely the problem with which the Constitutional Court in *New National Party* was concerned. By contrast, section 3(3) of the Independent Police Investigative Directorate Act 1 of 2011 (the IPID Act) stipulates, “the Directorate is financed from money that is appropriated by Parliament.” Its costs, therefore, are not subsumed by the South African Police Service’s budget, nor does SAPS have any control over it.
- 16) Chapter 9 institutions,<sup>21</sup> also tasked with independent oversight and monitoring mandates, are not accorded a separate budget vote – a factor which has led to much criticism<sup>22</sup> and repeated complaints of under-funding on the part of these institutions, in particular, the Public Protector.<sup>23</sup> Various academic commentators have stated that oversight and/or investigative bodies can be significantly weakened if budgetary restraints render the institution ineffective in carrying their mandates.<sup>24</sup> Corder goes as far to say that Chapter 9 Institutions’ budgets should be subject to a separate vote and that genuine independence would require the creation of a parliamentary oversight committee that takes responsibility for their efficacy.<sup>25</sup>
- 17) The JICS, like the Chapter 9 institutions does not have a separate budget vote. Rather, it is allocated a portion of the DCS budget. Moreover, the extent to which JICS’s requests for a specific budget amount is adhered to, is uncertain. During the 2014/15 financial year the JICS was allocated 0.23 per cent of the Department’s budget. The current legislative arrangement renders it almost impossible for the JICS to have any kind of meaningful input as to what its allotted budget should be.

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<sup>19</sup>Section 85(1) of the Correctional Services Act 111 of 1998.

<sup>20</sup>Section 91 of the Correctional Services Act 11 of 1998.

<sup>21</sup> These institutions are listed in sections 181-194 of the Constitution.

<sup>22</sup>See Corder above note 3.

<sup>23</sup>See for example Office of the Public Protector *Annual Report 2004–2005* (2005), available at [http://www.publicprotector.org/reports\\_and\\_publications/annual\\_report/public\\_protector\\_2004\\_2005.pdf](http://www.publicprotector.org/reports_and_publications/annual_report/public_protector_2004_2005.pdf)

<sup>24</sup>See M Oosting 'The Ombudsman and His Environment: A Global View' in L Reif (ed) *The International Ombudsman Anthology* (1999).

<sup>25</sup>See Corder *supra* at para 7.2

18) Thus, it is the CSPRI's recommendation that the JICS budget should not be linked to the Department, but should come directly from Parliament or be transferred from the executive in such a way that it would ensure, in the opinion of the Inspecting Judge, the independent and effective functioning of the JICS. This change would require an amendment to sections 88A(1)(b) and 91 of the Correctional services Act.*(see draft legislation below)*

### **Administrative and Operational Independence**

19) Administrative independence “implies control over matters directly connected with the functions that such institutions must perform.”<sup>26</sup> In relation to the JICS, this means, at least, control over the processing of applications for the appointment of staff and separate administrative systems. Unless efforts are made for administrative separation, there is the danger that an independent body is merely perceived as a directorate of the parent department both by the department itself as well as staff in the office, and the user public.<sup>27</sup>

20) A 2004 report on the Office of the Inspecting Judge, based on interviews with staff of the Judicial Inspectorate, members of civil society, Chapter Nine institutions, senior staff of the Department of Correctional Services and Members of Parliament, stated the following:

“A persistent concern raised by those interviewed was whether and the extent to which the Inspectorate was truly independent of the Department of Correctional Services. The concern arose from both the administrative and financial link between the Inspectorate and the DCS, as well as the fact that some staff of the Inspectorate were drawn from the ranks of DCS officials. Some expressed concern about the degree of independence of the IPVs, who some prisoners saw as being too close to prison officials. The perception that the Inspectorate was not independent of the DCS, or that it was a part of the DCS, was commonly held.”

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<sup>26</sup> Id.

<sup>27</sup> Id.

- 21) On 6 March 2013 JICS presented its quarterly report to the Committee. It noted that it had received an increased budget allocation to employ additional staff. The appointment of the staff, however, could not take place because the JICS staff establishment is part of the DCS staff establishment which is determined by Treasury. The practical consequence of this is that the Department cannot create additional posts on PERSAL and JICS was therefore not able to employ additional staff despite the funds being available. This serves as a good example of financial and administrative dependence and thus an undesirable situation. In the 2014/15 JICS Annual Report it is noted that the situation has remained unchanged.<sup>28</sup>
- 22) Although the esteem in which judges are held brings a measure of credibility and independence to the JICS, this safeguard remains fragile for it is reliant on an individual and not in the Office itself.<sup>29</sup> We recommend, therefore, that where administrative independence is lacking, that the requisite action be taken, be it through legislative amendment, or operational processes.

## Legislative Mandate

- 23) Section 85(2) of the Act states:

“The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres.”

- 24) This section quite clearly indicates that the purpose of the JICS is to perform a *monitoring and reporting* function. A number of other sections support this interpretation.<sup>30</sup>

- 25) Section 90(2) and 90(5) of the Act implies, however, that the Inspecting Judge also has an *investigative* role:

90(2) The Inspecting Judge may only receive and deal with the complaints submitted by the National Council, the Minister, the National Commissioner, a Visitors’ Committee and in cases of urgency, an Independent Correctional Centre Visitor and may of his or her own

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<sup>28</sup> JICS Annual Report 2014/15 p. 37.

<sup>29</sup> Jagwanth *supra* at 48.

<sup>30</sup> See sections 91(1), (3) and (4) of the Act.

volition deal with any complaint.

90(5) For the purpose of dealing with such complaints, the Inspecting Judge may make any enquiry and hold hearings.”

26) The inspection function of the JICS is supported by the ICCVs, who are tasked, almost exclusively, with “deal[ing] with the complaints of inmates by:

a) regular visits;

b) interviewing prisoners in private;

c) recording complaints in an official diary and monitoring the manner in which they have been dealt with; and

d) discussing complaints with the Head of the Correctional Centre....”<sup>31</sup>

The choice of phrase “dealing with” is rather vague and does not define what this entails.

27) There is nothing in the Act that requires ICCVs to inspect prisons for the purpose of monitoring and reporting. The Act does, however, state that they must undertake “regular visits” to prisons and that an ICCV shall have access to any part of the correctional centre, document and record. It is unclear, therefore, who, besides the Inspecting Judge and his or her ‘assistants’, is tasked with “reporting on the treatment of prisoners in correctional centres and on conditions and any corrupt or dishonest practices in correctional centres.”

The 2011/2012 JICS Annual Report states:

“During 2011/2012, 72 inspections were conducted across the country, covering just under a third of all correctional centres. These included inspections carried out by the Inspecting Judge himself, the Chief Executive Officer, Judges of the High Court and also by senior personnel of the Inspectorate.”<sup>32</sup>

28) The capacity to conduct inspections is, however, severely constrained as described in the 2014/15 JICS Annual Report:

While a consistent programme of inspections has been maintained, the ability of the Inspectorate to inquire into the increasing number of complaints and mandatory reports is constrained. The Inspectorate’s selected areas of inquiry were torture, assaults, deaths from unnatural causes and urgent matters (health care as an example); these are reported on in this chapter. The strategy was to extend the list gradually but due to human resource

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<sup>31</sup>Section 93 of the Act.

<sup>32</sup>Page 22. The 2010/2011 JICS Annual Report (page 35) states that “inspections were conducted at the Klerksdorp, Groenpunt, Kimberly, Van Rhynsdorp and Durban centres...” Although it is unclear what percentage of the total number of prisons this would constitute, it is certainly far from a representative sample.

issues this has not been possible.<sup>33</sup>

29) Inmates cannot be expected to be aware of all the various prescripts of the Act and the standard of care to which they are entitled. Accordingly, non-compliance with the Act and systemic failures on the part of the Department generally to uphold its obligations, fall through the complaints system. Inspections therefore serve an extremely important purpose: the regular and persistent check on the Department's fulfilment of its constitutional and statutory obligations. Unfortunately, any failures on the part of the Department remain unchecked if inspections are not carried out in, at the very least, the majority of the country's prisons.

30) The legislative mandate of the JICS is ambiguous, for although the Act envisions both investigate and monitoring functions, it fails to provide adequate directions on how each of these processes should be carried out. The result, we believe, and as the discussion immediately below shows, is an institution that lacks the resources to carry out either of these functions effectively.

## **Expanding the substantive mandate of the Inspectorate**

The discussion below deals with two issues concerning the current mandate of the JICS and where CSPRI believes the Inspectorate should have oversight and investigative powers. These are post-releases services rendered by the Department and the investigation of corrupt and dishonest practices in the Department.

### **Corruption and governance**

31) The mandate to investigate and report on corrupt and dishonest practices was originally also part of the Judicial Inspectorate's mandate but was removed when the Correctional Services Act was amended in 2001.<sup>34</sup> The result is a strange one where the Inspecting Judge can report on corrupt and dishonest practices, but the Judicial Inspectorate is not mandated

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<sup>33</sup> JICS Annual Report 2014/15 p. 40.

<sup>34</sup> Section 31 of Act 32 of 2001 amended section 85 (2) of the Correctional Services Act.

to investigate it. The removal of corrupt and dishonest practices from the Judicial Inspectorate's mandate was at the request of the Judicial Inspectorate in 2000.<sup>35</sup>

32) Where others saw a synergy created by investigating both corruption and the treatment of prisoners,<sup>36</sup> the Inspectorate saw a clear line of division between corruption and the treatment of prisoners, opining that each should be dealt with by different institutions. It argued that corruption calls for "a criminal investigation whilst the latter is concerned with the humane treatment of prisoners and ensuring their human dignity".<sup>37</sup> The reasoning is blatantly flawed as the link between corruption (i.e. governance) and the treatment of prisoners (i.e. human rights) has been well demonstrated, for example, by the Jali Commission, and confirmed by the Human Rights Council.<sup>38</sup> The Inspectorate motivated further that its Independent Visitors and Inspectors were reliant on the "good relationship that exists between the officials on the one hand, and our inspectors and visitors on the other hand".<sup>39</sup> If the Inspectorate were to investigate corruption and dishonest practices, the argument went, it would create suspicion and thus jeopardise the "good relationship". Moreover, the Inspectorate argued that the DCS had an Anti-Corruption Unit in place and if necessary, allegations of corruption would be reported to it or to the police. As an afterthought the Inspectorate added, "It would appear that the presence of Independent Prison Visitors has an inhibiting effect on corruption and dishonesty."<sup>40</sup> No evidence to substantiate the claim was presented. However, the Director of the Office of the Inspecting Judge testified before the Jali Commission that the change in mandate was also motivated by a fear for the safety of the Independent Prison Visitors if they were to report on and investigate corruption.<sup>41</sup> Again no evidence was submitted to substantiate this fear.

33) The Jali Commission was critical of the Judicial Inspectorate's actions, observing that it was "more concerned about the safety of its staff than about its mandate"<sup>42</sup> and that "since it opened, the Office of the Inspecting Judge has never investigated corruption. Instead of pursuing its mandate to investigate corruption as required in the Act, it sought instead to

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<sup>35</sup> Office of the Inspecting Judge (2001) *Annual Report of the Judicial Inspectorate for Prisons 2000*, Cape Town, pp. 18-19.

<sup>36</sup> Testimony of Prof Dirk Van Zyl Smit before the Jali Commission, Jali Commission, p. 568.

<sup>37</sup> Office of the Inspecting Judge (2001), p. 18.

<sup>38</sup> E/CN.4/RES/2000/64 para 1.

<sup>39</sup> Office of the Inspecting Judge (2001), p. 18.

<sup>40</sup> Office of the Inspecting Judge (2001), p. 19.

<sup>41</sup> Jali Commission, p. 571.

<sup>42</sup> Jali Commission, p. 571.

amend the Act.”<sup>43</sup> When testifying before the Jali Commission in November 2002, less than a year after the amendment came into force,<sup>44</sup> the Director of the Office of the Inspecting Judge conceded that the distinction between corruption and the treatment of prisoners, as made in the Judicial Inspectorate’s 2000 Annual Report, may in some instances be non-existent or, if it is there, imprecise.<sup>45</sup>

34) While the drafters of the Correctional Services Act saw a clear link between governance and human rights, the Inspectorate forced a distinction to avoid a confrontational relationship with the DCS. The Jali Commission did not have much hope for the Inspectorate and concluded that it had been rendered ineffective and appeared to be reluctant to investigate corruption.<sup>46</sup> The Commission made a number of recommendations, focusing on amendments to the Correctional Services Act to strengthen its independence and grant it more powers, but still believed that this was not sufficient.<sup>47</sup> It consequently recommended the creation of another national agency which it called the Prison Ombudsman with powers similar to that of the then Independent Complaints Directorate (ICD)<sup>48</sup> to investigate corruption, maladministration and dishonest practices.<sup>49</sup> The Jali Commission favoured the mandate and powers of the ICD and did not assess its efficiency and effectiveness, despite it being well known that there was room for substantial improvement.

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<sup>43</sup> Jali Commission, p. 575.

<sup>44</sup> Act 32 of 2001 came into force on 14 December 2001.

<sup>45</sup> Jali Commission, p. 575.

<sup>46</sup> Jali Commission, p. 589.

<sup>47</sup> Jali Commission, pp. 590-593.

<sup>48</sup> The Independent Complaints Directorate (ICD) is a government department, established in 1997, to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service (MPS). It received its mandate from the Section 53(2) of the South African Police Act (Act 68 of 1995). It operates independently from the SAPS in the effective and efficient investigation of alleged misconduct and criminality by SAPS members. The ICD investigates the following:

- deaths of persons in police custody or as a result of police action (such as shooting, assault).
- the involvement of SAPS members in criminal activities such as assault, theft, corruption, robbery, rape and any other criminal offences.
- police conduct or behaviour which is prohibited in terms of the SAPS Standing Orders or Police Regulations, such as neglect of duties or failure to comply with the police Code of Conduct.
- dissatisfaction/ complaints about poor service given by the police
- failure to assist or protect victims of domestic violence as required by the Domestic Violence Act
- misconduct or offences committed by members of the Municipal Police Services (MPS). (ICD Website <http://www.icd.gov.za/about%20us/legislation.asp> Accessed 7 December 2011)

<sup>49</sup> Jali Commission, p. 614.



- 35) Ultimately, few of the Jali Commission's recommendations in respect of the Judicial Inspectorate would be implemented, and the proposals for the establishment of a Prison Ombudsman were rejected by the DCS, as reported in 2011 to Parliament.
- 36) The Jali Commission's recommendation to create a structure similar to that of the ICD was aimed in particular at filling the gap created by the Judicial Inspectorate declining to investigate corruption cases reported by prisoners and the high-level, but time-limited, investigations being undertaken by the SIU. The Prison Ombudsman would have filled that gap by forging the link between governance and human rights.
- 37) It is therefore CSPRI's recommendation that the investigation of and reporting on corrupt and dishonest practices in the Department be returned to the Judicial Inspectorate. Since there are existing agencies such as the SIU tasked with investigating corruption and a new anti-corruption agency is being established in the public service,<sup>50</sup> the scope of the Inspectorate's investigations into corrupt and dishonest practices may be limited to matters that have a direct bearing on the treatment of inmates and persons under community corrections.

## Post-release

- 38) The current mandate of the Inspectorate limits its scope to those persons in the physical custody of the Department. It consequently excludes those persons under any form of community corrections (i.e. parole and correctional supervision). There are at any time an estimated 40 000 individuals under community corrections which makes them a substantial part of the DCS mandate. While their issues and concerns may be different from those individuals deprived of their liberty, there is reason to believe that the community corrections system is not operating optimally and that parolees and probationers may indeed have reason to lodge their complaints with an independent body. Research undertaken by CSPRI found evidence of substantial problems and legitimate complaints by parolees.<sup>51</sup>

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<sup>50</sup> Statement by Minister Sisulu on International Anti-Corruption Day 2012, <http://www.dpsa.gov.za/article.php?id=214>

<sup>51</sup> Muntingh L (2009) Ex-prisoners' views on imprisonment and re-entry, CSPRI Research Report, Bellville: Community Law Centre.

39) Precedent for the expansion of the JICS mandate to also cover community corrections exists with reference to Her Majesty’s Inspector of Prisons which also inspects re-settlement and re-entry service rendered by the Prison Service.

## Other jurisdictions

40) The English system of prison oversight serves as an excellent example of how monitoring and investigative functions are delineated among three institutions, each tasked with the fulfilment of a specific and comprehensive mandate. These institutions are financially and operationally independent from the Prison Authorities.<sup>52</sup>

41) Her Majesty’s Chief Inspectorate of Prisons (HMCIP), regulated by the Prisons Act of 1952, is responsible, primarily, for inspecting prisons and publishing reports, which include information on the treatment of prisoners and conditions of detention.<sup>53</sup> The Terms of Reference of the HMCIP state the following:<sup>54</sup>

“The Chief Inspector will need to ensure that he/she:

- inspects all the prison establishments in England and Wales;
- maintains information systems to ensure that inspection resources are targeted at areas of most need and problems identified can be tackled promptly;
- keeps the inspection process, and the composition of inspection teams, under review to ensure that inspection standards are maintained and that these objectives are met within available resources.

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<sup>52</sup> Terms of Reference, no. 12, available at <http://www.ppo.gov.uk/terms-of-reference.html>

<sup>53</sup>Section 5A of the Prisons Act 1952 states:

- (1) Her Majesty may appoint a person to be Chief Inspector of Prisons.
- (2) It shall be the duty of the Chief Inspector to inspect or arrange for the inspection of prisons in England and Wales and to report to the Secretary of State on them.
- (3) The Chief Inspector shall in particular report to the Secretary of State on the treatment of prisoners and conditions in prisons.
- (4) The Secretary of State may refer specific matters connected with prisons in England and Wales and prisoners in them to the Chief Inspector and direct him to report on them.
- (5) The Chief Inspector shall in each year submit to the Secretary of State a report in such form as the Secretary of State may direct, and the Secretary of State shall lay a copy of that report before Parliament.

<sup>54</sup>Terms of Reference available at <http://www.justice.gov.uk/about/hmi-prisons/terms-of-reference>.

The Chief Inspector will be expected to publish the methodology against which he/she inspects prison establishments including how the findings are supported.”

42) The Prison Ombudsman investigates complaints from prisoners. Its duties are set out in a ‘terms of reference’ document, and include the consideration of complaints by offenders, immigration detainees or probationers regarding their treatment and care and prison governance. The Ombudsman is discussed in greater detail below.

43) The Independent Monitoring Boards (IMBs) are statutory bodies established by the Prison Act 1952 tasked with monitoring the welfare of inmates. The IMBs are staffed by (voluntary) laypersons, have access to prisons at all times and interview prisoners and correctional officials to ensure that prisoners are being cared for decently and with humanity. Each Board reports annually to the Justice Minister with all their findings and at other times regarding matters of serious concern. There are on average between 15 to 20 volunteers per institution. Board members are permitted access at any time to every part of the prison and to all prisoners and detainees.

## **Human rights violations and the complaints system**

### **Background**

44) Since the 2009/2010 Annual Report, JICS has been providing more detailed information on unnatural deaths in custody, specifically, the results of investigations into these deaths. The 2011/2012 Annual Report states:

“In respect of criminal investigations and disciplinary proceedings, the 2010/2011 Annual Report indicated that a number of homicide cases that year had not yet been finalised. The Inspectorate followed up on these cases. SAPS closed the files in the majority of those cases, and where matters were referred to the National

Prosecuting Authority (NPA) for prosecution, the NPA returned a *nolle prosequi* i.e. they declined to prosecute.”<sup>55</sup>

45) It appears, therefore, that over the preceding years, there has not been a single criminal prosecution of a Departmental official implicated in the death of a prisoner. In November 2011 CSPRI submitted to the Portfolio Committee on Correctional Services that even though the descriptions provided in the JICS annual reports are brief, a number of traits are clear when officials are implicated in the deaths of prisoners:<sup>56</sup> they were the result of aggravated assaults inflicted either as punishment or in retaliation for an assault on an official and were committed by groups of officials on single prisoners. In several of the cases it was noted that the assaults continued after the prisoner was subdued and/or the situation stabilised, thus exceeding the use of minimum force requirements in the Act.<sup>57</sup> The most common weapon used by officials was a baton (tonfa), but prisoners were also subjected to kicks, teargas and electroshock equipment.<sup>58</sup> In a number of cases the deceased was denied prompt medical attention even though the Act clearly states that any prisoner who is subjected to the use of force must immediately undergo a medical examination.<sup>59</sup> It is also apparent that when disciplinary action was taken against officials, the proceedings took extremely long to be finalised, that the charges were inappropriate,<sup>60</sup> and that the sanctions imposed were relatively light.<sup>61</sup>

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<sup>55</sup> Office of the Inspecting Judge (2012) Annual Report of the Judicial Inspectorate for Correctional Services, Cape Town, p. 53.

<sup>56</sup> Submission by CSPRI to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011.  
<http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres>

<sup>57</sup>s 32 of the Correctional Services Act.

<sup>58</sup> The appropriateness of having and using electroshock equipment in prisons is increasingly under question. (Omega Research Foundation and the Institute for Security studies (2011) Submission on the Prevalence of Torture in Correctional Centres, Jointly Submitted to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011.  
<http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 21 December 2011.)

<sup>59</sup>s 32(5) of the Correctional Services Act.

<sup>60</sup> Even though little information is provided on the charges against implicated DCS officials, it appears that these are lesser charges such as misconduct, disregarding security rules, negligence, falsifying registers and altering the scene of a crime.

<sup>61</sup> The following sanctions were imposed in respect of the cases reported in 2009/10: one month suspended without pay – 8 officials; final written warning – 4 officials; written warning – 2 officials; demotion – 1 official; and dismissal – 1 official.

- 46) In light of this, the results of investigations reported in the Annual Reports offer little reason for optimism, but rather, the sense that the prevailing lack of criminal investigations serve to perpetuate a culture of impunity. While there may be legitimate reasons behind the Director of Public Prosecutions (DPP) decisions not to prosecute, the lack of transparency in this regard does little to support the accountability of the Department or the role JICS. Such issues are not limited to deaths in custody, but are relevant in respect of assaults.
- 47) The lack of transparency is also problematic in respect of investigations purportedly undertaken by the Department and SAPS into unnatural deaths in custody. Indeed, the lack of prosecutions indicates that such investigations are not particularly thorough or sufficiently independent.
- 48) Given the clear duty to detain all inmates in “safe custody whilst ensuring their human dignity...”<sup>62</sup>, internal Departmental investigations into deaths and serious assaults (implicating officials) for disciplinary purposes should not take precedence over investigations for determining criminal liability. Moreover, any direct involvement of the Department in criminal investigations (where it would interview witnesses, alleged perpetrators and assess physical evidence) goes against the internationally accepted requirement that such investigations must be conducted by impartial and independent authorities.<sup>63</sup> (The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions<sup>64</sup> provide useful guidance in respect of investigations of deaths in detention. Such deaths include political assassinations, deaths from torture or ill-treatment in prison or detention, death that results from enforced "disappearances," deaths resulting from the excessive use of force by police, executions without due process, and acts of genocide.<sup>65</sup>)

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<sup>62</sup>Section 2(b) of the Act.

<sup>63</sup>UNCAT art 13 and 14. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

<sup>64</sup> Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989

<sup>65</sup> United Nations (1991) *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, New York: United Nations, p. 3.

49) By virtue of the fact that the alleged perpetrator is an employee of the Department, the Department is implicated because the death in question indicates a material failing or neglect on the part of the Department to provide safe custody and uphold the right to life.

50) Although there is little recent information available on the role of SAPS in investigating crimes committed in prisons, the Jali Commission's final report made a number of observations and identified three impediments to effective investigations:

- continuous interference by DCS staff in investigations;
- investigations not being done in confidence due to the presence of DCS officials and their knowledge of the prisoner and the complaint, and
- intimidation of witnesses and victims by DCS officials.<sup>66</sup>

51) Given the lack of successful prosecutions described above, there is reason to believe that problems persist with the manner in which SAPS investigates such cases. Whether this is the result of interference by DCS officials or collusion between SAPS and DCS officials is open to speculation.

52) The current investigative regime regarding deaths in custody requires urgent attention, for unless drastic changes are made it is unlikely that any successful investigations and prosecutions will take place. It is, of course, ultimately in the interests of the Department that deaths and assaults are properly investigated and the perpetrators held criminally responsible.

### **JICS Investigative Mandate**

53) The Inspecting Judge, besides being authorised to visit and inspect prisons, is empowered to "deal" with a complaint referred to him or her from the National Commissioner, the Minister, the Visitors Committee or an ICCV.<sup>67</sup> Moreover, for the purpose of conducting

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<sup>66</sup> The Jali Commission Report p. 424-425

<sup>67</sup>Section 90(2).

an “investigation,” the Inspecting Judge “may make any enquiry and hold hearings.”<sup>68</sup>

54) In the event that a serious incident occurs involving the injury, assault or death of a prisoner, the Inspecting Judge would be notified via the complaints system and thereafter empowered to “deal” with such a complaint which may or may not require the investigative processes set out above and, where relevant, in terms of the Commissions Act 8 of 1947.

55) The Act states that “any death in prison must be reported forthwith to the Inspecting Judge who *may* carry out or instruct the Commissioner to conduct any enquiry.” It is worth noting that the IPID Act makes it mandatory to investigate the following:

- a) any deaths in police custody;
- b) deaths as a result of police actions;
- c) any complaint relating to the discharge of an official firearm by any police officer
- d) rape by a police officer, whether the police officer is on or off duty;
- e) rape of any person while that person is in police custody;
- f) any complaint of torture or assault against a police officer in the execution of his or her duties; and
- g) corruption matters within the police...”

The value of the above list is that it is clear in respect of what IPID must do, as opposed to leaving it open to the institution to interpret what it wants to do.

56) Ultimately, a finding by the Inspecting Judge that the criminal liability of the Department or a member of the Department should be investigated by the SAPS and the National Prosecuting Authority would be conveyed in the form of a recommendation to the Department itself and thereafter reported to the Portfolio Committee. The IPID Executive Director, however, “*must* refer criminal offences revealed as a result of an investigation, to the National Prosecuting Authority for criminal prosecution and notify the Minister of such referral.”<sup>69</sup> For the purposes of conducting an investigation, an IPID investigator has the same powers bestowed upon a peace officer/police officials regarding the following processes:

- a) the investigation of offences;

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<sup>68</sup>Section 90(5).

<sup>69</sup>Section 7 IPID Act.

- b) the ascertainment of bodily features of an accused person;
- c) the entry and search of premises;
- d) the seizure and disposal of articles;
- e) arrests;
- f) the execution of warrants; and
- g) the attendance of an accused person in court.

57) The English and Canadian legislation also serves as a good example of legislative clarity in respect of investigative processes and mandatory investigative obligations. The respective powers of the Ombudsman and Correctional Investigator are enumerated below.

58) In England and Wales the Ombudsman may investigate, *inter alia*, decisions and actions (including failures or refusals to act) relating to the management, supervision, care, and treatment of prisoners in custody, by prison staff...<sup>70</sup> It is empowered in terms of its Terms of Reference to enjoy access to prisons “for the purpose of conducting interviews with employees and other individuals, for examining documents (including those held electronically), and for pursuing other relevant inquiries in connection with investigations”<sup>71</sup>

59) At the conclusion of its investigation, the Ombudsman may make recommendations directly to any of the following, relevant authorities: the Secretary of State for Justice, the Home Secretary or the Secretary of State for Children, Schools and Families or to any other body or individual the Ombudsman considers appropriate given their role, duties and powers.” In addition, the Ombudsman is required to reply in writing to all those whose complaints have been investigated and advise them of any recommendations made. Moreover, the relevant government must reply within four weeks to recommendations from the Ombudsman.

60) The Ombudsman *must* investigate the circumstances of unnatural deaths and must aim to establish the following:

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<sup>70</sup> Terms of Reference, no. 9, available at <http://www.ppo.gov.uk/terms-of-reference.html>

<sup>71</sup> Terms of Reference, no. 12, available at <http://www.ppo.gov.uk/terms-of-reference.html>



- the circumstances and events surrounding the death, especially regarding the management of the individual by the relevant authority or authorities within remit, but including relevant outside factors;
- examine whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence;
- in conjunction with the National Health Service where appropriate, examine relevant health issues and assess clinical care;
- provide explanations and insight for the bereaved relatives; and
- assist the Coroner's inquest fulfil the investigative obligation arising under Article 2 of the European Convention on Human Rights ('the right to life'), by ensuring as far as possible that the full facts are brought to light and any relevant failing is exposed, any commendable action or practice is identified, and any lessons from the death are learned.

61) In Canada the Correctional Investigator is empowered to:

"to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner (of Corrections) or any person under the control and management of, or performing services for, or on behalf of, the Commissioner, that affect offenders either individually or as a group".<sup>72</sup>

62) The Correctional Investigator may commence an investigation on the receipt of a complaint by or on behalf of an offender, at the request of the Minister or of his own volition. He/she has full discretion as to whether and how an investigation should be conducted in relation to any particular complaint or request.<sup>73</sup> During the course of an investigation, the Correctional Investigator may direct any person to furnish relevant information or any object or document as well as examine any person under oath. The Correctional Investigator is also empowered to enter any premises under the control of the commissioner for the purpose of carrying out an inspection.<sup>74</sup>

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<sup>72</sup>Corrections and Correctional Releases Act, section 167.

<sup>73</sup>Corrections and Correctional Releases Act, section 170.

<sup>74</sup>Corrections and Correctional Releases Act, section 171-174

63) Once the Correctional Investigator has concluded an enquiry, he/she can then decide the matter on the basis that the action was contrary to law or policy, or on a number of administrative law bases. The Correctional Investigator may make any recommendation to the Prisons Commissioner and Parole Board he/she deems appropriate, which may include:<sup>75</sup>

- that reasons be given to explain why the decision or recommendation was made or the act or omission occurred;
- that the decision, recommendation, act or omission be referred to the appropriate authority for further consideration;
- that the decision or recommendation be cancelled or varied;
- that the act or omission be rectified; or
- that the law, practice or policy on which the decision, recommendation, act or omission was based be altered or reconsidered.

64) Although the recommendations are not binding, the Correctional Investigator is empowered to inform the Minister, if, after a reasonable time, that the Commissioner or Chairperson of the Parole Board, as the case may be, has failed to take adequate and appropriate action.<sup>76</sup>

## Recommendation

65) We recommend that legislative amendments be introduced that establish two bodies, both wholly independent from the government: (a) one tasked with inspecting prisons and monitoring and reporting on conditions of detention as well as making recommendations thereon (i.e. an inspectorate), (b) the other tasked with investigating and following up on complaints concerning serious rights violations.

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<sup>75</sup>Corrections and Correctional Releases Act, section 179.

<sup>76</sup> Corrections and Correctional Releases Act, section 180.

## Investigations

- 66) The investigative body could take on various forms. We recommend, however, that it emulate, as far as possible, the IPID. Such a proposal is not difficult to justify and the Jali Commission saw sense in going this route. First, many of the complaints received from inmates involve alleged incidents of violent assault, torture and sexual abuse – the same types of incidents that the IPID is *mandated* to investigate. Secondly, the fact that such incidents do not appear to be adequately investigated or prosecuted suggests that an independent body with policing-type powers would be the most appropriate response to prevailing impunity.
- 67) An investigative body for correctional services could take on exactly the same format as the IPID and its establishing legislation could mirror almost entirely the IPID Act provisions. Such a body would, similar to IPID, submit its findings directly to the Director: Public Prosecutions.
- 68) Our alternative recommendation would be, again, the establishment of an investigative body, either within the JICS structure or external to it, but regulated in a far more comprehensive way and granted greater powers of investigation. Such legislation could resemble the following draft example, annexed hereto as Appendix 1.

## Inspections

- 69) Our recommendation in this regard is that the current legislation be amended so as to establish an inspectorate that is tasked exclusively with inspecting and reporting on prison conditions and the treatment of prisoners. A draft example is annexed hereto as Appendix 2.



## Appendix 1

### Draft legislation for inspection and monitoring

The sections in the Act relating to the appointment of the Inspecting Judge, the Chief Executive Officer, staff and assistants and their respective conditions of employment are unproblematic. The remainder would be replaced by the following. This piece of legislation would ideally exist parallel to an IPID-type statute regulating investigations in prisons (see Appendix 2). Were such legislation not to be adopted, however, the text below would need to incorporate the next set of draft legislation on investigations.

#### *Establishment of Judicial Inspectorate for Correctional Services*

- *The Judicial Inspectorate for Correctional Services is an independent office under the control of the Inspecting Judge*
- *The Judicial Inspectorate is financed from money that is appropriated by Parliament.*

#### *Objects of the Judicial Inspectorate for Correctional Services*

- *The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres and the system of community corrections in order that the Inspecting Judge may report on the treatment of inmates in correctional centres, conditions of detention, the treatment of parolees and probationers, and any corrupt or dishonest practices related to the treatment of inmates, probationers and parolees with the aim to foster compliance with the Constitution and the Correctional Services Act .*

#### *Powers, functions and duties of Inspecting Judge*

- *The Inspecting Judge inspects or arranges for the inspection of correctional centres and remand detention facilities in order to report on the treatment of inmates in correctional centres and remand detention facilities, on conditions of detention and the treatment of parolees and probationers, and any corrupt or dishonest practices in correctional centres and remand detention facilities.*

- *The Inspecting Judge must:*
  - i) *arrange for the inspection of all correctional facilities in the country on a regular basis supported by follow-up visits;*
  - ii) *submit a report on each inspection to the Minister and the relevant Parliamentary Committees on Correctional Services;*
  - iii) *publish the methodology against which he/she inspects correctional facilities, including how the findings are supported;*
  - iv) *submit an annual report to the President and to the Minister which must then be tabled before Parliament*

### ***Powers and duties of inspectors***

- *An inspector shall conduct inspection by:*
  - i) *regular visits to correctional centres; and*
  - ii) *recording observations on conditions in correctional centres and the treatment of inmates in an official diary.*
- *An inspector, in the exercise and performance of such powers, functions and duties, must be given access to any part of the correctional centre and to any document or record.*
- *The Head of the Correctional Centre must assist an inspector in the performance of the assigned powers, functions and duties.*
- *Should the Head of the Correctional Centre refuse any request from an inspector relating to the functions and duties of an inspector, the dispute must be referred to the Inspecting Judge, whose decision will be final.*
- *The Inspecting Judge may make rules concerning, or on the appointment of an inspector, specify, the number of visits to be made to the correctional centre over a stated period of time and the minimum duration of a visit, or any other aspect of the work of an inspector.*
- *Each inspector must submit a quarterly report to the Inspecting Judge, which shall include the number and duration of visits.*

## Appendix 2

### Draft legislation for investigative processes

All the sections in chapters nine and ten of the Act dealing with investigations would be replaced by the following. This draft piece would be relevant only if IPID-type legislation were to not be adopted. Obviously the text below would be added to the draft text above.

#### ***Objects of the Judicial Inspectorate for Correctional Services***

*The object of the Judicial Inspectorate for Correctional Services is to facilitate the inspection of correctional centres and investigate inmates' complaints in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and persons subject to community corrections, and on conditions in correctional centres as well as see to the finalisation of inmates' complaints.*

#### ***Powers, functions and duties of Inspecting Judge***

- The Inspecting Judge may investigate, inter alia, decisions and actions (including failures or refusals to act) relating to the management, supervision, care, and treatment of inmates in correctional centres and persons subject to community corrections.
- The Inspecting Judge may receive and deal with the complaints submitted by the National Council, the Minister, the National Commissioner, a Visitors' Committee and, in cases of urgency, an Independent Correctional Centre Visitor and may of his or her own volition deal with any complaint.
- For the purpose of conducting an investigation, the Inspecting Judge may make any enquiry and hold *hearings*.
- *At a hearing, sections 3, 4 and 5 of the Commissions Act, 1947, apply as if the Inspecting Judge and the secretary of the Judicial Inspectorate were the chairperson and secretary of a Commission, respectively.*
- *The Inspecting Judge may assign any of his or her functions to inspectors, except where a hearing is to be conducted by the Inspecting Judge*

- *During the course of an investigation, the Inspecting Judge may direct any person to furnish relevant information or any object or document as well as examine any person under oath. The Inspecting Judge may also enter any premises under the control of the Commissioner for the purpose of carrying out an investigation. At the conclusion of its investigation, the Inspecting Judge may make recommendations directly to any institution or individual that he or she considers appropriate.*
- *The Inspecting Judge is required to reply in writing to all those whose complaints have been investigated and advise them of any recommendations made. Moreover, the relevant institution or individual must reply within four weeks to recommendations from the Inspecting Judge.*
- *The Inspecting Judge must investigate the circumstances of unnatural deaths and must aim to establish the following:*
  - i) the circumstances and events surrounding the death, especially regarding the management of the individual by the relevant authority or authorities;*
  - ii) examine whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence;*
  - iii) assist the inquest process by ensuring as far as possible that the full facts are brought to light and any relevant failing is exposed, any commendable action or practice is identified, and any lessons from the death are learned.*

In addition, we would recommend that the addition of the following provisions be considered:

- that it be mandatory for the Department to report all assaults allegedly committed by officials, assaults by prisoners and deaths to JICS immediately;
- that upon receipt of such information, the JICS conduct its own investigation into the incident and report its finding to the SAPS directly along with its recommendation as to whether the matter should be criminally investigated by the SAPS;
- that the Department be prohibited from conducting any internal investigations into deaths and assaults until the JICS and SAPS have completed their own investigations;
- that the JICS publish the findings and recommendations of all its investigations into deaths, serious assaults and torture; and



- that the results of investigations and prosecutions be published annually by JICS, including the reasons why the DPP has declined to prosecute where such a decision was made.