



CSPRI SUBMISSION ON THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES ANNUAL REPORT 2011/12

Introduction

CSPRI welcomes the opportunity to make a submission in response to the 2011/12 Annual Report of the Judicial Inspectorate for Correctional Services (JICS). These opportunities to engage with Parliament are highly appreciated and reflect the fundamental character of a People's Parliament.

While some of the comments made below may be regarded as critical of JICS, the aim is not to criticise for the sake criticising, but rather to strengthen oversight of the prison system and promote transparency and accountability; two mutually reinforcing concepts.

We wish to draw the Committee's attention to the fact that since its establishment in 2000, the JICS has not been the subject of a review process scrutinising whether it is indeed advancing prisoners' rights in South Africa. The Jali Commission was extremely critical of the JICS, particularly in relation to the removal of the investigation of corruption and dishonest practices from its mandate. Many of the problems identified by the Jali Commission remain and it is therefore regrettable that so few of the Commission's recommendations in respect oversight and investigations were adopted.

Continuous and regular review is necessary in order for state institutions to adapt to changing needs and improve efficiency and effectiveness. In 2000 the Inspectorate - with its system of Independent Prison Visitors (later renamed Independent Correctional Centre Visitors ICCV)- was a novel concept and there is little doubt that it has made significant improvements in respect of advancing transparency and providing prisoners with an independent complaints

mechanism. However, 13 years later it is necessary to ask if the current structure and functioning meet the requirements of the situation.

This submission deals with three central issues pertaining to the Judicial Inspectorate for Correctional Services (JICS):

- The independence and impartiality of the institution
- The current investigation regime into deaths and assaults on custody
- Specific matters

INDEPENDENCE OF THE JUDICIAL INSPECTORATE

1. The JICS 2011/2012 Annual Report (the Report) (pg 13-14) reflects on past discussions on the independence of the JICS and notes that it has met with the Chief Directorate of the Independent Police Investigative Directorate (IPID) in response to the Portfolio Committee's suggestion that it do so. The Report also states that the JICS "will embark on further engagement" with the Department of Public Service and Administration (DPSA) regarding the organizational independence of the JICS.
2. CSPRI is supportive of such engagement and recommend that the Committee follow up on this important aspect of the JICS. For the reasons set out below, we submit that the independence of the JICS is compromised, particularly in respect of its financial and organizational processes. This necessarily has an impact on the effectiveness with which it carries out its legislative mandate and the extent to which it able to monitor and protect the rights of prisoners.

The value of independence

3. A vitally important aspect of any oversight mechanism is its independence from the institution or organization it intends to assess and its impartiality in respect of "undue political interference".¹ Corder point out that independence has two facets:

¹*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 188.

“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”.²

4. The Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa*³ stated that independence (albeit in respect of the Independent Electoral Commission) required *both financial and administrative independence*. 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 (as would be the case with an election-monitoring body). Meaningful independence is necessary not only to ensure that the JICS is in a position to disseminate findings and lobby with civil society for particular reforms, but for public confidence and trust in the Inspectorate.⁴

Financial independence

5. Financial independence requires that an organization be able 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.⁵ 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

²H Corder, S Jagwanth and F Soltau *Report on Parliamentary Oversight and Accountability* (June 1999), 56. Available on the 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.

³121 1996 (6) BCLR 489 (CC).

⁴Jagwanth, p. 38.

⁵Jagwanth, p. 37-8.

certain functions...is fundamentally inappropriate when applied to independent institutions...”⁶ Accordingly, the Court stated, it was for parliament, and not the executive arm of government to provide for funding...”⁷

6. Although section 85(1) of the Correctional Services Act 111 of 1998 (the Act) guarantees the independence of the JICS, section 91 states that it is the Department that is responsible for all the expenses of the Judicial Inspectorate. Indeed, the esteem in which judges are held brings credibility and a measure of independence to the Office, however this safeguard remains somewhat fragile for it is reliant on an individual and not in the Office itself.⁸
7. The budget of the Judicial Inspectorate should not be linked to the Department, but should come directly from Parliament or be transferred from the Department 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 section 91 and we recommend, therefore, that this be proposed to the Department.

Administrative Independence

8. Administrative independence “implies control over matters directly connected with the functions that such institutions must perform.”⁹ In relation to the JICS, this means, at least in part, control over processing of applications for the appointment of staff and separate administrative systems.
9. A 2004 report on the Office of the Judicial Inspectorate, 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:

⁶At para 89.

⁷ Id.

⁸Jagwanth supra at 48.

⁹ Id.

“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.”

10. We recommend therefore, as did the 2004 CSPRI Report that where administrative independence is lacking, that the requisite action be taken, be it through legislative amendment, or operational processes. We recommend, accordingly, that consideration should be given to placing certain core administrative responsibilities within the JICS Office itself, with a concomitant increase in resources to cope with it. 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.¹⁰

The Independent Police Directorate Act

11. As the Annual Report indeed acknowledges, the IPID Act, in certain respects, serves as an excellent comparator given that it, too, establishes an independent monitoring body. It is therefore worth emphasizing the following provisions from the IPID Act, which, ultimately, we hope the Correctional Services Act will emulate:

- Section 3(3): The Directorate is financed from money that is appropriated by Parliament.
- Section 4(1): The Directorate functions independently from the South African Police Service.
- Section 4(2): Each organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively.

Human rights violations and the complaints system

¹⁰ Id.

12. As stated in the Act, the Inspecting Judge, besides being empowered to visit and inspect prisons, is also empowered “deal” with a complaint referred to him or her from the National Commissioner, the Minister, the Visitors Committee or an Independent Visitor (IV).¹¹ Moreover, for the purpose of conducting an “investigation,” the Inspecting Judge “may make any enquiry and hold hearings.”¹²
13. 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. 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.
14. By contrast, IPID investigators are given a wide range of policing powers (set out in the Criminal Procedure Act 51 of 1977 (CPA) relating to the investigation of offences, entry and search, seizure, arrests and the execution of warrants.¹³
15. These powers may therefore be used in any instances which the IPID Act stipulates must be investigated, including: any deaths in police custody, deaths as a result of police action, any complaint of torture or assault against a police officer in the execution of his or her duties.¹⁴ In addition, the IPID Executive Director “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.”¹⁵
16. The complaints the JICS receive concern serious human rights violations, such as assault, torture and attempted murder. The current legislative regime does not permit the JICS to conduct police-type investigations itself. This means that such cases are more difficult for the public and the inmates’ themselves to follow, and more

¹¹Section 90(2).

¹²Section 90(5).

¹³Section 24(2) of the Independent Police Investigative Directorate Act 1 of 2011.

¹⁴Section 28(1) IPID Act.

¹⁵Section 7 IPID Act.

susceptible to DCS intimidation and interference (discussed in greater deal below).

17. Although we accept that it is absolutely necessary that the IPID have the investigative powers that it does (since the SAPS, charged with investigating crime in general, cannot investigate their own conduct), given the nature of the complaints to the JICS, we are of the opinion that the JICS would be a far more effective oversight body were it able to exercise similar investigative powers as the IPID.
18. We recommend, therefore, that the possibility of legislative amendment (and concomitant financial support) be raised by the Committee. At the very least, the JICS' mandate should be amended to empower the Inspecting Judge to notify directly the SAPS and NPA where he or she is of the opinion that a criminal charge should be laid against a member of the Department. The Department should not be the final arbiter on whether it refers cases against its own members to the investigative authorities.

Unnatural deaths and assaults in custody

19. The right to life is protected by the Constitution and the Correctional Services Act furthermore requires that the Department of Correctional Services detains 'all prisoners in safe custody whilst ensuring their human dignity'.¹⁶ Section 15 of the Correctional Services Act furthermore requires that
 - (1) Where a prisoner dies and a medical practitioner cannot certify that the death was due to natural causes, the Head of Prison must in terms of section 2 of the Inquests Act, 1959 (Act 58 of 1959), report such death.
 - (2) Any death in prison must be reported forthwith to the Inspecting Judge who may carry out or instruct the Commissioner to conduct any enquiry.
20. Since the 2009/10 annual report the Judicial Inspectorate for Correctional Services (JICS) has been providing more detailed information on unnatural deaths in custody and more specifically on the results of investigations into these deaths. In the 2011/12 Annual Report JICS concludes on this issue as follows:

¹⁶s 2(b)

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.¹⁷

21. Looking at the three-year period from 2009/10 to 2011/12 it then appears, as far as could be established, that there had not been a single criminal prosecution of a DCS 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.¹⁸ These deaths were the result of aggravated assaults inflicted either as punishment or in retaliation for an assault on an official. It also appears that these assaults were committed by groups of officials on single prisoners. In several of the cases it was noted by the Judicial Inspectorate that the assaults continued after the prisoner was subdued and/or the situation stabilised, thus exceeding the use of minimum force requirements in the Correctional Services Act.¹⁹ The most common weapon used by officials was a baton (tonfa), but prisoners were also subjected to kicks, teargas and electroshock equipment.²⁰ In a number of cases the deceased was denied prompt medical attention even though the Correctional Services Act is clear that any prisoner who is subjected to the use of force must immediately undergo a medical examination.²¹ It is also apparent that when disciplinary action was taken against officials, the proceedings took extremely long to

¹⁷Office of the Inspecting Judge (2012) Annual Report of the Judicial Inspectorate for Correctional Services, Cape Town, p. 53.

¹⁸ 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>

¹⁹s 32 of the Correctional Services Act.

²⁰ 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.)

²¹s 32(5) of the Correctional Services Act.

be finalised, that the charges were inappropriate,²² and that the sanctions imposed were light.²³

22. The results of investigations reported by JICS in the 2011/12 annual report therefore gives little reason for optimism, but rather that the prevailing lack of criminal investigations perpetuate impunity. While there may be legitimate reasons why the Director of Public Prosecutions (DPP) declines to prosecute, the lack of transparency in this regard draws one to conclude that all may indeed not be above board. It seems improbably that in the now substantial number of cases of unnatural deaths implicating DCS officials that there was not one case that the DPP continued with a prosecution. The problems with investigations are not limited to deaths in custody, but also in respect of assaults. Assault cases are probably treated with even more disdain than deaths, as was illustrated clearly in the 2005 St Alban's assault which resulted in the *McCullum* decision by the UN Human Rights Committee.²⁴
23. The lack of transparency is not only problematic in respect of the DPP's decisions, but also with reference to the investigations being undertaken by DCS and SAPS into unnatural deaths in custody. The lack of prosecutions may indicate that these investigations are not thorough, or not sufficiently independent and impartial. In the case of DCS investigations it appears that a matter as serious as a death in custody due to unnatural causes, that a criminal investigation should take priority over an investigation from a disciplinary perspective. The DCS's direct involvement in such an investigation, where it has to interview witnesses, alleged perpetrators and assesses material evidence seems to fly in the face of the internationally accepted requirements that such investigations must be conducted by impartial and independent authorities.²⁵ By virtue of the fact that the alleged perpetrator is an employee of the DCS, the Department is implicated because the death in question indicates a material failing on the part of the Department to provide safe custody and uphold the right to life.

²² 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.

²³ 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.

²⁴ CCPR/C/100/D/1818/2008.

²⁵ 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.

24. Little recent information is available on the role of SAPS in investigating crimes committed in prisons, but 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.²⁶

25. 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 though.

26. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions²⁷ 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.²⁸ Principles 9 – 17 are relevant to the discussion here and presented below:

Principle 9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

²⁶ The Jali Commission Report p. 424-425

²⁷ Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989

²⁸ United Nations (1991) *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, New York: United Nations, p. 3.

Principle 10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

Principle 11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

Principle 12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

Principle 13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of

the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

Principle 14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

Principle 15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations.

Principle 16. Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

Principle 17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection.

The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

27. Measured against the above principles and the known results of investigations, it is submitted that the current situation with regard to the investigation of deaths in custody is highly unsatisfactory and requires urgent attention. Unless drastic changes are made to the current investigation regime it is unlikely that more successful investigations and prosecutions will take place. It is ultimately in the interests of the DCS that deaths and assaults are properly investigated and the perpetrators held criminally responsible. The Department stands to gain nothing from the current situation as it only perpetuates the impression that the Department's leadership does not regard the rights of prisoners as a priority and, by omission, permits officials to conduct themselves with impunity.
28. To this end CSPRI proposes that the Portfolio Committee on Correctional Services conducts its own investigation into the problem and call on the National Prosecuting Authority (NPA), South African Police Services (SAPS), DCS and the JICS to provide clarity on how investigations are being conducted, the problems in investigations, how decisions to prosecute or not are made, and the current lack of criminal prosecutions implicating DCS officials in the deaths of prisoners.
29. It is furthermore evident that the current investigative regime is unsatisfactory and that alternative options need to be explored. In this regard, it is submitted that the following are possibilities to be considered:
- That the mandate of JICS be expanded to give it investigative powers similar to that of IPID where it pertains to deaths in custody and allegations of torture
 - That the DCS is not permitted to conduct investigations into such matters until the JICS has completed its investigations
 - 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

SPECIFIC MATTERS

30. The Report is critical of the Department in several respects:
- a. the possibility of the miscalculation of deaths as “natural” in correctional centres (pg 23);
 - b. the repeated and continuous delays in respect of the criminal trials of those in remand detention (pg 29);
 - c. overcrowding, particularly in remand detention facilitates (pg 31);
 - d. critical shortage of personnel and skewed ratio between staff and inmates (pg 35);
 - e. slow progress in the upkeep and maintenance of centres (pg 35);
 - f. the fact that eight of the ten suicides by hanging reported occurred in single cells or in special care units and were only discovered in the morning when the cells were unlocked (pg 51-2);
 - g. the declination of the NPA to prosecute cases against Department officials referred to it (pg 53);
 - h. the failure of certain correctional centres to correctly report on segregations (pg 56); and
 - i. the sharp increase in the use of mechanical restraints (pg 56)
31. The Report also notes the number and nature of complaints in respect of transfers, parole, assaults and the increase in incidences of use of force during the year.
32. Although it is vitally important that these concerns are reported, we note that the Report does not contain any detailed recommendations as to how these issues could be improved or solved. In view of this CSPRI submits that the Committee requests the JICS to adjust the format of its next and subsequent annual reports to clearly reflect its recommendations to the Department and other departments, where applicable. This will enable more accurate monitoring and, we believe, strengthen the ability of the Portfolio Committee to exercise oversight over the
33. We also recommend that where a proposed solution might involve an interpretation of the law, that the JICS draw on the large body of constitutional law, several

international instruments as well as foreign and international law jurisprudence in order to give recommendations based on sound principles of human rights law, particularly in relation to conditions of detention and health care.

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