

THEMATIC REPORT ON CRIMINAL JUSTICE AND HUMAN RIGHTS IN SOUTH AFRICA

**A Submission to the UN Human Rights Committee in
response to the Initial Report by South Africa under the
International Covenant on Civil and Political Rights at the
116th session of the Human Rights Committee
(Geneva March 2016)**

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Executive summary

The submission deals with criminal justice and human rights in South Africa, focussing on critical areas requiring reform and improvement.

Arbitrary arrest and detention

Annually the police execute some 1.5 million arrests, the majority without a warrant. However, a relatively small proportion of total arrests result in convictions (roughly 20%) and no charges are brought against arrested persons in one third of cases. Moreover, nearly half of arrests are for non-priority crimes. It can thus be concluded with certainty that a substantial proportion of arrests are not in line with legislative prescripts and jurisprudence, and thus unlawful and arbitrary. It is submitted that the police requiring additional training on its powers to arrest without a warrant and further that less emphasis be placed on arrest numbers as a measure of police performance.

Pre-trial detention

There are some 50 000 awaiting trial prisoners in South Africa, half of whom have been in custody for three months or longer and one third for three to twelve months. A range of factors drive the number of such prisoners as well as the duration of their detention: too many avoidable arrests; a restrictive and delay-creating bail regime; no mandatory review mechanism and a slow moving court system to name a few. It is submitted that a statutory mechanism be created to compel the review of cases when a certain time period has lapsed and/or a certain set of circumstances are present.

Delays in bail applications

A change in the bail legislation increased the duration of postponement for a bail application for further investigation from one to seven days at a time under certain conditions. Data shows that this has had a profound impact on the number for people admitted to prison awaiting trial and their duration in custody.

The prohibition of torture

Torture was criminalised in 2013, but there has not been one completed prosecution for the crime of torture. Even when law enforcement officials are charged with alternate offences (e.g. assault) the disciplinary sanction and criminal sentences imposed are extremely lenient.

The right to be free from violence

Inter-prisoner violence is common and large numbers of complaints are recorded. Trends regarding police detainees appear to be similar. Whilst prison overcrowding is frequently blamed for violence,

this is an over-simplification of the reasons. What is required is more active supervision of detainees and prisoners to limit opportunities for victimisation and to protect vulnerable individuals.

Solitary confinement

South Africa has two super-maximum prisons which are highly reliant on solitary confinement for its daily regime. Their regiments amount to prolonged solitary confinement and is in violation of the UN Standard Minimum Rules for the Treatment of Prisons (2015).

An amendment to the legislation removed 'solitary confinement' from the statute as a punishment option for prisoners. However, it is submitted that under the guise of segregation that solitary confinement is still practiced and that the oversight mechanism formerly applicable to solitary confinement has been substantially weakened in respect of segregation.

Conditions of detention

Conditions of detention in especially the large awaiting-trial prisons in metropolitan areas is well below what the legislation and Constitution require. This is in a large part due to overcrowding (as high as 300% occupation in some instances) and understaffing (in one case 49% vacancy rate). Poor services and understaffing subject such prisoners to prolonged and continuous ill treatment.

Inequality before the law

The manner in which police management allocate human and other resources has resulted in a situation where poor and often crime-ridden communities receive the thin side of the wedge. Despite their need being greater, they are not receiving equal treatment.

Right to an effective remedy

The Constitution and subordinate law established a number of oversight institutions with a mandate in respect of the criminal justice system. However, there are deep concerns as to their ability to provide an affective remedy to victims of rights violations. These concerns are borne out of the lack of independence (i.e. JICS and IPID), political interference (i.e. Public Protector) and general underfunding.

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Introduction

1. This submission provides additional information in response to South Africa's initial report under the ICCPR as well as the State party's response to the List of Issues. The submission deals thematically with criminal justice and human rights focussing on the following:
 - arbitrary arrest and detention
 - delays in bail applications
 - the prohibition of torture and other ill treatment
 - conditions of detention
 - inequality in access to justice
 - oversight, accountability and the right to an effective remedy
 - services to perpetrators.
2. Given that the State party submitted its first report since ratification, the submission cannot deal with the full period under review. It was rather opted to focus on a number of key issues that the contributing organisations regard as of particular concern as these appear to be of a persistent nature in the intersection of human rights and criminal justice.
3. Children in conflict with the law or matters relating to the implementation of the Child Justice Act 75 of 2008. For relevant information on this matter, we refer to the Alternate Report to the UN Committee on the Rights of the Child in response to South Africa's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child.¹
4. It is our submission that human rights standards in the criminal justice system is under increasing pressure despite the advances made in the first ten years of democracy (1994 to 2004). In the subsequent ten years the government has shown an increasing intolerance towards attempts at accountability. A number of oversight institutions have been undermined or weakened. Symptomatic of this is that long standing systemic problems remain unresolved despite recommendations in good faith from oversight institutions, judicial commissions of inquiry and civil society structures.
5. The significant challenges faced by post-1994 governments cannot be denied. We are, however, 22 years later and many of the problems prevalent in the criminal justice system in the mid-1990s remain almost untouched by a democratic dispensation, the rule of law and a liberal constitution. We are concerned further about the perceived shrinking democratic space to enable a critical yet constructive dialogue between the state and civil society.

¹ The report is available here: http://dullahomarinstitute.org.za/our-focus/women-and-democracy-initiative/reporting-on-childrens-rights/civil-society-sa-alternate-report-coalition-on.pdf/at_download/file

Methodology and limitations

6. The submission was compiled by the organisations listed on page 4 following two coordination workshops in November 2014 in preparation of the List of Issues and in January 2016 following the submission of the State party's response to the List of Issues. We submit that, at least in relation to the issues addressed in this alternate report (criminal justice and human rights), South Africa's first report to the UN Human Rights Committee (the Committee) does not provide a comprehensive and accurate overview of measures taken to fulfil its obligations under the Covenant or to gain a deeper understanding of challenges. This is at least in part due to the fact that various government departments and other institutions of state do not collect the necessary information on a consistent basis. Furthermore, the government did not, to the knowledge of the contributing organisations consult civil society in the drafting of the State report nor in its response to the LoI.

Arbitrary arrest and detention

Art 9(1) of the ICCPR

Arrest without a warrant

7. The purpose of arrest and subsequent detention (first police detention and then pre-trial detention in a prison if applicable) of a suspect is to ensure the attendance of the person in court or for another just cause. The requirements for arrest without a warrant are set down in section 40 of the Criminal Procedure Act (51 of 1977) and further supported by the South African Police Services (SAPS) Standing Orders as well as a substantial body of case law on this matter.² However, police practice seem to frequently stray from this guidance, or they are not adequately trained on the power to arrest without a warrant. There is good reason to conclude that the police abuse their powers of arrest and a substantial number of suspects are, after arrest, detained by the police for anything from a few hours to several days, and even longer, without ever being charged or appearing in court.³ The Supreme Court of Appeal (SCA) has also remarked as follows on the issue

² *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (TPD), *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (TPD), *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (wld) *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (ECD) *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (NPD) *MVU v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) and *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB).

³ South African Human Rights Commission (1999) *Report into the Arrest and Detention of Suspected Undocumented Migrants*, Johannesburg: SAHRC, p. 31
[http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%](http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20)

There is judicial, academic and, according to media reports, public disquiet about the apparent abuse by some peace officers⁴ of the provisions of s 40(1) [of the Criminal Procedure Act] because they arrest persons merely because they have the ‘right’ to do so but where under the circumstances an arrest is neither objectively nor subjectively justifiable. Paragraph (a) [of s 40(1) of the Criminal Procedure Act], for instance, permits a peace officer to arrest a person who commits *any* crime in his or her presence. This may be used to arrest persons for petty crimes such as parking offences, drinking in public, and the like. There is in para (o) [of s 40(1) of the Criminal Procedure Act] the right to arrest any person who is reasonably suspected of having failed to pay any fine, which is used to justify road blocks and arrest of persons who have failed to pay traffic fines. Some of the provisions even hark back to the days when gambling was a serious sin, possession of an infinitesimal amount of dagga [cannabis] attracted a minimum prison sentence and prohibition was racially based.⁵

8. Annual statistics show the high number of arrests for non-priority crimes (i.e. crimes presumably less serious than shoplifting). In 2013/4 the SAPS made 1 392 856 arrests of which 818 322 (59%) were for priority crimes and 574 534 (41%) for non-priority crimes. Of priority crimes 22% were drug related. Research has also found that between one out of every eight (only the urban adult male population) to one out of every 13 adult men (the total adult male population) aged between 18 to 65 years are arrested annually in South Africa, assuming that no one is arrested more than once in a year.⁶ The data therefore indicate that large numbers of adult males are annually arrested for crimes that do not pose a serious threat to public safety.
9. Despite the high numbers of arrests, the number of convictions is comparatively low for a country that has experienced high crime rates since 1990. As shown in Table 1 below, during the period 2010/11 to 2013/14, less than 22% of arrests resulted in convictions, indicating that the police are arresting either unnecessarily or investigating poorly in a large proportion of cases. Of all persons arrested in 2013/2014, in only 67% of these cases charges were formally brought against the person. At such an attrition rate of cases from arrest to conviction, it is fairly safe to conclude that a substantial proportion of arrests were in all likelihood arbitrary and

[20suspected%20migrants19.pdf](#); *Ndaba and Others v Minister of Police* (48208/2012, 48209/2012, 49490/2012) [2014] ZAGPPHC 180 (2 April 2014); ‘Months in prison without a bail hearing’ *Groundup*, 28 November 2012, http://groundup.org.za/article/months-prison-without-bail-hearing_591

⁴ ‘peace officer’ includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section. (Definitions, Criminal Procedure Act)

⁵ *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 (19 November 2010), para 13. See also Plasket, C. ‘Controlling the discretion to arrest without a warrant through the Constitution’ (1998) 11 *Suid-Afrikaanse Tydskrif vir Strafrechtspleging* 173. Compare *S v Van Heerden* 2002 (1) SACR 409 (T).

⁶ Muntingh, L. (2013) *Race, gender and socio-economic status in law enforcement in South Africa – are there worrying signs?* CSPRI Research Paper, Bellville: Community Law Centre.

unnecessary as there was apparently insufficient evidence to formulate a charge and pursue a prosecution.

Table 1

	All arrests	All cases enrolled	All convictions	All sentenced admissions
2010/11	1,452,600	962,317	293,673	124,443
%	100.0	66.2	20.2	8.6
2011/12	1,613,254	897,842	280,658	127,220
%	100.0	55.7	17.4	7.9
2012/13	1,682,763	916,917	290,834	129,172
%	100.0	54.49	17.28	7.68
2013/14	1,392,856	931,799	301,798	132,020
%	100.0	66.9	21.7	9.5

10. Given that in nearly a third of arrests no charges were brought, it points to a pattern of arrests that potentially violate the provisions of section 40 of the Criminal Procedure Act and Article 9(1) of the ICCPR thus amounting to arbitrary arrest and detention. It is submitted that the State party provide additional information on measures to be taken to ensure that arbitrary arrests and detention are avoided and that powers of arrest without a warrant are only exercised in accordance with the law and applicable jurisprudence. It is further submitted that SAPS should place less emphasis on arrests as a performance measure and rather focus on effective and efficient investigations as measured by convictions.

Pre-trial detention

11. It should be noted that the discussion below deals with the situation pertaining to adults as children are dealt with in the Child Justice Act (75 of 2008) which provide a far more protective regime.

12. The South African government's response to the List of Issues (paras 35 to 37) deals with the right to liberty and security of the person. It refers to 49G of the Correctional Services Act which states that "a remand detainee may not be detained for a period exceeding two years without such matter having been brought to the attention of the court concerned." The most recently available and reliable figures (as at March 2011) indicate that detainees who have been awaiting trial for longer than two years is a minority (i.e. 4.6% of the awaiting trial population)

and that on any day approximately half of the awaiting trial population had been in custody for three months or longer; amounting to nearly 24 000 prisoners.⁷ While half of the awaiting trial population had been detained for less than three months, it should be noted that one third (some 16 000 prisoners) had been in custody for between three and twelve months. This is not an insignificant period to be imprisoned when presumed to be innocent.

13. The awaiting trial population problem is as much about the duration of detention as it is about the total numbers and consequent pressure on prison infrastructure. While the overall aim of section 49G of the Correctional Services Act is laudable, it is submitted that the section suffers from two serious flaws. The first is that the specified period of two years is simply too long for a person to spend awaiting trial without their continued detention being formally and regularly reviewed by a court. Secondly, it does not provide that the court must take any particular action, such as conducting an investigation into an unduly delayed trial, as provided for in section 342A of the Criminal Procedure Act. Again this provision (section 342A) appear to be optional to the court as it does not make such an investigation mandatory after a particular passage of time or under a particular set of circumstances. It needs to be emphasised that the longer a person is detained, the more onerous the burden becomes on the state to justify such continued detention.⁸
14. While a detained accused person may bring a bail application at any stage prior to conviction,⁹ a subsequent application, if bail had earlier been denied, can only be brought if new evidence is placed before the court. As far as could be established, the long duration of detention has only in one matter been recognised as constituting ‘new evidence’.¹⁰ Moreover, the accused is on the back foot in order to obtain other new evidence as Ballard explains:

There is no mechanism through which the review of bail decisions are routinely brought to courts thereby compelling magistrates to interrogate whether remand detainees continue to be held in custody on relevant and sufficient grounds. Currently, the onus is on the accused to bring such matters before the court. This seems unfair given that much of the information required (i.e. whether the state is diligently investigating and prosecuting a case) is not readily in the hands of the accused, particularly since he or she has been in remand detention.¹¹

15. There is no single reason for South Africa’s large awaiting trial population as well as the long custody periods. High numbers of people are arrested (often in the absence of solid evidence); the lack of a mandatory review mechanism; the absence of custody time limits; a slow moving

⁷ Statistics on file with author.

⁸ CCPR/C/GC/35 para 15. Also *Bakmutskiy v. Russia* (Application no. 36932/02) ECHR, 25 June 2009, para 135.

⁹ Section 58(1) Criminal Procedure Act.

¹⁰ *S v Vermaas* 1996 (1) SACR 528 (T) at para 56.

¹¹ Ballard, C. (2011) *Research report on remand detention in South Africa: an overview of the current law and proposals for reform*, Bellville: Community Law Centre, p. 21.

criminal justice process; and a restrictive bail regime are some of the most obvious reasons. The net effect is that accused persons are often detained unnecessarily and frequently for too long. We would propose that the Committee recommend that South Africa creates a mechanism that would compel courts to review continued detention on a regular basis. The current legislative framework does not provide adequate protection for the right to liberty and freedom of the person and protection against arbitrary arrest and detention.

Delays in bail applications

Article 9(3 and 4) of the ICCPR.

16. Between 1995 and 2003 five amendments were made to the bail legislation, as contained in the Criminal Procedure Act (51 of 1977), with the net result of restricting entitlement to bail.¹² These amendments profoundly changed the legal framework in relation to arrest and detention before trial.
17. Among these amendments was a provision which removed strict time limits on delaying bail applications for further investigation. Section 50(7) of the Criminal Procedure Act provided as it was, for a time limit of one day on delaying bail applications for the purpose of further investigations.¹³ This section was repealed and Act 62 of 2000, which commenced in March 2001, inserted section 50(6)(d), which permits the postponement of a bail application for a maximum of seven days at a time if:
 - the court thinks it has insufficient information to make a decision on bail
 - the Director of Public Prosecutions (DPP) confirms the accused will be charged with a Schedule 5 or 6 offence¹⁴
 - there is a need to provide the state with a reasonable opportunity to procure material evidence that may be lost if bail is granted
 - there is a need to provide the state with the opportunity to obtain fingerprints (and other similar functions)
 - the court thinks it is in the interests of justice to do so.¹⁵

¹² Criminal Procedure Second Amendment Act 75 of 1995; Criminal Procedure Second Amendment Act 85 of 1997; Judicial Matters Amendment Act 34 of 1998; Judicial Matters Amendment Act 62 of 2000 and Judicial Matters Second Amendment Act 55 of 2003.

¹³ Criminal Procedure Second Amendment Act 85 of 1997

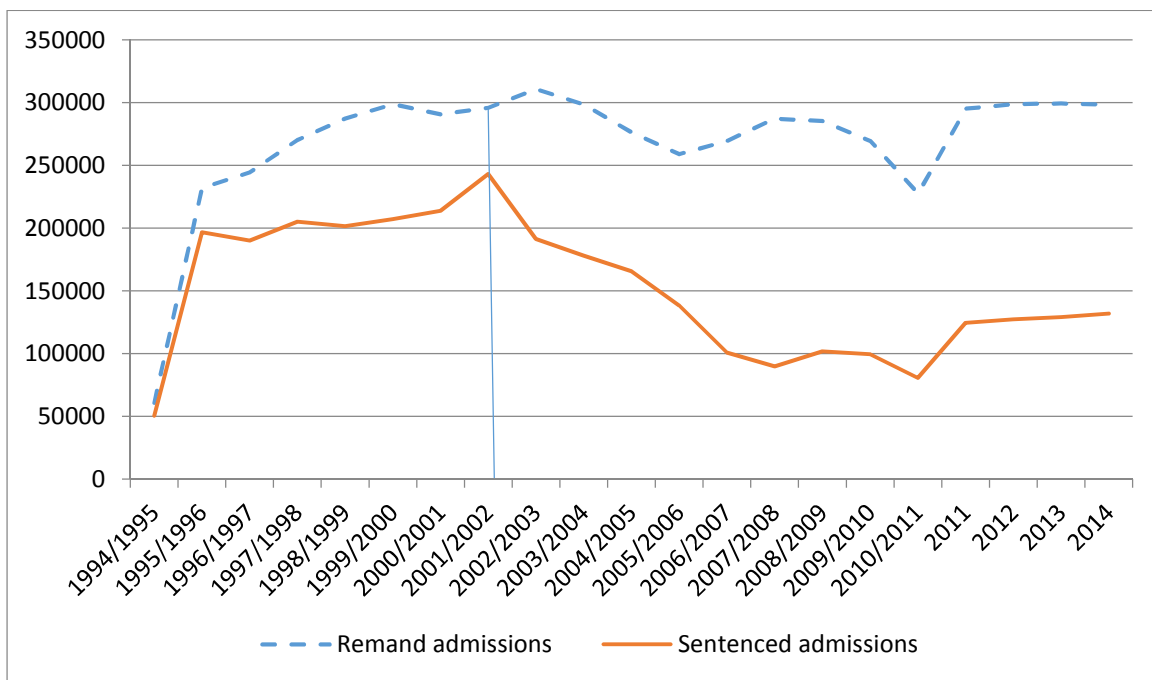
¹⁴ These are more serious and generally violent offences but not exclusively.

¹⁵ The full text of s50(6)(d): The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a

18. The evidence suggests that as a result of this amendment such postponements have become relatively routinely granted for the maximum seven days at a time, and persons arrested endure two such seven-day postponements before their bail application is heard. The impact of this provision means that it is in effect the general rule that a large proportion of those arrested and brought before court are further detained in custody for one or two weeks until their bail application is heard.
19. During this time the arrested persons are transferred from police detention to an awaiting trial prison even though it may later transpire that bail – or even unconditional release – is appropriate. Thus the provision tends to artificially increase the number of people being routinely admitted to prisons before a court has decided on the merits of their continued detention.
20. The evidence shows that in the seven years subsequent to this amendment in 2001, the number of admissions on remand to correctional facilities increased by 19% while the number of sentenced admissions dropped by 12%, compared to the previous seven years (see Figure 1 below).

time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if— (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A); (iii) (deleted) (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to (aa) procure material evidence that may be lost if bail is granted; or (bb) perform the functions referred to in section 37; or (v) it appears to the court that it is necessary in the interests of justice to do so.

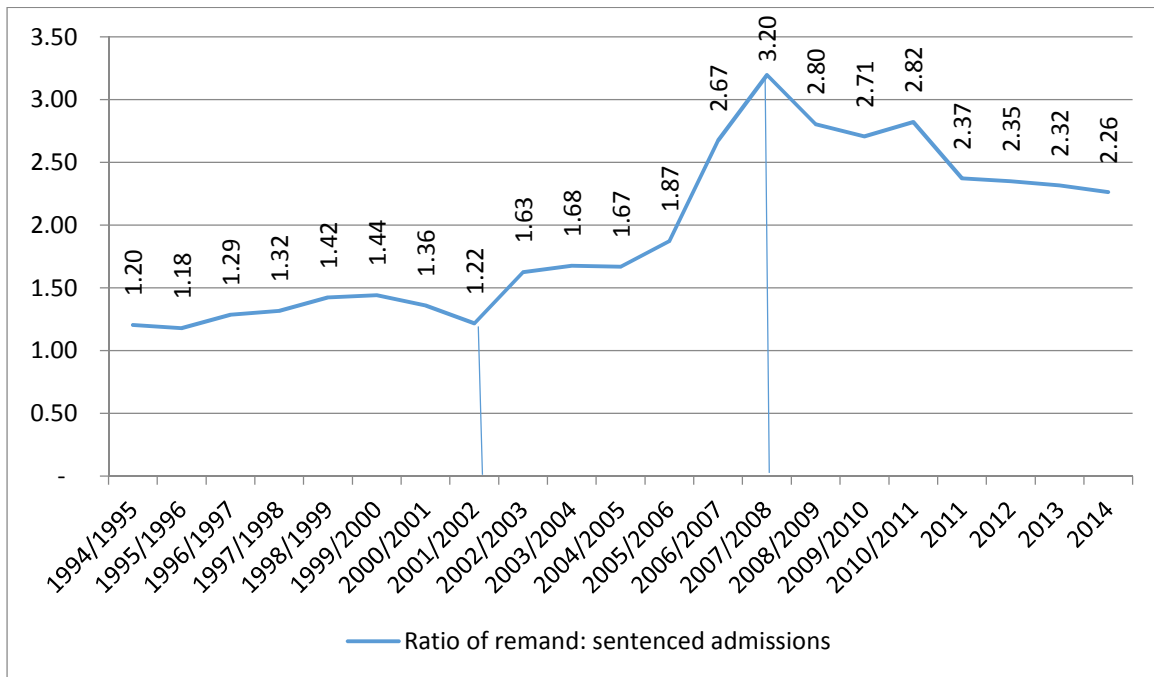
Figure 1: Remand and sentenced admissions 1994/5 - 2014¹⁶



21. Figure 1 suggests an increase in the propensity to detain before trial without such detention eventually resulting in a conviction. The ratio of awaiting trial admissions to prisons to sentenced admissions worsened from 6:5 in 2001 to a peak of 16:5 in 2008 (from 1.2 to 3.2 – see Figure 2 below). Indeed in the pre-2001 era, the ratio never exceeded 3:2. By contrast in the post 2001-era the ratio never went below 3:2 and indeed has stabilized at a high value of around 9:4. Thus despite the intention of the amendments to secure more criminal convictions, the decline in sentenced admissions to prison must be interpreted as a failure to achieve this.

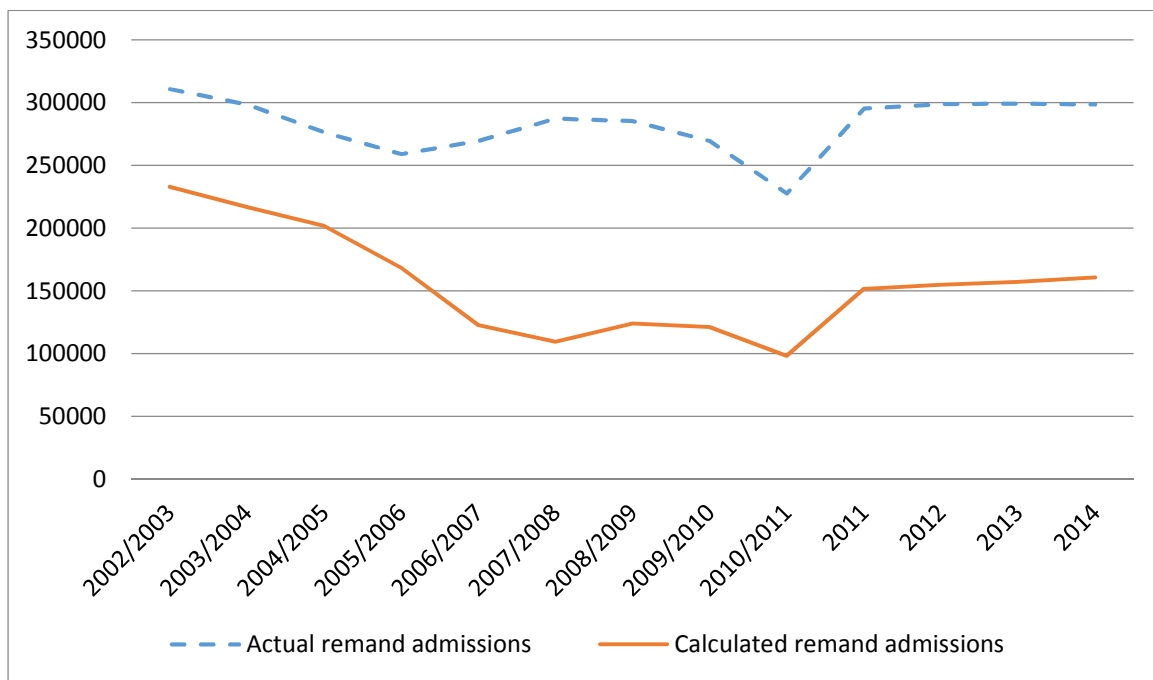
¹⁶ Data obtained from the Department of Correctional Services. Data for 1994/1995 to 2010/2011 covers financial years (April to March) while 2011 – 2014 covers calendar years (January to December)

Figure 2: Ratio of remand to sentenced admissions 1994/5 to 2014



22. In 2001, for every 5 sentenced admissions there were 6 remand admissions, while in 2008 there were 16 remand admissions for every 5 sentenced admissions. This suggest that while in 1994 1 in 6 remand admissions did not yield a sentence of imprisonment, in 2008 as much as 11 in 16 did not yield a sentence of imprisonment. Although there has been a subsequent improvement in the trend, the ratio in 2014 still implied more than twice as many remand admissions as sentenced admissions to prison. These trends appear to be consistent with data presented in Table 1 above on the attrition of cases from arrest to finalisation.

Figure 3: Actual remand admissions compared to expected remand based on 6: 5 remand to sentenced ratio



23. The number of possibly unnecessary incarcerations can be calculated by applying the 6:5 ratio to the sentenced number in each year after 2001, and comparing that to the actual remand admissions recorded (see Figure 4 above). Subtracting the calculated from the actual gives the number of additional detentions. The total number of *additional* detentions amounts to 1,65 million people over the period 2002-2014.
24. The evidence therefore suggests that the law has resulted in many more admissions to prisons than would be suggested by sentenced admission figures. Some of this may be attributable to the delayed hearing of bail applications. The legal framework is thus contrary to the intent of Article 9 of the ICCPR in that it systematically results in the delay of a court making a determination on the liberty or detention of an accused, resulting in their detention in a prison. Currently less than half thus detained are likely ever to be convicted.

Prevention and prohibition of torture and other ill treatment

Art. 7 of the ICCPR

25. Fifteen years after South Africa ratified the ICCPR and UNCAT, torture was criminalised by means of the Prevention of Combating and Torture of Persons Act (13 of 2013). Despite the delay, it remains a significant advance in efforts to eradicate torture and other ill treatment.

26. From the South African government's response to the List of Issues it is also encouraging to note that some effort is being made to train police and prison officials on the absolute prohibition of torture, although it would have been more helpful if actual figures were presented on the number of officials trained as well as more information on the training content (of both the training focusing on torture and other ill-treatment and on the extent to which torture and other ill-treatment is included in the basic training of new recruits). and to what extent the prohibition of torture and other ill treatment is covered. This submission has already highlighted that inadequate training of law enforcement may explain lack of compliance with some provisions of the ICCPR. We submit that the Committee requests such information from the State party.
27. Effective prevention measures also require adequate complaints and investigation mechanisms into allegations of torture and other ill-treatment, and effective accountability measures taken against individual perpetrators.
28. It appears that the State party deemed it sufficient to criminalise torture in order to fulfil its international obligations and prevent and eradicate torture and other ill treatment. However, the lack of effective prevention measures alluded to already indicate that more needs to be done to ensure effective compliance with article 7 of the ICCPR. Indeed, without adequate political will and leadership, the provisions of the Torture Act will not give the prohibition real impact. Pronouncements by politicians are thus important in shaping public opinion and state attitudes towards rights violations and in this particular instance, the prohibition of torture. A recent statement by the Minister of Justice and Correctional Services to the Parliamentary Portfolio Committee on Justice and Correctional Services appears to express resentment that a prisoner directed a complaint alleging torture to the UN Human Rights Committee:

We are compliant with international conventions on offender policy. For example, the St Albans matter in which a gang member killed a correctional facility official, required significant clean up to the extent of almost war. However, these offenders ran to the UN and claimed maltreatment and torture that resulted in a finding [*the McCallum case*¹⁷] against SA by the UN that the Department intends to challenge. Previous cases have found on the side of SA that officials did not act too heavily. These officials work in extremely difficult conditions.¹⁸

29. The statement is regrettable as it implies that the use of excessive violence and torture is permissible under 'difficult conditions'. The submission below will give some figures on the scope of the problem of torture and other ill treatment in South Africa. The overall impression is that the drivers of the problem are systemic and that leaders in government need to

¹⁷ CCPR/C/100/D/1818/2008.

¹⁸ *PMG Report on the meeting of the Portfolio Committee on Justice and Correctional Service*, 11 November 2015, <https://pmg.org.za/committee-meeting/21819/>.

demonstrate the necessary will to acknowledge it as such and take the appropriate measures, as it is obliged to do under international law.

30. Further indicative of the apparent lack of political will is the fact that South Africa signed OPCAT in 2006 but is yet to ratify it. Ten years later the State party has not committed itself to ratification with the result that the designation of a National Preventive Mechanism (NPM) remains wanting. At present, only prisons are subject to regular and independent monitoring by means of a lay visitors system under the Judicial Inspectorate for Correctional Services (JICS). Police cells, psychiatric hospitals, immigrant detention, and child and youth care centres, to name a few, are places that are not monitored on a regular basis by independent persons. The ratification of OPCAT and the designation of a National Preventive Mechanism will make a substantive contribution to prevent torture and other ill treatment through regular monitoring of places of detention.

Torture and addressing impunity

31. Statistics available through the annual reports of Independent Police Investigative Directorate (IPID) and JICS indicate that the prosecution of law enforcement officials for serious rights violations (e.g. assault, torture and attempted murder) is a rare event and, as far as could be established, no single prosecution for the crime of torture had been completed since the Prevention of Combating and Torture of Persons Act came into force in August 2013.
32. During 2014/15 IPID recorded 145 complaints of torture and 3711 of assault; the latter constituting 63% of the total intake for the year.¹⁹ We combine data on assault and torture in this report as IPID staff appears to classify some allegations of torture as assault and possibly vice versa.
33. IPID completed 5137 cases (out of a workload of 10657²⁰) and made 983 recommendations for criminal prosecution to the National Prosecuting Authority,²¹ four for allegations of torture and 812 for allegations of assault. It also made a total of 1004 disciplinary recommendations to SAPS, 703 being for assault (none for torture).²² Importantly, the sanction imposed on all the four officials disciplined for torture was a written warning.²³ Cases finalised resulted in the outcomes outlined in Table 2 below.
34. The trend appears to be that there is a large quantum of complaints recorded, with very few resulting in either disciplinary sanction or criminal convictions. Earlier research, reviewing the

¹⁹ IPID Annual Report 2014/15 p. 66.

²⁰ IPID Annual Report 2014/15, p. 8.

²¹ IPID Annual Report 2014/15, p. 78.

²² IPID Annual Report 2014/15, p. 80.

²³ IPID Annual Report 2014/15, pp. 93-87.

period 2009/10 to 2011/12, found a similar trend in that between 6% and 11% of cases recommended by IPID for criminal prosecution, resulted in criminal convictions.²⁴

Table 2

	Disciplinary convictions	Disciplinary Acquittals
Torture	4	2
Assault	127	44
Total disciplinary convictions	200	64
	Criminal convictions	Criminal acquittals
Torture	0	0
Assault	19	26
Total criminal convictions	58	37

35. It also appears that it may indeed be only under exceptional circumstances that police officials are charged with torture as reflected in the following media statement by IPID:

The Independent Police Investigative Directorate (IPID) has secured [the] conviction of a 54 year old Warrant Officer from Ladybrand SAPS convicted for assaulting a 32 year old disabled man. It is alleged that on 2015 May 15 at around 15:00, the mother of the victim was at work when her daughter arrived and informed her that the victim a 32 year old disabled man has been assaulted by the policeman. The complainant rushed home as the victim is her disabled son. Upon arrival she enquired what transpired that lead to assault and she was told that the victim poured the policeman with soft porridge on his trouser and the officer became angry and assaulted the man with a Sjambok [*a short whip originally made from rhino hide*] [over] the entire body. An ambulance was called; the victim was taken to hospital for treatment. A case of assault was opened at Ladybrand SAPS. IPID took over the investigation and completed it, the accused was found guilty as follows: R5000, 00 [fine] or 36 months imprisonment, suspended for 5 years.²⁵

36. Despite the fact that the prosecution was successful, it can be argued that the police official should have been charged with the crime of torture as the assault committed meets the requirements. Moreover, the legislation specifically requires that if the victim has a disability, that this be considered as an aggravating factor when passing sentence.²⁶ The judiciary also appears not to take violent police actions seriously, as the sentences imposed following IPID investigations and prosecutions are usually shockingly light. The officials found guilty of

²⁴ Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre, p. 45.

²⁵ Issued by IPID <http://www.ipid.gov.za/content/warrant-officer-convicted-assaulting-disabled-man>

²⁶ Section 5(c) Act 13 of 2013.

assault or assault to do grievous bodily harm were usually fined (between R 300 (20 USD) and R 5000 (320 USD) or to a suspended prison sentence, with only one sentenced to an effective prison sentence, of 12 months.²⁷

37. The prosecution of DCS officials also appears to be a rare event, even when implicated in the deaths of prisoners, as remarked by the Inspecting Judge in his annual report of 2011/12

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.²⁸

38. The duty to combat impunity rests with the NPA for it has the sole authority²⁹ to prosecute suspected perpetrators of crime. There is little that can be identified as material obstacles to effective prosecutions. The failure to prosecute therefore relates more to an apparent unwillingness to prosecute state officials, or perhaps the deliberate protection of law enforcement officials against prosecution. The National Director of Public Prosecutions hold wide discretionary powers, but this discretion is to some extent limited by its own policy directives. A prosecutor is not required to prosecute every matter that is put before her. Rather, she exercises discretion in determining whether to prosecute a matter. There is, however, a duty to prosecute when there is a *prima facie* case and there is no compelling reason not to prosecute.³⁰ The extremely low number of prosecutions against law enforcement officials call into question how prosecutors are employing their discretionary powers.

39. In view of the above we submit that the Committee should recommend that the State party:

- Establish the reasons for the low number of prosecutions against law enforcement officials relative to the high volume of complaints;

²⁷ IPID Annual Report 2014/15 pp. 92-97.

²⁸ JICS Annual report 2011/12 p. 53.

²⁹ There is one exception in the sense that private prosecutions are possible, as enabled by section 7 of the Criminal procedure Act. This option is, as far as could be established, rarely used and has been met with little success. Moreover, a private prosecution can only be instituted once the prosecutor has issued a certificate of *nolle prosequi*.

³⁰ Over the years case law has made it clear that 'prima facie' would, amongst other things, require the following: (1) The allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. (2) The prosecutor may question whether there are reasonable prospects of success? A prosecutor does not, however, have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution. (3) There may be grounds for refusing to prosecute despite the existence of a *prima facie* case. Such grounds include: the triviality of the offence, the advanced age or very young age of an accused, where a plea bargain was struck between the prosecution and the defence, the antiquated nature of the offence, the ill-health of the accused and the tragic personal circumstances of an accused. See *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP); *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) *S v Lubaxa* 2001 (2) SACR 703 (SCA).

- Take remedial measures to ensure diligent prosecutions of law enforcement officials implicated in rights violations.
- Prosecutors should be trained to ‘recognize’ a case of torture where one of assault or attempted murder is recommended by SAPS, thereby triggering UNCAT requirements. Also, torture is punishable with life imprisonment, which automatically makes it a ‘priority crime’ in terms of the SAPS Act and schedules when the offences/s appear to be organised in nature. This leaves even less discretion to the NPA.³¹

Personal safety and freedom from violence

Art 10(1) of the ICCPR

Violence in detention

40. In line with article 10(1) of the ICCPR, section 12 of the Constitution deals with the freedom and security of the person and section 12(c) guarantees the right ‘to be free from all forms of violence from either public or private sources’. The right to be treated with dignity assumes the right to be free from violence and to be protected from violence. This is an especially important obligation on the state in situations of confinement. When people are deprived of their liberty they are extremely vulnerable to various forms of victimisation by officials and fellow detainees. As much as there an obligation on officials to refrain from victimising prisoners and detainees, there is also an obligation to prevent violence amongst prisoners and detainees.³²
41. The number of complaints from prisoners recorded by JICS alleging assault, either by another prisoner or by an official are not insignificant as shown in Table 3 below.³³ It is furthermore accepted that these figures are in all likelihood an undercount of the true situation as there are significant obstacles to reporting assaults, such as intimidation and fear of reprisal.

Table 3

	2012/13	2013/14	2014/15
Prisoner on prisoner	6127	9096	6566
Official on prisoner	3370	4203	2341

42. In respect of the police, IPID recorded the following complaints during 2014/15:
- 244 deaths in police custody, an increase of 4% from previous year³⁴

³¹ Section 16 South African Police Services Act 68 of 1995.

³² CCPR/C/BIH/CO/2 para 11.

³³ JICS Annual report 2013/4, p. 82; JICS Annual Report 2014/15, p. 76.

³⁴ It should be noted that it is not known whether these deaths were due to police action or inter-detainee violence. It merely gives the number of people who died in police custody, which could have been in a police cell or a vehicle *en route* to a police station for example.

- 396 deaths due to police action, an increase of 2% from previous year
 - 34 rapes in police custody, an increase of 79% from previous year
 - 124 rapes by a police official, an increase of 2% from previous year
 - 145 cases of torture, an increase of 86% from previous year
 - 3711 assaults, a decline of 5% from previous year.³⁵
43. The overall impression gained from this data is that South Africa's prisons are particularly violent and that interactions with the police and experiences in police custody are also frequently violent, and too often fatal.
44. In respect of inter-prisoner violence, prison overcrowding is frequently offered as the main driver of such violence by DCS. This is, however, an over-simplification of the issue as the extant literature clearly indicates a far more complex set of interacting factors driving violence in prisons.³⁶ A review of the literature noted the following:
- Firstly, because of the nature of the prison as an institution, management should be acutely aware of its own legitimacy deficit and thus be sure that its decisions and actions build legitimacy rather than eroding it further. Secondly, management approaches to reduce violence driven by the control model is not supported by the evidence and consensual approaches have yielded better results in creating safer prisons. Thirdly, the day-to-day relationship between staff and prisoners is central to creating safer prisons. How prisoners are treated, spoken to and interacted with have a material impact on levels of conflict and the potential for violence. Fourthly, the situational approach to managing conflict and violence holds significant potential for reducing violence in prisons. Fifthly, risk classification systems relying on objective indicators (e.g. offence and sentence length) are not reliable and approaches to reducing violence in prisons should not depend on these.³⁷
45. The number of deaths in police custody also indicate that inter-detainee violence may be common, but accurate data is not available. Nonetheless, consistent anecdotal reports do indicate that vulnerable detainees are almost as a matter of course relieved of their belongings and cash, and often assaulted. Rape by other detainees have also been reported on in the media as well as in litigation against the Minister of Police.³⁸

³⁵ IPID Annual Report 2014/15 p. 42.

³⁶ Muntingh, L. (2008) *Reducing prison violence: implications from the literature for South Africa*, Bellville: Community Law Centre, CSPRI Research Report No. 17. Also HM Prison Service. (2006) *Violence Reduction Strategy* (Prison Service Order 2750). London: HM Prison Service.

³⁷ Muntingh, L. (2008) *Reducing prison violence: implications from the literature for South Africa*, Bellville: Community Law Centre, CSPRI Research Report No. 17, p. 28.

³⁸ 'Man sues after rape in police cells' *News24.com*, 3 June 2013, <http://www.news24.com/SouthAfrica/News/Man-sues-after-rape-in-police-cells-20130603>, 'Man recounts horror gang rape in police cells' *IOL*, 10 August 2003, <http://www.iol.co.za/news/south-africa/man-recounts-horror-gang-rape-in-police-cells-111188>, "Joburg police officer 'rapes' detainee in holding cell", *The Citizen*, 2 July 2015, <http://citizen.co.za/415524/joburg-police-officer-rapes-detainee-in-holding-cell/>.

46. A notable shortcoming in respect of police detention is that there exists no independent monitoring mechanism similar to the lay visitor system in prisons. Seen against the high number of arrests and consequent police detention, a substantial number of people are at risk of ill treatment. We therefore submit that the Committee recommend that a system of lay visitors to monitor police detention be implemented as a matter of priority.

Sexual violence

47. Sexual abuse in places of detention is a widespread problem that directly infringes on the right to personal safety and freedom from violence for far too many inmates in South Africa, and fuels gender-based violence both in and outside prisons. In 2013, the *Policy to Address the Sexual Abuse of Inmates in DCS Facilities* (the Policy) was finally approved by DCS. It was developed through a partnership between civil society and the DCS in 2010, but its formal approval only came after years of civil society pressure. The Policy is a tool to assist DCS to prevent, detect, respond to, and document the sexual abuse happening in its facilities.

48. The State party's initial report as well as many other key government documents including the DCS's Annual Reports and Performance Plans make no reference to the Policy nor the problem of sexual abuse behind bars. The overall impression is that DCS has, to date, not prioritized inmates' right to be free from sexual violence. Most officials are not aware of the Policy's existence. The South African government need to plan for and execute the implementation of the Policy.

49. Against this background, we submit that the DCS and SAPS have as yet not implemented adequate measures to ensure the personal safety of prisoners and detainees. The following are recommended:

- Identification of and segregation of vulnerable individuals in both prisons and police detention
- Improved supervision of prisoners and police detainees to prevent inter-prisoner violence and sexual assaults
- The implementation of a comprehensive training programme with police and prison officials on the absolute prohibition of torture and the prevention of other ill treatment.

Solitary confinement and super-maximum prisons

Art 7 of the ICCPR

Super-maximum prisons

50. General Comment 20 notes that prolonged solitary confinement may amount to a violation of article 7 of the ICCPR.³⁹ The UN Special Rapporteur on Torture has also concurred with this view as well as similar views expressed by the Committee against Torture and the Committee on the Rights of the Child.⁴⁰ The recently revised Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) has now established a clear, measurable and internationally accepted standard in respect of solitary confinement noting that “For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.”⁴¹
51. We submit that the two super-maximum security prisons in South Africa rely heavily on solitary confinement and that this constitutes a violation of article 7 of the ICCPR. Even though little information is available on the two prisons, the known daily regime amounts to prolonged solitary confinement.
52. South Africa has two super-maximum security prisons, C-Max in Pretoria (Gauteng), with a capacity of 281 prisoners, and Ebongweni in Kokstad (KwaZulu-Natal), with capacity for 1440 prisoners. Both house only male sentenced prisoners. C-Max became operational in 1997 and Ebongweni, in 2002. Both prisons were created to house South Africa’s most dangerous and disruptive prisoners, and initial estimates were that space for 7 000 such prisoners would be needed. Despite these estimates, the prisons remain under-utilised.⁴²
53. As the first to become operational, it was predominantly C-Max that attracted the attention of human rights groups and the South African Human Rights Commission (SAHRC). In C-Max, security measures included prisoner isolation, cordoned-off exercise yards, plastic cutlery, specially developed hand- and leg-irons, video surveillance, warders armed with stun guns, electrified riot shields, bullet and stab-proof vests, and the denial of permission for prisoners to shave or smoke.⁴³ According to the SAHRC Chairperson at the time, ‘We concede there are dangerous offenders and high-risk prisoners, and that you need a system to deal with them. But

³⁹ General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) para 6.

⁴⁰ A/63/175 pp. 23-24. In its concluding remarks to the periodic report of the USA, the Committee against Torture noted its concern about prolonged solitary confinement in super-maximum prisons and that it may constitute a violation of article 16 of UNCAT (CAT/C/USA/CO/2 para 36).

⁴¹ Rule 44.

⁴² As at the end of February 2011 Ebongweni was 37% full and C-Max 45% (figures supplied by Judicial Inspectorate for Correctional Services).

⁴³ SAIRR (1998) *Annual Survey 1997/98*. Johannesburg: South African Institute for Race Relations, p. 71; ‘C-Max prison hatched in secret’. *Mail and Guardian*, 14 November 1997, <http://mg.co.za/printformat/single/1997-11-14-cmax-prison-hatched-in-secret> Accessed 17 January 2012.

we think C-Max goes beyond what you require. It's difficult to imagine how the almost solitary-confinement conditions of C-Max encourage rehabilitation.⁷⁴⁴

54. Ebongweni Super-maximum prison in Kokstad follows an equally harsh regime, relying heavily on long term solitary confinement. All prisoners are housed in single cells. Under Phase 1 of detention, which lasts an absolute minimum of six months, there is no contact with other prisoners and prisoners are locked up 23 hours a day.⁴⁵ An April 2015 media report described the situation in Ebongweni as follows after journalists were taken on a tour of the prison: 'Everything the prisoners do, they do alone. And when they do leave their cells - never for more than one hour a day - they are handcuffed and there is a warder right alongside them.'⁴⁶
55. A psychologist testifying in a court case where a prisoner challenged his transfer to C-Max described the prison as "inhumane, depressing, debilitating and destructive" adding that "You must see those cages to believe it. These people are locked up for 23 hours a day and then they are not even allowed to speak to anyone."⁴⁷
56. The central issue in the regimes of both super-maximum prisons is that solitary confinement is applied in a manner that meets the requirements for prolonged solitary confinement as per the Mandela Rules. In view of this, it is submitted that the DCS reviews the regimes at the two facilities to ensure that prisoners are no longer subjected to solitary confinement in excess of 22 hours per day without meaningful human contact and for 15 days or longer.

Solitary confinement and segregation

57. Even though the disciplinary punishment of 'solitary confinement' has been removed from the Correctional Services Act by the 2008 amendment⁴⁸, it is necessary to describe it as there is reason to conclude that it still occurs under the guise of 'segregation'. Originally the distinction between solitary confinement and segregation was clear: solitary confinement was a punishment following a disciplinary procedure, while segregation was a mechanism used for a range of other purposes.⁴⁹
58. While the difference between effective solitary confinement and segregation appears now to be one only in name, an important distinction has nevertheless crept in under the noble mantle of

⁴⁴ 'Rights groups slam new prison units' IOL, 2 June 2000, <http://www.iol.co.za/news/politics/rights-groups-slam-new-prison-units-1.39352?ot=inmsa.ArticlePrintPageLayout.ot> Accessed 3 December 2011.

⁴⁵ DCS programme description Ebongweni Super-maximum prison, <http://www.dcs.gov.za/AboutUs/COE/centre/KZN/EbongweniMaxCC.aspx>

⁴⁶ 'Inside the SA prison no one has ever escaped from' *TimesLive*, 2 April 2015,

<http://www.timeslive.co.za/local/2015/04/02/inside-the-sa-prison-no-one-has-ever-escaped-from>

⁴⁷ 'The place still haunts me' *Mail and Guardian*, 15 Nov 2004, <http://mg.co.za/article/2004-11-15-the-place-still-haunts-me>

⁴⁸ Correctional Services Amendment Act (25 of 2008).

⁴⁹ Correctional Services Act, s 30(1) Segregation is therefore permissible under the following conditions: if a prisoner requests to be placed in segregation; to give effect to the penalty of the restriction of amenities; if prescribed by a medical practitioner; when a prisoner is a threat to himself or others; if recaptured after escape and there is reason to believe that he will attempt to escape again; and at the request of the police in the interests of justice.

correcting offending behaviour. Prior to the amendment, the Act was clear that the limit was 30 days and there was no possibility of an extension.⁵⁰ Following the amendment, the Act states that in the event of serious and repeated transgressions, a prisoner may be placed in segregation ‘in order to undergo specific programmes aimed at correcting his behaviour’, with a loss of gratuity up to two months and a restriction of amenities for up to 42 days.⁵¹ What exactly constitutes a programme is not clear, nor are minimum requirements laid down in the Act. Moreover, segregation should be used only “as far as it may be necessary” with the aim of giving effect to the restriction of amenities⁵² and should not be ordered as a form of punishment or disciplinary measure.⁵³ In short, detaining a prisoner in a single cell for punishment is permitted when done with the purpose of restricting his access to amenities, and if necessary this could be done for 42 days. While the practice goes by a different name, it is evident that it can be used in exactly the same manner as solitary confinement.

59. Prior to the 2008 amendment, the Inspecting Judge had either to confirm or set aside the penalty of solitary confinement, but this mechanism has been weakened. Prisoners subjected to segregation may refer the matter to the Inspecting Judge, who must make a decision thereon within 72 hours.⁵⁴ Instead of a mandatory review, there is now a voluntary review mechanism which relies on the prisoner having knowledge of this review mechanism, being able to lodge such an application (e.g. by having access to writing materials or telephone), and being permitted to do so. As it turned out, less than 2% of reported segregation cases were referred to the Inspecting Judge for review.⁵⁵ It must therefore be assumed that segregated prisoners are not informed of their right to refer their case to the Inspecting Judge or that they are prevented from doing so.
60. The amendment to the legislation rid the prison system of the stigma associated with the concept “solitary confinement”, a practice questioned (if not condemned) internationally.⁵⁶ Nonetheless, the status of solitary confinement is recognised in international human rights law and has been the focus international instruments and commentaries by treaty monitoring bodies.

⁵⁰ s 24(5)(d) prior to the amendment by Act 25 of 2008.

⁵¹ s 24(5)(d) read with 24(5)(b and c)

⁵² Amenities refer to exercise, contact with the community, reading material, recreation and incentive schemes (Definitions, Correctional Services Act).

⁵³ s 30(9).

⁵⁴ s 30(7).

⁵⁵ Office of the Inspecting Judge (2010) p. 27. Office of the Inspecting Judge (2015) p. 93.

⁵⁶ General Comment 20 on the ICCPR para. 6. *The Istanbul statement on the use and effects of solitary confinement* defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic. [Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.] A/HRC/13/39/Add.5 para 55.

This status is important for controlling its use.⁵⁷ However, following the 2008 amendment to the Correctional Services Act, detention in a single cell for punishment purposes continues but with a weaker oversight regime than was the case with solitary confinement, where all instances were subject to mandatory review by the Inspecting Judge. Solitary confinement possessed a particular legal status which has now been lost, given that confinement in a single cell for punishment or disciplinary reasons is grouped together with a host of other reasons for segregation. It was because solitary confinement posed such risks to the individual's well-being that it was tightly controlled and safeguards built into the 1998 Correctional Services Act. However, segregation, accompanied by programmes to correct offending behaviour, appears to be terminologically less ominous and protective measures have been diluted.

Conditions of detention

Art 10(1) of the ICCPR

61. The Correctional Services Act 111 of 1998 details the minimum rights of prisoners. It requires that they are held in hygienic, safe and dignified conditions, with adequate nutrition, bedding, clothing, exercise (at least one hour per day), reading material, and health care. Further, the Correctional Matters Amendment Act of 2011 requires that remand detainees, wherever practicable, access all the amenities to which they would have access outside of the facility, and that they are subjected only to those restrictions necessary to maintain security and good order.
62. In reality, however, prison conditions in numerous facilities across South Africa are a far cry from those required by law. Many facilities battle with extreme overcrowding. This results in crowded cells, which hold double or up to three times the number of prisoners they were designed for; severely unsanitary conditions - where 50 to 90 inmates are expected to use the single, unshielded shower and toilet contained in communal cells (not always in working order);

⁵⁷ For example, Principle 7 of the UN Basic Principles for the Treatment of Prisoners states that “efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged”, while the Human Rights Committee stressed that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Art. 7 (prohibition of torture)”. Regional instruments have also prescribed that “solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.” Art. 60.5, European Prison Rules (revised 2006). See also *Prisons in Cameroon - Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*. The African Commission on Human and Peoples' Rights, Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa, From 2 to 15 September 2002, ACHPR/37/OS/11/437; Communication 54/91, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000)(Annex V) para 115. African Commission on Human and Peoples' Rights Communications: 64/92: *Krishna Achuthan (on behalf of Aleke Banda)* / Malawi; 68/92: *Amnesty International (on behalf of Orton and Vera Chirwa)* / Malawi; 78/92: *Amnesty International* / Malawi.

and limits inmate access to basic services.⁵⁸ As a Constitutional Court delegation stated following a visit to Pollsmoor Correctional Centre in 2015, “To know, statistically, that there is 300% overcrowding does not prepare the outsider for the practical reality ... with understatement, it can only be described as horrendous.”⁵⁹ But overcrowding is not the only critical challenge facing the system.

63. Staffing is a key factor: staffing levels and shifts are problematic, as is staff capacity. Particularly at section level (where inmates are housed) there are too few correctional officers to supervise prisoners,⁶⁰ and often less than that stated on staffing schedules per section. This is because officers allocated to a section are frequently called on to perform other duties outside the section, and absenteeism is high.⁶¹ Moreover, posts are vacant and the current shift system is impractical.⁶² For example, during research at the Johannesburg Management Area in 2010, a correctional centre had only 463 of its 726 approved positions filled, and the remand centre had 384 of its 751 approved positions filled.⁶³
64. The current shift system, known as “the 7-Day Establishment” further stretches staff capacity. Many centres implement a four-day weekend to meet the requirements of the 7-Day Establishment. This means that there are even fewer staff on duty from Friday to Monday inclusive, with serious implications for inmate management during that time. While DCS has, for several years been in discussions about the shift system and set up a Ministerial Task Team to consider solutions,⁶⁴ it remains unresolved.
65. Short staffing and challenges retaining staff, combined with overcrowding, have numerous consequences: in many facilities inmates are not properly assessed on arrival or during imprisonment,⁶⁵ heightening the risk of violence and ill-health; inmate supervision is diminished; some inmates do not receive exercise time out of the over-crowded cells, or do so only infrequently; and entire sections of cells may be out of use because there are not enough staff to oversee them, further exacerbating overcrowding. In addition, these conditions leave

⁵⁸ Justice Cameron, E. (2015) *Pollsmoor Correctional Centre – Remand Centre and Women’s Centre*, Constitutional Court of South Africa Report; Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa.

⁵⁹ Justice Cameron, E. (2015) *Pollsmoor Correctional Centre – Remand Centre and Women’s Centre*, Constitutional Court of South Africa Report, p13, para 44.

⁶⁰ Judicial Inspectorate for Correctional Services. *2011/2012 Annual Report*.

⁶¹ Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa; Justice Cameron, E. (2015) *Pollsmoor Correctional Centre – Remand Centre and Women’s Centre*, Constitutional Court of South Africa Report; Forthcoming: Dissel, A. (2016) *By the Grace of God: Staffing Correctional Centres*, Cape Town: Sonke Gender Justice.

⁶² Judicial Inspectorate for Correctional Services. *2010/2011 Annual Report*.

⁶³ Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa.

⁶⁴ Department of Correctional Services. *Annual Report 2012/2013*.

⁶⁵ Judicial Inspectorate for Correctional Services. *2011/2012 Annual Report*

staff feeling overwhelmed, severely stressed and disillusioned, which in turn impacts on their treatment of inmates.⁶⁶

66. Night shift, which runs from approximately 3 pm to 7 am the next day, presents additional and serious problems. Typically, a single officer is responsible for overseeing an entire section (some of which house over 1000 inmates). Officers are generally unable to see inside cells, and in the event of an emergency, that is if officers are aware of the emergency, they must go through a lengthy process to get the backup and ‘master’ key needed to open a cell.⁶⁷ This can take up to an hour, posing additional risks for inmates and staff, and is obviously disastrous in rapidly developing, dangerous situations.⁶⁸
67. While these issues effect DCS facilities overall, the situation tends to be especially poor for awaiting trial inmates, or remandees, as they are now known – particularly in large, urban facilities.⁶⁹ Although the legal framework provides for remandees to access amenities in line with access outside, and to be limited only by the requirement for security and order, conditions in remand facilities are frequently much worse than those in facilities for sentenced inmates. Psycho-social services are generally not available to awaiting trial prisoners⁷⁰; who also are unable to access development or support programmes.
68. A little understood problem, but one in need of attention, and which is also apparently felt more acutely in remand facilities, is that of prisoners with serious mental disabilities or illnesses.⁷¹ These prisoners should be cared for in specialised institutions, but are being shunted into the prison system where they are at increased risk for violence and ill-health and pose risks to others. Again, officers complain that they do not have the skills to manage these inmates and numerous other issues they regularly encounter in their work.⁷²
69. In 2015 a Constitutional Court delegation led by Justice Cameron visited the women’s and men’s remand centres at the Pollsmoor Correctional Centre in the Western Cape. The delegation’s report underscores the horrific conditions they found: ‘It must be first stated that Justice Cameron and his law clerks were deeply shocked ... The extent of overcrowding,

⁶⁶ Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa

⁶⁷ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 8 May 2013, <https://pmg.org.za/committee-meeting/15805/>

⁶⁸ Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa

⁶⁹ Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa; ‘Awaiting trial inmates held in grim conditions’ *Business Day*, 23 August 2012. <http://www.bdlive.co.za/opinion/2012/08/23/awaiting-trial-prisoners-held-in-grim-conditions> Accessed 4 February 2016.

⁷⁰ Certainly, staff shortages and overcrowding mean that sentenced inmates too battle to access psycho-social services, but the possibility of such access is much greater for them than their remandee counterparts.

⁷¹ Judicial Inspectorate for Correctional Services. *2010/2011 Annual Report*.

⁷² Gear, S. (2015) *In Their Boots: Staff Perspectives on Violence Behind Bars in Johannesburg*, Johannesburg: Just Detention International – South Africa

unsanitary conditions, sickness, emaciated physical appearance of detainees, and overall deplorable living conditions, were profoundly disturbing⁷³. Bedding had never been washed and was lice infested; sick remandees were not accessing medicines due to persistent stock outs of basic medical and pharmaceutical supplies (including tuberculosis medication); the lack of ventilation – already the subject of a constitutional court ruling⁷⁴ – extreme; and some inmates were getting exercise time only once a month.⁷⁵

70. Overcrowding, unsanitary conditions, and a lack of ventilation are also central drivers of ill-health and deaths due to natural causes. An analysis done by JICS in 2012 of the prison population size and deaths due to natural causes, showed how the rate of deaths due to natural causes death increased by 250% when the total population increased by 25%.⁷⁶ Tuberculosis, pneumonia and AIDS are the most common natural causes of death in DCS facilities.⁷⁷
71. While there have been important developments regarding inmate health, such as tuberculosis-focused interventions in selected prisons, and the manufacture and distribution of condoms and lubricants suitable for use by men who have sex with men, these interventions are only felt by a fraction of the prison population, and largely enabled by donor funding. Overall, the health situation in DCS facilities remains bleak.⁷⁸ While overcrowding is a main driver of this situation, key recommendations on other factors aggravating the situation, and directives made over the years by courts, oversight bodies, and experts, have not been implemented.
72. Relatively little information is available on conditions in police holding cells; the result at least in part, of the lack of legislated inspections of these cells.⁷⁹ Existing evidence points to an uneven situation. Cells at some stations are well-kept and in good condition, while others are “appalling”.⁸⁰ In the latter category, there are reports of filthy cells and blankets, neither of which had been cleaned for days, and dysfunctional ablution facilities. Some cells are overcrowded and there are reports of detainees being refused their AIDS medication, to make

⁷³ p.6 paragraph 17.

⁷⁴ *Lee v Minister of Correctional Services* (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012)

⁷⁵ Justice Cameron, E. (2015) *Pollsmoor Correctional Centre – Remand Centre and Women’s Centre*, Constitutional Court of South Africa Report.

⁷⁶ Judicial Inspectorate for Correctional Services. *2011/2012 Annual Report*, p 54.

⁷⁷ Judicial Inspectorate for Correctional Services. *2011/2012 Annual Report*.

⁷⁸ See for example, ‘HIV-positive prisoner denied antiretroviral treatment, Pollsmoor detainees speak out’ GroundUp, 3 February 2016. <http://www.groundup.org.za/article/pollsmoor-detainees-speak-out-remand-centre/> Accessed 3 February 2016. ‘Detainees go to court over conditions in Pollsmoor,’ *GroundUp*. 3 February 2016. <http://www.groundup.org.za/article/court-action-against-dire-health-risks-and-overcrowding-pollsmoor/> Accessed 3 February 2016.

⁷⁹ Ballard, C. (2014) *Expert Report on the Independent Oversight of Police Stations*, Khayelitsha Commission of Inquiry.

⁸⁰ Portfolio Committee on Police, *Report of the Portfolio Committee on Police on its oversight visit from 02-05 August 2011 and 10-12 August 2011 dated 28 October, 2011*, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/comreports/111031pepolicereport.htm>

phone calls, and not receiving food.⁸¹ The Portfolio Committee on Police has noted that the required hourly, monitoring visits to cells by an officer, are not always taking place, posing serious risks for detainees.⁸²

Inequality and access to justice

Art 26 of the ICCPR

73. Inequities in the distribution of police human resources have been highlighted⁸³ by the Khayelitsha Commission of Inquiry⁸⁴ (the Commission), which called for an immediate “review of the South African Police Service (SAPS) mechanism for determining human resource allocation”.⁸⁵
74. A fixed ratio of police personnel per 100 000 population is not expected across policing districts due to variations in work load and crime rate. However, evidence before the Khayelitsha Commission showed that the national method used by SAPS to allocate human resources to police stations results in township areas (designated as Black and Coloured residential areas under apartheid) in the Western Cape province, which experience amongst the highest rates of murder and violent crime, receiving the lowest allocation of police personnel per 100 000 people.
75. For example, at the time of the Commission, Harare, one of three policing areas in Khayelitsha (a large informal settlement), had only 111 police personnel per 100 000 residents, while the

⁸¹ Portfolio Committee on Police, *Report of the Portfolio Committee on Police on its oversight visit from 02-05 August 2011 and 10-12 August 2011 dated 28 October, 2011*, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/comreports/111031pcpolicereport.htm> ; Portfolio Committee on Police, *Report of the Portfolio Committee on Police, dated 16 August 2011, on its oversight visit from 25-28 January 2011*, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2011/comreports/110816pcpolicereport.htm> ; ‘Good, bad and ugly of SA’s police stations’ *Mail and Guardian*, 26 Nov 2007. <http://mg.co.za/article/2007-11-26-good-bad-and-ugly-of-sas-police-stations> Accessed 3 February 2016.; ‘Conditions at police station a disgrace’ *IOL*, 8 February 2000. <http://www.iol.co.za/news/south-africa/conditions-at-police-station-a-disgrace-1.27544> Accessed 3 February 2016.

⁸² Portfolio Committee on Police, *Report of the Portfolio Committee on Police on its oversight visit from 02-05 August 2011 and 10-12 August 2011 dated 28 October, 2011*, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/comreports/111031pcpolicereport.htm> ; Portfolio Committee on Police, *Report of the Portfolio Committee on Police, dated 16 August 2011, on its oversight visit from 25-28 January 2011*, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2011/comreports/110816pcpolicereport.htm>

⁸³ O’Regan, C. & Pikoli, V. (2014) *Towards A Safer Khayelitsha: The Report of the Commission of Inquiry into the Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha*, (hereinafter Khayelitsha Commission Report), Cape Town: Commission of Inquiry into the Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha, page xxiv.

⁸⁴ The “Khayelitsha Commission of Inquiry into allegations of police inefficiency and a breakdown in relations between SAPS and the Community of Khayelitsha” ; also referred to as “the O Reagan-Pikoli Commission” as well as the “Khayelitsha Commission”.

⁸⁵ Khayelitsha Commission Report, Summary, page xxvi.

median for the province of the Western Cape was 211 per 100 000 and the average approximately 280 per 100 000.⁸⁶

76. The least resourced policing districts in a ranked list thus tend to be places in which the urban poor live and which experience both a high number and a high rate of violent crime, particularly of murder.⁸⁷ While the national murder rate was approximately 33 per 100 000 in 2014, the murder rate for greater Khayelitsha is approximately 83 per 100 000.⁸⁸
77. The low allocation of police human resources means people living in areas like Harare receive lower rates of police patrolling and response, while victims of crime are less likely to have their cases investigated or investigated properly by the police service, in comparison to more resourced areas. A subsequent study has shown a similar inequitable pattern in the province of KwaZulu-Natal.⁸⁹
78. Despite the recommendations of the Commission being published in August 2014, the SAPS has failed to make a systematic adjustment to the method of distribution of police human resources.

Oversight, transparency and accountability

Article 2(3) of the ICCPR

79. In the State party's Initial Report quasi-judicial mechanisms such as the South African Human Rights Commission (SAHRC), Office of the Public Protector (OPP), the IPID and JICS were highlighted as complementing "competent courts" as an effective remedy for victims of human rights violations to seek redress. Unfortunately, most of these institutions are faced with a range of challenges hampering their efficacy to provide for an effective remedy for victims of human rights violations. Challenges faced include: limited and or lack of institutional independence; limited powers and functions; a lack of transparency and accountability in executing the mandate of the institution; limited finances, capacity and resources as a result of insufficient budget allocations, and political interference with their institutional independence and the integrity of its leadership.

⁸⁶ Khayelitsha Commission Report, p 315 et. seq.

⁸⁷ Khayelitsha Commission Report, p 315 et. seq.

⁸⁸ Nationally there were 17 805 murders in 2014-2015 in a population of approximately 54 million. In Khayelitsha, Harare and Lingeletu-West there were a combined total of 326 murders in 2014-2015 in a population of approximately 392 000.

⁸⁹ Redpath, J. and Nagia-Luddy, F. 'Unconscionable and irrational' SAPS human resource allocation' *South African Crime Quarterly* No. 53 September 2015, Institute for Security Studies, p.15.

80. JICS is the designated oversight institution for the prison.⁹⁰ However, it is not sufficiently independent from the DCS and further that its mandate is too limited.⁹¹ In terms of the Correctional Services Act, JICS forms administratively part of the DCS, the same department it is mandated to oversee and receives its budget from the DCS.⁹² JICS is financially reliant on the DCS to provide adequate funding for the effective functioning of the institution. Moreover, the Chief Executive Officer is identified by the Inspecting Judge but appointed by the DCS National Commissioner,⁹³ who is also responsible for dealing with disciplinary matters pertaining to the CEO, such as misconduct and incapacity.⁹⁴ JICS has over the years reported that its financial dependence on the DCS hampers its operational efficiency,⁹⁵ citing human resources and infrastructure shortages as a result of inadequate funding provided to the institution by DCS to finance an approved restructuring process, which has still not been addressed.⁹⁶
81. Moreover, JICS lacks the necessary powers and functions to provide an effective remedy for prisoners of human rights violations.⁹⁷ JICS mandate is to inspect and report on the conditions of detention and treatment of prisoners and it is thus not mandated to investigate with powers similar to that of SAPS and IPID.⁹⁸ Concerns have been raised about the large number of complaints recorded by the Independent Correctional Centre Visitors⁹⁹ (ICCV), particularly those in relation to assaults on prisoners by officials, and the lack of transparency in respect of investigations purportedly undertaken by the DCS and SAPS into unnatural deaths in custody.¹⁰⁰ This is because JICS has a limited role when it comes to investigations of deaths

⁹⁰See the Civil Society Prison Rights Initiative's (CSPRI) Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning September 2015. Available at:

http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

⁹¹ CSPRI, 'Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning,' September 2015. Available at: http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

⁹² In terms of section 88 of the Correctional Services Act 111 of 1998 the Department is responsible for the expenses of the Judicial Inspectorate

⁹³ Section 88A (2), Correctional Services Act 111 of 1998.

⁹⁴ Section 88A (4), Correctional Services Act 111 of 1998.

⁹⁵ CSPRI, 'Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning,' September 2015. Available at: http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

⁹⁶ Judicial Inspectorate for Correctional Services Annual Reports: 2012/2013, 2013/2014, 2014/2015.

⁹⁷ CSPRI, 'Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning,' September 2015. Available at: http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

⁹⁸ CSPRI, 'Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning,' September 2015. Available at: http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

⁹⁹ These are lay visitors assigned to each prison in South Africa who is tasked with inspecting prisons and conducting interviews with prisoners regarding their conditions of detention and treatment.

¹⁰⁰ CSPRI, 'Submission to Portfolio Committee on Justice and Correctional Services Strategic Planning,' September 2015. Available at: http://cspri.org.za/publications/submissions-and-presentations/CSPRI%20SUBMISSION%20SEP%202015_5.pdf

and assaults of prisoners in prison. JICS merely makes recommendations and its decisions are not binding or enforceable.

82. In response to the List of Issues in respect of steps taken to strengthen the JICS's independence and to ensure that it is adequately funded, the State party noted that 'the Department of Public Service and Administration is assisting the JICS to restructure its current model to a government component, which is a form of a service delivery model.'¹⁰¹ The response is vague and unsatisfactory, as it does not provide clarity on whether the planned organisational model will ensure ultimate institutional independence (administrative and financial) from political influence, nor does it indicate that the mandate of the JICS would be strengthened in order to provide for better investigative powers as well as binding and enforceable findings. The State also failed to provide a timeline for completion of such a restructuring process and the response does not address any interim arrangements to the current financial and staffing challenges faced by the JICS. It is submitted that the Committee seeks clarification from the State party.
83. IPID was established to investigate misconduct and offences, including corruption, committed by members of SAPS and Municipal Police Services.¹⁰² The IPID Act did, however, not ensure full institutional independence from the Minister of Police as it gave the Minister the power to suspend the head of the IPID which is what happened in March 2015. Following the suspension,¹⁰³ the suspended head challenged the power of the Minister to remove an executive head of IPID for misconduct, ill health or failure to perform his duties in the High Court as stated in the IPID Act.¹⁰⁴ In December 2015, the High Court ruled in favour of the suspended head and struck down sections of the IPID Act because they gave the Police Minister unfettered power to suspend the head of IPID.¹⁰⁵ The Constitutional Court, however, has to either confirm or vary the ruling of the High Court. The fact that the law allows the Minister to remove IPID's head hinders the independence and integrity of the institution, as it allows for political interference in the mandate of an independent body. IPID's mandate is to investigate the police and it is essential for the sake of transparency and accountability, that IPID remain independent of SAPS.
84. The Office of the Public Protector (OPP) has widely been recognised as an effective, impartial and transparent institution that exercises its powers and functions without 'fear, favour or prejudice'. The OPP was constitutionally set up to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.¹⁰⁶ Of concern, however, is the interference

¹⁰¹ United Nations Human Rights Committee, UN Doc: CCPR/C/ZAF/Q/1/Add.1, para 28.

¹⁰² Section 2, Independent Police Investigative Directorate Act 1 of 2011.

¹⁰³ The suspension of the Executive Head is alleged to be politically motivated.

¹⁰⁴ *McBride v Minister of Police and Another* (06588/2015) [2015] ZAGPPHC 830 (4 December 2015)

¹⁰⁵ *McBride v Minister of Police and Another* (06588/2015) [2015] ZAGPPHC 830 (4 December 2015)

¹⁰⁶ Section 182, Act 108 of 1996.

in the work of the OPP and the repeated attacks on the institution's independence and integrity by high ranking public officials. There have been instances where the mandate of the OPP and the legality of its findings have been called to question by political figures.¹⁰⁷ Moreover, in 2013 the Ministers of Police, Justice, Intelligence and Defence (known as the Security Cluster) attempted to interdict the OPP from releasing an interim report investigating expenditure for security upgrades to the President's private residence but withdraw the application.¹⁰⁸ The South African Constitution states that the Public Protector shall be subject only to the Constitution and the law.¹⁰⁹ No person or organ of state may interfere with the functioning of the Public Protector's office.¹¹⁰ The repeated attacks and interference in the work of the OPP is against the letter and spirit of the Constitution. It reflects a deliberate effort to weaken the OPP and is an attack on the public's right to accountability and transparent leadership.

85. The OPP has on numerous occasions pleaded before Parliament's Portfolio Committee on Justice and Correctional Services for more funding, but has not been successful.¹¹¹ The lack of financial and human resources has resulted in the closure of some of its regional offices.¹¹² Furthermore, some offices have merged and employees have had to relocate. The efficacy of the OPP is dependent on the proximity of its offices to the communities in which they operate and therefore this situation impacts the access to services of the OPP.
86. South Africa's oversight institutions were created for the purpose of preventing abuses of power, but are either under attack or, in a state of disarray. It is clear that the SAHRC, JICS, IPID and OPP face many challenges. The State has a duty to ensure that these oversight bodies are institutionally independent, equipped with the necessary powers and functions and without any political influence, so that victims of human rights violations have access to an effective remedy by a competent authority. The State has a duty to respect the integrity of these institutions and their legal findings. The State needs to ensure that these institutions are adequately funded, as the cost associated with litigation is expensive for the majority of South

¹⁰⁷ Parliamentary Monitoring Group, *Ad Hoc Committee - President's Submission in response to Public Protector's Report on Nkandla*, 26 September 2014. Available at: <https://pmg.org.za/committee-meeting/17596/>

¹⁰⁸ The OPP's report stated Zuma had unduly benefited from the non-security upgrades at his private Nkandla residence which amounted to R246-million and recommended that Zuma pay back a reasonable percentage of the cost. The report is available at: http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf

¹⁰⁹ Section 181, Act 108 of 1996

¹¹⁰ Section 181, Act 108 of 1996

¹¹¹ Available at: http://www.publicprotector.org/media_gallery/2014/04072014.asp. [Accessed on 5 February 2016] Public Protector Adv. Thuli Madonsela on Friday appealed to the Portfolio Committee on Justice and Correctional Services to help her office get more financial resources and to collaborate with her in balancing the three constitutional values of access, promptitude and thoroughness; *Madonsela asks Parliament for 200m*, 29 April 2015. Available at: <http://ewn.co.za/2015/04/29/Madonsela-asks-Parliament-for-R200m>.

¹¹² *Public protector: 'Hearts have hardened'*, Mail & Guardian, 27 November 2015. Available at: <http://mg.co.za/article/2015-11-27-00-protector-hearts-have-hardened>; *Public protector forced to close offices due to lack of cash*, ENCA, 12 November 2015. Available at: <https://www.enca.com/south-africa/public-protector-forced-close-offices-due-lack-cash>. [Accessed on 5 February 2016]

Africans. It is important that these institutions promote transparency and accountability within their respective mandates and therefore they must be headed by competent persons who have undergone a rigorous appointment process. It is essential that they are able to deal with complaints and investigations promptly and effectively and that the relevant authorities be held accountable when it fails to take measures against frequently reported problems.

Services to perpetrators

Art 10(3) and Art 15(4-5) of the ICCPR

87. The White Paper on Corrections in South Africa, defines rehabilitation as, ‘the result of a process that combines the correction of offending behaviour, human development, and the promotion of social responsibility and values.’¹¹³ According to the White Paper, the purpose of the correctional system in South Africa, is not punishment, but
- the protection of the public, promotion of social responsibility and enhancing human development in order to prevent recidivism. Sentences do provide a deterrent to repeat offending if justice is seen to be swift, effective and consistent, but the essence of deterrence is rehabilitation, buy-in that crime does not pay and that good citizenship is the duty of all. It is rehabilitation and not punishment that breaks the cycle of crime leading to a reduction of crime-hence a reduction in the prison population.¹¹⁴
88. Ultimately the purpose of rehabilitation is aimed at preventing recidivism, contributing to the safety and security of a nation, and to social cohesion. The main aim of the prison authorities in their treatment of prisoners should be to encourage personal reformation and social rehabilitation. The purpose of the prison regime should be to help prisoners to lead law-abiding and self-supporting lives after their release.¹¹⁵
89. Regarding the rehabilitation and reintegration of inmates, the Correctional Services Act (111 of 1998) provides that non-governmental and religious organisations render services to prisoners;¹¹⁶ all prisoners should have access to adequate reading material;¹¹⁷ and that all sentenced must be assessed to determine their needs to enable appropriate programming.¹¹⁸ The Correctional Services Act makes furthermore provision for release preparation, temporary

¹¹³ Chapter 6.1, p. 49 of the White Paper on Corrections

¹¹⁴ Padayachee, V. (2015) NICRO Submission to Parliament, *SA’s performance in relation to and compliance with international standards in inmate management and offender rehabilitation and the independent monitoring of conditions of incarceration*, 12 August 2015,

¹¹⁵ Padayachee, V. (2015) NICRO Submission to Parliament, *SA’s performance in relation to and compliance with international standards in inmate management and offender rehabilitation and the independent monitoring of conditions of incarceration*, 12 August 2015, p. 13.

¹¹⁶ s 13(7).

¹¹⁷ s 18.

¹¹⁸ s 38.

release and non-custodial sentencing options including parole. The overall impression is that the legislation is more than adequate to enable DCS to implement effective and efficient programmes, and more specifically, that it has a statutory duty to do so. The following are regarded as key problem areas.

Reading material

90. Rule 64 of the UNSMR states that ‘Every prison shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.’ The Constitution in section 35(2)(e) reads: “Everyone who is detained, including every sentenced prisoner, has the right- to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”.
91. Despite the clarity of the Constitution in this regard, it appears that it is the exception that South African prisons have libraries to which all categories of prisoners have access to. Earlier research by CSPRI also found that even if there is a library at a particular prison, then access is restricted on arbitrary and unlawful grounds.¹¹⁹

Rehabilitation programmes and education

92. The revised UNSMR (2015) in Rule 104 reads:
1. Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterate prisoners and of young prisoners shall be compulsory and special attention shall be paid to it by the prison administration.
 2. So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.
93. The core issue from the UNSMR is that education should be accessible to at least all sentenced prisoners and that illiterate and young prisoners should be a priority. It is regrettably the situation that the Correctional Services Act is at odds with this requirement. Section 38(1) requires that all admitted sentenced prisoners must be assessed against a range of possible needs, including educational needs. However, section 38(1)(A)(a) states that a sentence plan will be developed only for prisoners serving a sentence of longer than two years. This requirement applies to all sentenced prisoners, regardless of their age, level of literacy or previous access to education.

¹¹⁹ Muntingh, L. and Ballard, C. (2010) *Report on children in prison in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre.

94. With regard to adults serving sentences of less than two years, it is unclear what services are rendered to them as they are excluded from having sentence plans. It can indeed be argued that first time prisoners, serving a relatively short sentence should be a specific target of DCS in order to reduce the risk of re-offending, and therefore have access to extensive reintegration programmes. As the Department has in recent years not made public comprehensive statistics on the prison population, it is not possible to estimate what the demand for services in this category is, but it can be assumed that it will be substantial as there is a high turnover of prisoners serving short sentences.
95. The planned and actual achievements of the DCS to provide access to education are modest, as reflected in Table 4.¹²⁰ In short, some 85 000 were targeted of some 110 000 sentenced prisoners in 2013/14, but only 17 654 accessed education, or 21% of the target. From this it is evident that access to education, an essential tool for preparing for release, is the preserve of an estimated 15% of the total sentenced population. If 85% of the prison population is not accessing education, it clearly shows that there is a major problem in how the Department is running educational services. To this it should be added that it is not clear from the DCS annual reports what the nature of these educational programmes are and how many hours per week are spent on this.

Table 4

Category	Target	Achievement	Percentage
Educational programmes per sentence plan	16929	9793	57.8
	39566	986	2.5
FET College	13536	2986	22.1
	15436	3889	25.2
Total	85467	17654	20.7

96. Attention is furthermore drawn to section 19(1)(a) of the Correctional Services Act stating that all children of compulsory school-going age must have access to such education, whether they are sentenced or unsentenced. Compulsory school going age is under 15 years or attaining Grade 9.
97. In respect of children's access to education, it was reported in 2010:
- Firstly, unsentenced children do not have access to education even though the Correctional Services Act requires that they should have if of compulsory school-going age. Secondly, from Brandvlei [Prison] it was reported that sentenced inmates with further charges are not permitted to attend school as they pose a security risk and the school building is less secure than the lock-up section. Thirdly, at Emthonjeni [Prison] it

¹²⁰ Dept of Correctional Services *Annual Report 2013/14*, pp. 46-47.

was found that children in the “Special Needs Section” are also excluded from education. Fourthly, from Pollsmoor [Prison] it was reported that only children serving sentences longer than two years are allowed to attend education programmes.¹²¹

98. It needs to be emphasised that the Correctional Services Act does not make access to education for children of compulsory school-going age conditional to having been sentenced, facing further charges, or sentence length. Not allowing children of compulsory school-going age to attend school is a flagrant violation of the Correctional Services Act and the Schools Act.

99. A survey conducted by JICS and CSPRI in 2014 found the following:

The survey data found that with the exception of Bizzah Makhate [Prison] that unsentenced children are not provided with access to any educational services despite the Correctional Service Act being clear that all children of compulsory school-going age must have access to education. The unsentenced children interviewed confirmed that none of them have access to any education or training. In respect of sentenced children, the situation looks somewhat better, but three of the centres do not provide compulsory education being Kroonstad, Piet Retief and Pollsmoor Med A. As is the case with unsentenced children, there appears to be confusion about the definition of compulsory school-going age. For example, from Kroonstad it was reported that there is no sentenced child of age 15 years or younger implying that they have no children of compulsory school-going age. This interpretation is, of course, incorrect as age is one of the two variables determining compulsory school-going age, the other attaining the ninth grade of basic education.¹²²

Conclusion

100. South Africa faces many challenges, some of which have stubbornly persisted post-1994 and these will not be resolved overnight. It is also not the responsibility of the State alone to address societal challenges as we all have a duty to uphold the Constitution. We therefore encourage the government to engage civil society structures in resolving human rights concerns in the criminal justice system. We further encourage the State to utilise the concluding remarks from the Human Rights Committee as a basis for dialogue within government as well as with non-governmental stakeholders.

101. The central thrust of this submission focused on the intersection of good governance and human rights. In a 2000 resolution the then UN Human Rights Commission recognised that

¹²¹ Muntingh, L. and Ballard, C. (2010) *Report on children in prison in South Africa*, CSPRI Research Paper, Bellville: Community Law Centre, p. 69

¹²² Muntingh, L. and Petersen, K. (2015) *Survey of children in South African Correctional Centres*, Judicial Inspectorate for Correctional Services.

‘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’.¹²³ 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.¹²⁴

¹²³ E/CN.4/RES/2000/64 para 1.

¹²⁴ 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.