



**Thematic alternate report on criminal justice and human rights
in South Africa**

**Submitted to the African Commission on Human and Peoples' Rights in
response to South Africa's Second Periodic Report under the African
Charter on Human and Peoples' Rights, to be reviewed at the 58th
Ordinary Session of the African Commission on Human and Peoples'
Rights**

March 2016

Prepared by:

CSPRI

LHR

Just Detention International – South Africa

1. Executive summary

The State report outlines at length the legislation, policies and institutions in place to address the rights of arrestees and detainees in South Africa and which, indeed, by and large uphold their fundamental rights. However, the main challenge lies in the implementation of the legislation and policies and the operational framework of the said institutions. Evidence

shows that law enforcement officials enjoy de facto impunity for gross human rights violations they commit, including for acts of torture, despite specialised oversight institutions in place to inspect prisons and to investigate serious crime committed by police. There is a need to review the practice, and in some instances the powers and mandate, of these oversight institutions and the prosecution practices that follow. Too many people die at the hands of the police, which may be facilitated by legislation authorising the use of deadly force by police even when lives are not immediately in danger. The Marikana massacre is an extreme example of such abuse of force. Furthermore, vulnerable groups are the target of abusive and unnecessary arrests. Also, conditions of detention in prison amount to a violation of the right to security and dignity of prisoners, in particular as they are exposed to high levels of violence from other prisoners and from officials, are detained in overcrowded cells, do not have access to adequate healthcare, do not have access to adequate care or rehabilitation services and are not examined for parole in accordance with legal prescripts.

2. Contact details of contributing organisations

Civil Society Prison Reform Initiative
Community Law Centre
University of the Western Cape
Robert Sobukwe Rd
Bellville, 7535
South Africa
Tel. +27-21-9592950
Fax. +27-21-9592411
www.cspri.org.za
Contact: Prof. L.M. Muntingh
lmuntingh@uwc.ac.za

Just Detention International
Just Detention International – South Africa
2nd Floor, Norwood Place
66 Grant Avenue
Norwood
Johannesburg
2192
South Africa
Tel +27 11 728 6299

<http://southafrica.justdetention.org>

Contact: Ms S. Gear

SGear@justdetention.org

Lawyers for Human Rights

4th floor Poyntons Building

24 Burg Street

Cape Town

South Africa

Tel: +27-21 424 8561

Fax number: +27-21 424 7135

www.lhr.org.za

Contact: Ms C. Ballard

Clare@lhr.org.za

3. Article 4: Right to life and personal integrity

S49 of the Criminal Procedure Act

Given the inconsistencies between section 49 of the Criminal Procedure Act 51 of 1977, as amended in 2012, and the constitutional requirements set out in *S v Walters* (2002) 2 SACR 105 (CC), the authors to this submission find it curious that the State report indicates that the amended version is compliant with that judgment (paragraphs 32 and 33). At the very least, the amended section 49 drops the bar for permissible killing during the effecting of an arrest.¹

Section 49 was amended in 2000 (resulting in the version prior to the 2012 amendment), rendering it, in many ways, a mirror of the language of the *Walters* principles.² That version

¹ The *Walters* Court declared unconstitutional a previous version of section 49(2) of the Criminal Procedure Act on the basis that it permitted the use of deadly force “where it may not be necessary or reasonably proportionate.” Importantly, the impugned section of Criminal Procedure Act in the *Walters* judgment was not that different from the amended section 49(2). For, in essence, both provisions speak of the use of force when a certain category of crime has been committed, or was reasonably suspected of having been committed, and there was no other means of carrying out an arrest. The amended section 49(2) is slightly narrower in that the suspect must pose a threat of serious violence to the arrestor or any other person.

² The Constitutional Court declared these principles to be:

- a. the purpose of arrest is to bring before court for trial persons suspected of having committed
- b. offences;
- c. arrest is not the only means of achieving this purpose, nor always the best.
- d. arrest may never be used to punish a suspect;
- e. where arrest is called for, force may be used only where it is necessary in order to carry out the
- f. arrest;
- g. where force is necessary, only the least degree of force reasonably necessary to carry out the
- h. arrest may be used;
- i. in deciding what degree of force is both reasonable and necessary, all the circumstances must
- j. be taken into account, including the threat of violence the suspect poses to the arrestor or

listed three separate circumstances in which the use of deadly force would be justified. These were: a) that the force is immediately necessary to protect the arrestor, or any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm; b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or c) that the offence is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.³ By contrast, according to the 2012 amended section 49(2):

- Deadly force is no longer limited to circumstances in which a serious crime had occurred and the police responded “immediately” attempting to arrest a suspect. The unfortunate consequence of this is that deadly force could be justified during the course of a routine investigation;
- The threat of danger to the arrestor or any other person need only be *serious*, (as opposed to grievous bodily harm required by the previous text);
- There need not be a “substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed.” Put differently, there need not be a genuine risk to the lives of enforcement officials to justify deadly force, a “physical tussle between law enforcement officials and a suspect that occurs long after the crime” would suffice.
- There need not be an offence in progress that is of a forcible and serious nature and that involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

-
- k. others, and the nature and circumstances of the offence the suspect is suspected of having
 - l. committed; the force being proportional in all these circumstances;
 - m. shooting a suspect solely in order to carry out an arrest is permitted in very limited
 - n. circumstances only;
 - o. ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the
 - p. arrestor or others or is suspected on reasonable grounds of having committed a crime
 - q. involving the infliction or threatened infliction of serious bodily harm and there are no other
 - r. reasonable means of carrying out the arrest, whether at that time or later;
 - s. these limitations in no way detract from the rights of an arrestor attempting to carry out an
 - t. arrest to kill a suspect in self-defence or in defence of any other person.

³ Section 49(2)’s emphasis on the immanency of the threat, the protection from life-threatening violence and immediate need for force, correspond well to the type of proportionality analysis envisaged by the *Walters* court. Accordingly, section 49, as it currently reads prior to the 2012 amendment, set a constitutionally acceptable threshold for the limitation of a suspect’s rights to life, dignity, freedom and security and to be presumed innocent until convicted by a court of law.

Therefore, the 2012 amendment is a *regression* in the guarantees previously set out in legislation to ensure that the police uses deadly force only when absolutely necessary.

Marikana massacre

The information contained in the State report (paragraphs 35 to 37) on the processes that followed the establishment of the Marikana Commission of Inquiry⁴ is outdated. Furthermore, it suggests that the incident is reflective of the mining environment, whereas it should be seen as reflective, albeit in one of its worse forms, of general police behaviour in the country.

The Commission of Inquiry ended its work in 2014 and the President of the Republic made the report of the Commission public in June 2015.⁵ Whereas the process and report of the Commission of Inquiry are largely seen as having contributed to establishing the truth as to what happened the week of 12 August 2012, many were disappointed in its lack of concrete recommendations, in particular pertaining to individual responsibilities. The government has adopted some measures to implement the recommendations of the report, in particular in setting up an independent panel to review public order policing.⁶

However, no disciplinary steps and very few prosecutorial steps have been taken against individual police officials directly or indirectly implicated in the incidents that led to the killing of 43 people and the wounding at least 78. The Independent Police Investigative Directorate (IPID), the police watchdog, has investigated and recommended criminal prosecutions against the suspended National Commissioner of Police, Riah Phiyega, and the former police commissioner in North West, Zukiswa Mbombo, for providing misleading information to the Marikana Commission of Inquiry.⁷ Therefore, despite IPID being the dedicated body to investigate serious crime committed by police, its recommendations for

⁴ The full title of the Commission is the “Commission of Inquiry into the Tragic Incident at or near the Area Commonly Known as the Marikana Mine In Rustenburg, North West Province, South Africa”

⁵ *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province*, available at <http://www.thepresidency.gov.za/medialib/downloads/downloads/Full%20Report%20of%20the%20Marikana%20Commission%20of%20Inquiry.pdf> (accessed 15 March 2016).

⁶ L Ensor, “Panel to look at public order policing begins to take shape”, 25 January 2016, *Business Day*, available at <http://www.bdlive.co.za/national/2016/01/25/panel-to-look-at-public-order-policing-begins-to-take-shape> (accessed 15 March 2016).

⁷ E Ferreira, “Phiyega faces criminal charges over Marikana”, *IOL News*, 2 February 2016, available at <http://www.iol.co.za/news/crime-courts/phyiega-faces-criminal-charges-over-marikana-1978977> (accessed 15 March 2016).

prosecution in this instance do not relate to the massacre as such. Furthermore, the South African Police Service (SAPS) has not taken any disciplinary action against those who were on the crime scene on the day of the massacre, or who authorised the police operation. This is despite evidence having been provided to Parliament in January 2016 by policing expert David Bruce having pointed to *prima facie* evidence of criminal and disciplinary liability of officials implicated in the incidents, as well as systemic failures in policing which may have led to the massacre.⁸

Police killings and deaths in police custody

According to the 2014/15 annual report of IPID, in excess of 600 people die annually due to police action or in police custody.⁹ Table 1 below gives a further breakdown.

Table 1

	2013/14	2014/15
Deaths in police custody	234	244
Death due to police action	390	396
Total	624	640

While it is accepted that a death in police custody does not necessarily implicate the police, questions may still be raised about the quality of care available to detainees and measures taken to prevent injury and death in custody. Nonetheless, these numbers are alarming and imply that at least one person dies each day due to police action. Of equal concern is the fact that even when police officials are investigated and prosecuted for human rights violations, a small minority are convicted and their sentences frequently inappropriately lenient. Table 1 presents a sample of cases reported on in the 2014/15 IPID Annual Report indicating some extremely light sentences:

⁸ D Bruce, “Marikana: Implications for professionalising the SAPS”, available at pmg.org.za/files/160209David_Bruce_.ppt (accessed 15 March 2016); the minutes of the Parliamentary Portfolio Committee on Police to which the presentation was made can be found here: <https://pmg.org.za/committee-meeting/21987/> (accessed 15 March 2016).

⁹ IPID Annual Report 2014/15, p. 46.

Table 2

Case nr.	Charge	Sentence
2008100417 EC	Murder (as a result of police action)	7 years imprisonment
2011070082 MP	Murder (as a result of police action)	Fined R500 (approx. US\$ 30) or 6 months imprisonment
2009110498 FS	Murder (as a result of police action)	12 years imprisonment suspended for 6 years
2012070405 NW	Murder (as a result of police action)	Fined R 5000 (approx. US\$ 350) or 1 year imprisonment and community service suspended for 2 years
2013010090 KZN	Murder (as a result of police action)	8 years imprisonment wholly suspended for 5 years
2008120165EC	Murder (as a result of police action)	5 years imprisonment

Considering the above, we recommend that the Commission ask the State:

- **Does the State envisage amending section 49 of the Criminal Procedure Act to bring it in line with the Walters judgment?**
- **What measures are taken to ensure individual accountability of those who were involved in the Marikana events and of those who authorised the operation? What measures are taken to ensure that systemic failures in policing highlighted in the Marikana Commission of Inquiry report, beyond a review of public order policing?**
- **What measure are being taken by the State party to reduce the number of fatalities due to police action as well as the number of deaths in police custody?**
- **Are police officials subject to a regular firearms proficiency test?**

4. Article 5: Right to dignity, prohibition of torture, other ill-treatment and slavery

Torture Act

The State report by and large focuses on outlining the content of the Prevention and Combating of Torture of Persons Act (Torture Act) (paragraphs 46 and 47), failing to point out that the Torture Act contains some major omissions, including a lack of reference to the prevention and prohibition of ill-treatment or to the right to redress (limiting this to the possibility to seek financial compensation before the courts, an expensive and cumbersome process that is not available to the majority of South Africans). Furthermore, the State report claims that the maximum penalties for the crime of torture set out in the Torture Act are life imprisonment of a fine of R100 million. The fine is nowhere reflected in the Torture Act or in relevant case law and the Commission should therefore consider this information as inexact.

However, most importantly, the State report does not contain any statistical or other information highlighting that police and prison officials still commit acts of torture today, but which remain largely unpunished. This points to a culture of *de facto* impunity for acts of torture and other gross human rights violations committed by South Africa's law enforcement officials and their management structures. Furthermore, the political discourse, including from the most senior government officials, is focused on the language of a "war on crime" in which it is suggested that some constitutional violations by the police and prison officials is excusable if not necessary to effectively combat crime.

Statistics from IPID¹⁰ indicate that, while the institution receives a large number of complaints, the majority being for assault and torture, disciplinary and criminal convictions are rare. We include data on both assaults and torture as the institution has alleged that its staff does not always correctly categorises an incident as either torture or assault; furthermore, some victims have pointed to their inability to report an incident as torture (it

¹⁰ IPID's mandate is to investigate, following a complaint or the notification by the police or any other person of an alleged offence, the following: deaths in police custody; deaths as a result of police action; any complaint relating to the discharge of an official firearm by any police officer; rape by a police officer, whether the police officer is on or off duty; rape of any person while that person is in police custody; any complaint of torture or assault against a police officer in the execution of his or her duties; corruption matters (individual or systemic) within the police; any other matter referred to it following a decision by the Executive Director, Minister, a MEC, or the Secretary of Police (see article 28 of the Independent Police Investigative Directorate Act).

was categorised as assault instead). IPID investigates an allegation and then makes a recommendation either to SAPS to take disciplinary action, or to the National Prosecuting Authority (NPA) to institute criminal proceedings.

Table 3 below outlines the number of complaints received by IPID,¹¹ the number of recommendations it made to SAPS to take disciplinary action, the number of recommendations it made to the NPA to institute criminal proceedings and the outcome of these recommendations. SAPS imposed a disciplinary sanction in 20% of cases, but only 6% of criminal recommendations resulted in a criminal conviction. Importantly, the sanction imposed on all four officials disciplined for torture was a written warning.¹² Similarly and as highlighted in the previous section, the judiciary 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 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. Examples of shockingly light sentenced for murder by the police were outlined in the previous section. 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 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.¹³

Table 3 Number of complaints received and outcome of IPID's recommendations to SAPS to take disciplinary action and to the NPA to institute criminal prosecution¹⁴

	No. complaints received	Recomm discipl. action	Discipl. sanction	Discipl. acquit.	Recomm. criminal pros.	Crim. conv.	Crim. acquit.
--	-------------------------	-------------------------------	-------------------	------------------	-------------------------------	-------------	---------------

¹¹ IPID's workload was higher than the number of complaints it received, since its workload included cases from the previous financial year(s), some of which were finalised in 2014/15. Furthermore, not all complaints received in 2014/15 were finalised in that financial year. This explains in part the disparity between the number of recommendations for disciplinary action and the disciplinary convictions/acquittals. In 2014/15, it completed 5137 cases out of a workload of 10657.

¹² IPID Annual Report 2014/15, pp. 93-87.

¹³ Muntingh, L. and Dereymaeker, G. (2013) *Understanding impunity in the South African law enforcement agencies*, CSPRI Research Paper, Bellville: Community Law Centre, p. 45.

¹⁴ IPID Annual Report 2014/15 pp. 8, 66, 78 and 80.

Overall	5879	1004	200	64	983	58	37
Torture	145	0	4	2	4	0	0
Assault	3711	703	127	44	812	19	26

Statistics from the Judicial Inspectorate for Correctional Services (JICS) (the oversight body primarily mandated to inspect prisons) only reflect the number of complaints recorded by its lay visitors, the Independent Correctional Centre Visitors (ICCVs) and the number of investigations it conducted. However, there is no information available on the outcome of these complaints or investigations. Sporadically available information indicates that no prison official has been criminally sentenced for murder, torture or assault of a prisoner since 2009. Interestingly, the State report identifies JICS as being the dedicated body to ‘investigate’ deaths and allegations of torture and other ill-treatment in prison (paragraph 57). This mandate is not reflected in the Correctional Services Act,¹⁵ and JICS’ staff is not granted any investigative powers by law. They have however started conducting a few investigations annually, but without the adequate regulatory framework to conduct these, they can only draft recommendations to the Department of Correctional Services (DCS) at the outcome of their investigations. Investigations for crimes committed in prison remain the mandate of SAPS, with whom JICS does not have a formalised relationship (it does not have such a formalised relationship with the NPA, to whom it could send its recommendations following its investigations, either). Considering the fact that no official has been convicted in the past few years, SAPS, the NPA or both should be asked to explain whether and how they contribute to the culture of impunity enjoyed by prison officials in South Africa. It is also necessary to review the mandate and independence of JICS, an issue developed below.

Table 4 below indicates that the vast majority of allegations of assault by prison officials never reach JICS (let alone SAPS). This is because ICCVs are supposed to first resolve complaints internally, with the Head of Prison.¹⁶ Complaints of assault by officials cannot be resolved internally and should immediately be brought to the attention of SAPS and JICS, but the data below indicates that this does not take place. One possible explanation is that victims and/or ICCVs are intimidated into not taking the complaint outside the prison structures.

¹⁵ See Chapters IX and X of the Correctional Services Act.

¹⁶ Judicial Inspectorate for Correctional Services *Annual Report 2012/13*, 46.

Table 4 Number of complaints from prisoners recorded by ICCVs and by JICS alleging assault by an official; number of investigations conducted by JICS

	2012/13	2013/14	2014/15
Complaints of assault, official on prisoner, recorded by ICCVs	3370	4203	2341
Complaints of assault, official on prisoner, recorded by JICS	71	99	109
Investigations conducted by JICS, all categories of complaint	11	39	20

Right to redress

The right to redress cannot be limited to financial compensation and must be understood as encompassing the right to a remedy and reparations. The latter comprise restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁷ As noted above, the Torture Act does not contain a comprehensive definition of redress, and only refers to the general common law to access financial compensation through the courts, a cumbersome, lengthy and expensive process.

Satisfaction includes *effective complaints and investigation mechanisms* over allegations of torture and other ill-treatment. However, an analysis of the legal mandate and functioning of both IPID and JICS indicate that victims of torture cannot obtain satisfaction in South Africa.

While IPID largely has an excellent legal mandate and powers on paper, data outlined above pointed that its investigations do not result in individual police officials being held accountable. One can only speculate on the reasons for such low disciplinary steps and prosecutions being undertaken, but it could be explained by an unwillingness of SAPS or the NPA to act, or by the quality of IPID's investigations, or both.

Furthermore, the Independent Police Investigative Directorate Act (IPID Act) did not ensure full institutional independence from the Minister of Police as it gave the Minister the power

¹⁷ UN Committee against Torture, General Comment No. 3 of the Committee against Torture on the Implementation of article 14 by States parties, CAT/C/GC/3, para. 2.

to suspend the Head of IPID, which is what happened in March 2015.¹⁸ The suspended Head challenged this decision before the courts and 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.¹⁹ 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.

JICS is not sufficiently independent from DCS and its mandate is furthermore too limited.²⁰ In terms of the Correctional Services Act, JICS forms administratively part of DCS, the same department it is mandated to oversee. Moreover, its Chief Executive Officer (CEO) is identified by the Inspecting Judge but appointed by the DCS National Commissioner, who is also responsible for dealing with disciplinary matters pertaining to the CEO, such as misconduct and incapacity.²¹ JICS is not financially independent from DCS, since it receives its budget from DCS.²² JICS has over the years reported that its financial dependence on the DCS hampers its operational efficiency, 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.²³

Furthermore, JICS lacks the necessary powers and functions to provide an effective remedy for prisoners who are victims of human rights violations. Despite what the State report claims, JICS' mandate is not to investigate crime that takes place inside prison, but to inspect and report on the conditions of detention and treatment of prisoners, and does not have powers similar to that of SAPS and IPID. JICS merely makes recommendations and its decisions are not binding or enforceable. Concerns have been raised about the large number of complaints recorded by ICCVs, particularly those in relation to assaults on prisoners by officials, and the lack of transparency in respect of investigations purportedly undertaken by

¹⁸ The suspension of the Executive Head is alleged to be politically motivated.

¹⁹ *McBride v Minister of Police and Another* (06588/2015) [2015] ZAGPPHC 830 (4 December 2015)

²⁰ 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

²¹ Section 88A (2) and (4), Correctional Services Act 111 of 1998.

²² In terms of section 88 of the Correctional Services Act 111 of 1998 the Department is responsible for the expenses of the Judicial Inspectorate

²³ Judicial Inspectorate for Correctional Services Annual Reports: 2012/2013, 2013/2014, 2014/2015.

JICS, DCS and SAPS into unnatural deaths and assaults in custody.²⁴ Table 4 above outlined the relevant data on this point.

Finally, the position of Inspecting Judge has been vacant since September 2015, when Judge Skweyiya passed away unexpectedly. It is unclear why the position has not been filled and who exercises the powers of the Inspecting Judge in the interim. The Correctional Services Act does not provide for a “back up” solution in the absence of an Inspecting Judge, and allocates certain powers to the Inspecting Judge only, which cannot be delegated to subordinates. Some of these powers directly relate to the fundamental rights of prisoners, who therefore are unable to see their rights respected in the absence of an Inspecting Judge. Some of these are outlined below.

Monitoring conditions of detention

As highlighted above, ICCVs are mandated to regularly visit prisons, record complaints from prisoners, attempt to resolve them with management then eventually refer the unresolved ones to JICS. With about 450 000 complaints recorded annually by ICCVs but only about 1000 recorded by JICS (and not all of them sent by ICCVs), one should question whether this referral mechanism is effective, as the vast majority of complaints never reach JICS.

The State report claims that oversight measures over the use of force and specific detention measures in prison that were put in place following the 2008 amendment to the Correctional Services Act reinforced the prevention of torture and other ill-treatment in prisons (paragraphs 48 to 51). However, we submit that this information is largely misleading.

Indeed, although the disciplinary punishment of ‘solitary confinement’ was replaced by that of ‘segregation’ in 2008,²⁵ we submit that ‘segregation’ has actually become a disguised form of solitary confinement. Not only is the law unclear as to the purpose of segregation,²⁶ it can also now be extended beyond 30 days in the event of serious and repeated transgressions,

²⁴ 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

²⁵ Correctional Services Amendment Act (25 of 2008).

²⁶ Correctional Services Act, s 30(1) Segregation is 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. Therefore, segregation should not be used for punishment.

under the noble mantle of correcting offending behaviour.²⁷ Solitary confinement could not be extended beyond 30 days,²⁸ and the purpose of extended segregation today is forgotten in practice.

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 now refer the matter to the Inspecting Judge, who must make a decision thereon within 72 hours.²⁹ 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 are referred to the Inspecting Judge for review.³⁰ 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.

Therefore, following the 2008 amendment to the Correctional Services Act, detention in a single cell for punishment purposes continues but with a weaker external oversight regime than was the case with solitary confinement, where all instances were subject to mandatory review by the Inspecting Judge. 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.

Finally, the State report fails to mention the absence of regular visits and monitoring of conditions of detention in police cells in South Africa. There is no independent mechanism currently in place to visit police cells on a regular basis.³¹ Existing evidence points to an uneven situation. Cells at some stations are well-kept and in good condition, while others are "appalling".³² In the latter category, there are reports of filthy cells and blankets, neither of

²⁷ s 24(5)(d) read with 24(5)(b and c) and s30(9) of the Correctional Services Act.

²⁸ s 24(5)(d) prior to the amendment by Act 25 of 2008.

²⁹ s 30(7).

³⁰ Office of the Inspecting Judge (2010) p. 27. Office of the Inspecting Judge (2015) p. 93.

³¹ Ballard, C. (2014) *Expert Report on the Independent Oversight of Police Stations*, Khayelitsha Commission of Inquiry.

³² 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>

which had been cleaned for days, and dysfunctional ablution facilities. Some cells are overcrowded and there are reports of detainees being refused their HIV medication, to make phone calls, and not receiving food.³³ The Parliamentary 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.³⁴

In addition, the State report mentions the possibility to introduce audio and video recording of police interrogations. This certainly constitutes a positive measure, and we trust SAPS will follow international best practice when putting these measures in place. Since arbitrary and abusive arrests are a major problem in South African policing, we recommend that the police also pilot the introduction of body-mounted cameras as a measure to limit violent arrests and the subsequent claims for civil damages that often follow these arrests.³⁵ However, such an introduction should also follow international best practice.³⁶

Abusive, arbitrary and unnecessary arrests

Annual statistics from the police on the number of arrests they carry out indicate a 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

³³ 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.

³⁴ 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>

³⁵ G Dereymaeker, "Making sense of the numbers. Civil claims against the SAPS", 54 *SACQ* December 2015.

³⁶ J Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*, 2nd Ed., ACLU Research Report, March 2015, available at https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf (accessed 16 March 2015).

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.³⁷ The data therefore indicate that large numbers of adult males are annually arrested, many for crimes that do not pose a serious threat to public safety. Furthermore, recent Alternate reports submitted to the UN Human Rights Committee in preparation for South Africa's review in March 2016 highlighted that many vulnerable groups, or those to which a social stigma are attached, appear to be regularly subject to arbitrary or unlawful arrest and detention, which remains unpunished. This includes migrants, sex workers, and the poor.³⁸

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 5 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, charges were formally brought against the person in only 67% of these cases. 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 unnecessary as there was apparently insufficient evidence to formulate a charge and pursue a prosecution.

Table 5

³⁷ 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.

³⁸ CSPRI *et al*, *Thematic Report on Criminal Justice and Human Rights in South Africa*, Geneva, March 2016, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23064_E.pdf (accessed 16 March 2016); Gender Dynamix *et al*, *Recognition of Civil and Political Rights: A continued struggle for Transgender and Intersex Persons in South Africa*, Geneva, February 2016, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23065_E.pdf (accessed 16 March 2016); Lawyers for Human Rights *et al*, *Thematic Report on the Rights of Migrants, Asylum Seekers and Stateless Persons in South Africa*, Geneva, March 2016, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23067_E.pdf (accessed 16 March 2016); NGO Consortium, *Overview of cross cutting issues raised in five Alternate Reports to the Initial Report by South Africa under the International Covenant on Civil and Political Rights*, Geneva, March 2016, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23068_E.pdf (accessed 16 March 2016); Lawyers for Human Rights *et al*, *Thematic Report on Violence against Women and LGBTI Persons in South Africa*, Geneva, March 2016, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23069_E.pdf (accessed 16 March 2016).

	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

The fact that in nearly a third of arrests no charges were brought 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.

Considering the above, we recommend that the Commission ask the State:

- **What measures are put in place to train the NPA and the judiciary on the existence and content of the Torture Act?**
- **What steps does the State intend on taking to address the *de facto* impunity enjoyed by police and prison officials for gross human rights violations, despite the existence of the two specialised oversight bodies?**
- **What steps are taken to reinforce the independence, mandate and powers of the Judicial Inspectorate for Correctional Services?**
- **What steps are taken to appoint an Inspecting Judge and who is fulfilling its functions in the absence of an Inspecting Judge?**

- **Does the State intend on setting up a mechanism mandated to regularly visit police cells?**
- **What measures are taken to address high number of unnecessary and abusive arrests by police?**
- **Can the State party provide additional information on measures 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?**

5. Article 6: Right to liberty and security of the person

Conditions of detention

The State report refers to overcrowding as a major challenge to fulfil the rights of prisoners enshrined in Article 6 of the Charter. However, this statement must be qualified. Indeed, severe prison overcrowding is mostly experienced in the large awaiting trial prison near metropolitan centres, where occupation levels of 200% or more are not uncommon. The reasons for high levels of awaiting trial detention lie in the high volumes of avoidable arrests as well as a slow-moving criminal justice system. The result is that roughly half of the awaiting trial population have been in custody for three months or longer. Earlier research also found that the cases of half of all awaiting trial prisoners will either be withdrawn or struck from the roll due to lengthy delays.³⁹

Therefore, the State is mistaken in promoting measures targeting sentenced prisoners to reduce overcrowding (such as electronic monitoring, although the rollout of this measure remains positive for prison conditions overall). Measures to reduce overcrowding should be aimed at reducing the awaiting trial prison population. One effective measure would be to impose regular review of detention by a judge, which will achieve much in ensuring that the right to a speedy trial is adhered to.

Furthermore, DCS should not be seen as the sole or even primary government department responsible for reducing overcrowding or pre-trial detention. The State report rightfully states that all departments of the Crime and Justice Cluster should focus on reducing overcrowding

³⁹ Karth, V. and Redpath J. (2006) *Between a rock and a hard place*. Cape Town: Open Society Foundation.

and the length of awaiting trial detention. However, the Department of Justice (responsible for the NPA and the management of courts) and the Department of Correctional Services merged almost two years ago, without this merger showing any sign of improvement of the situation on the ground.

It is furthermore reason for concern that women are generally held in severely overcrowded facilities. The fact that they are a minority (roughly 2.3%) of the prison population does not mean that they are therefore entitled to less. The majority of female prisoners are held in overcrowded prisons, and at the end of February 2011 occupation levels for six of the eight designated female prisons were as follows: Pollsmoor 204%; Pretoria 196%; Johannesburg 183%; Worcester 173%; Thohoyandou 150%; and Durban 143%.⁴⁰ Overcrowding has similar effects here as it has in male prisons, but in this case, given the low and stable number of female prisoners, it is even more perplexing that the construction of female prisons to alleviate overcrowding has never featured in the plans of DCS.

The State report reports extensively on access to healthcare in prison. However, access to health care can be very difficult in prison and this is caused by a myriad of factors, including shortage of staff, medication and equipment and corruption. Furthermore, medical staff in prison are employees of the Department of Correctional Services and not the Department of Health, which may lead to conflicts of interest between prisoners and officials. For example, the decision to classify a death as natural or unnatural, and therefore the decision to subject the death to an independent inquest and a report it to JICS, is taken by the prison doctor, a DCS employee. If the death was caused by a prison warder or by negligence from the prison doctor, the prison doctor may be pressured into reporting the death as natural rather than unnatural. JICS has therefore called on all deaths in prison, whether the consequence of natural or unnatural causes, to be subjected to a post-mortem examination and an independent investigation, without success.⁴¹ Furthermore, all medical staff in prison should be in the employ of the Department of Health.

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

⁴⁰ Statistics supplied by the Judicial Inspectorate for Correctional Services.

⁴¹ JICS Annual Report 2007/08, 24; JICS Annual Report 2009/10, 27.

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. However, it is not reflected in DCS' Annual Reports and Performance Plans, giving the impression that addressing sexual violence in prison is not a priority for DCS.

Access to care and rehabilitation

The State report claims that care and rehabilitation is the focus of DCS but a closer examination of the available information shows that the claim is misleading. The planned and actual achievements of the DCS to provide access to education are modest, as reflected in Table 6.⁴² In short, some 85 000 prisoners were targeted (against a sentenced prison population of 110 412), 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 6 Access to education in the correctional environment, 2013/14.

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

⁴² Dept of Correctional Services *Annual Report 2013/14*, pp. 46-47.

Parole

The measures described in the State report in relation to parole (paragraphs 73 to 75) do not address the systemic failures on the part of the state to process parole applications within a reasonable time, particularly in respect of inmates serving sentences of life imprisonment. Approximately 50% of the complaints received by JICS relate to parole, indicating large-scale complications with the way in which parole applications are processed. This has not gone unnoticed by the courts. In the recent case of *Gwebu v Minister of Correctional Services*⁴³ Judge Ebersohn criticized the Parole Board for “doddering” and described the ‘last-minute’ imposition of new requirements as ‘an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it.’ It is the unfortunate reality that more and more applications for release on parole are being brought before the courts on the grounds that the parole board has simply failed to make a determination.

Prisoners serving sentences of life imprisonment are subject to a more protracted parole application process than offenders serving determinate sentences. There are massive holdups in this process. There are several hundred offenders throughout the country that are a) eligible for parole but have not been considered yet due to a series of systemic delays; or b) have been considered and denied parole, are due for reconsideration but it is clear that the prison will not have their reconstituted profile reports ready in time. The net effect is that these inmates (many with excellent disciplinary records) have waited many years past their eligibility date due to no fault of their own. Given the number of inmates currently serving sentences of life imprisonment (approximately 13 000) and the existence of the mandatory minimum sentencing regime, the problem is likely to get worse unless the state imposes drastic remedial measures.

Considering the above, we recommend that the Commission ask the State:

- **What steps are taken to effectively address overcrowding in awaiting trial prisons?**

⁴³ North Gauteng High Court, 26 June 2013, as yet unreported

- **What measures are planned to make education available to more sentenced prisoners?**
- **What measures are planned or in place to expedite parole applications?**
- **Has the State envisaged amending the Correctional Services Act to ensure that all deaths in prison, natural and unnatural, are subject to an independent post-mortem and inquest?**
- **Has the State envisaged shifting responsibility of health care in prison to Department of Health to improve quality and independence of care provided?**
- **Does the State envisage engaging with its national Parliament on the concluding observations issues by the ACHPR and by other Treaty Monitoring Bodies?**