



CSV  
R

The Centre for the Study of  
Violence and Reconciliation

# Review

## of Existing Mechanisms

for the Prevention and Investigation  
of Torture and Cruel, Inhuman and  
Degrading Treatment or Punishment  
in South Africa

by **Olivia Streater**

Centre for the Study of Violence and Reconciliation



# Review

of Existing Mechanisms for the  
Prevention and Investigation of Torture  
and Cruel, Inhuman and Degrading Treatment  
or Punishment in South Africa

by **Olivia Streater**

Centre for the Study of Violence and Reconciliation  
2008



**CSV**  
The Centre for the Study of  
Violence and Reconciliation



## Acknowledgements

The CSVR would like to thank Olivia Streater for conducting the initial research for the project and for writing the draft report. Thanks also go to Professor Julia Sloth-Nielsen and Lukas Muntingh for updating the section on detention in respect of children. We would also like to thank those who participated at the workshop co-hosted by the South African Human Rights Commission and CSVR in February 2007 and who commented on the draft report. Thanks also go to all those who participated in the study and gave freely of their time and experience. Frances Williams provided editorial assistance, and Amanda Dissel and Carnita Ernest provided the overall project management and editorial oversight.

This document was prepared with financial assistance from the Foundation for Human Rights, an organisation funded by the European Union under the European Programme for Reconstruction and Development, and the Rehabilitation and Research Centre for Torture Victims. The views expressed herein do not necessarily represent the official views of the FHR or RCT.

# Table of Contents

<b>INTRODUCTION AND EXECUTIVE SUMMARY – AN OPPORTUNITY TO ACT</b>	<b>1</b>
The need to place torture back on the political agenda	2
<b>PART 1: THE OPTIONAL PROTOCOL</b>	<b>5</b>
How does OPCAT work?	5
- <i>Do visiting mechanisms have to be invited?</i>	6
- <i>What places of detention can be visited?</i>	6
- <i>The national arm: what kind of institutions should be NPMs?</i>	6
OPCAT guidance on creating and designating NPMs	7
<b>PART 2: WHAT IS TORTURE?</b>	<b>11</b>
International law: prohibition and criminalisation of torture	11
The independent crime of torture under international law	11
- <i>Elements of the offence</i>	12
The prohibition on ill-treatment	13
- <i>Conditions of detention may amount to torture or ill-treatment</i>	13
How important is the distinction between torture and ill-treatment for the work to be undertaken by NPMs?	14
Current legal framework on torture and ill-treatment in South Africa	14
- <i>Ratification of international treaties on torture &amp; status of torture under national law</i>	14
- <i>Torture and ill-treatment are prohibited acts</i>	15
- <i>Torture and ill-treatment are non-derogable</i>	15
- <i>Torture is not a criminal offence</i>	15
- <i>Remedies available for torture (CAT, Article 14(1))</i>	16
- <i>Torture not subject to principle of universal jurisdiction</i>	16
- <i>Non-refoulement</i>	16
- <i>Other administrative measures to prevent torture</i>	16
<b>PART 3: DOMESTIC VISITING MECHANISMS</b>	<b>17</b>
Detention in prisons: the Judicial Inspectorate of Prisons	17
- <i>Background to establishment</i>	17
- <i>Factors indicating suitability for designation</i>	18
- <i>Factors requiring further consideration before designation</i>	19
South African Human Rights Commission	22
- <i>Mandate</i>	22
- <i>Factors indicating suitability for designation</i>	23
- <i>Issues requiring further consideration before designation</i>	24
Detention in police custody	26
- <i>Establishment of oversight mechanisms to monitor police</i>	26
Independent Complaints Directorate	27
- <i>Mandate</i>	27
- <i>Factors indicating suitability for designation</i>	27
- <i>Issues requiring further consideration before designation</i>	28
Secretariats of Safety and Security	33
- <i>Establishment and role of Secretariats</i>	33
- <i>Factors to consider regarding designation</i>	33
Detention under the Mental Health Care Act 2002	35
- <i>The role of Mental Health Review Boards</i>	35
- <i>Factors in favour of designation of Mental Health Review Boards</i>	35
- <i>Factors requiring further consideration before designation of MHRBs</i>	36
Detention in Children's institutions	38
- <i>Routes to detention</i>	39
- <i>Oversight mechanisms</i>	41
<b>PART 4: GAPS IN OVERSIGHT PROVISION</b>	<b>45</b>
Gaps in oversight: immigrants and refugees	45

<b>PART 5: MODELS AND RECOMMENDATIONS</b>	<b>49</b>
Conclusion and recommendations	49
National Preventive Mechanism Models	51
<b>APPENDICES</b>	<b>53</b>
Abbreviations	53
List of References	54
<b>OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT</b>	<b>60</b>

# INTRODUCTION AND EXECUTIVE SUMMARY

## An opportunity to act

On 20 September 2006, South Africa signed a radical new international treaty designed to prevent torture in detention: the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT entered into force on 22 June 2006 after adoption by an overwhelming majority of UN Member States in 2002.<sup>1</sup> South Africa played a key role in drafting, negotiating and promoting it.

The role of oversight bodies is illustrated by the example of when former President Nelson Mandela was in prison, the only organisation to visit him was the International Committee of the Red Cross (ICRC). He related the effect of the visit. Shortly afterwards, prisoners were given long trousers to wear instead of the “demeaning” shorts and messages were sent to their families (Stern, 1998, p.245).

This account is just one example of the positive impact that visits to detainees can have on conditions and treatment in detention. Secrecy allows torture to flourish. Visits can help prevent torture. Regular, independent, unannounced and unrestricted visits of inspection to all places of detention play a vital part of an effective strategy to prevent and punish torture and other ill-treatment.

OPCAT aims to prevent torture and improve conditions of detention and treatment of detainees through regular visits to places of detention by an international body (the Sub Committee for the Prevention of Torture (SPT)) and national bodies (known as National Preventive Mechanisms or “NPM”s) and by confidential and open dialogue with the state.

NPMs are independent, monitoring bodies with a mandate to visit all places of detention regularly to make recommendations and proposals to prevent torture. States can create new ones or “designate” existing organisations or institutions and must do so within one year of OPCAT ratification.

This report is designed to assist civil society and South African institutions in deciding what body or institutions could appropriately fulfil this task. It is intended as a starting point for consultation.

This report suggests that South Africa should start with considering the strengths and weaknesses of its own domestic models of oversight. Which institutions currently function well and why? This may be determined not just by an institution’s legal powers, organisational mandate and resources (although these are important factors) but also by the extra ingredients of political will and skilled leadership.

The report comprises 5 sections:

- Part 1** provides an overview of OPCAT and suggests criteria to use to assess the suitability of South African institutions for NPM designation.
- Part 2** attempts to bring some clarity to the thorny issue of what exactly “torture” is. It addresses the difference between “torture” and “cruel, inhuman or degrading punishment or treatment” (“ill-treatment”). It explains why the distinction between torture and ill-treatment is less important for torture prevention work than for other efforts to combat torture. Finally, it reviews South African law and policy on torture prevention and punishment.
- Part 3** analyses South African institutions whose functions include oversight of detention and/or the prevention of torture and ill-treatment: the Judicial Inspectorate of Prisons; the South African Human Rights Commission; the Independent Complaints Directorate; the Civilian Secretariats of Safety and Security and Mental Health Review Boards. Statutory inspection processes for children’s institutions are also considered.
- Part 4** surveys the forms of detention currently lacking oversight provision: asylum and immigration detention centres and military detention.
- Part 5** presents 4 possible models for NPMs and suggests recommendations.

---

1 GA Resolution A/RES/57/199 of 9 January 2003. For a full list of signatures and ratifications, see [http://www.ohchr.org/english/countries/ratification/9\\_b.htm](http://www.ohchr.org/english/countries/ratification/9_b.htm).

## Recommendations

- Ratify OPCAT
- Take comprehensive measures to prevent, investigate & punish torture
- Put torture back on the public agenda
- Ensure the effectiveness and functional independence of NPMs:
  1. Use OPCAT to strengthen existing oversight mechanisms
  2. Appoint the right people
  3. Ensure funding is adequate
  4. Develop minimum standards on conditions & treatment for inspections
  5. Make use of experts
  6. Ensure NPMs' relationship with the state has maximum impact
  7. Coordinate activities and involve civil society
  8. Audit all places of detention in South Africa

## The need to place torture back on the political agenda

Over ten years after the end of apartheid, South Africa has taken many steps to eradicate torture. In September 2005, at the invitation of the Government, the UN Working Group on Arbitrary Detention visited 15 South African detention facilities and interviewed more than 500 detainees in private (UN Report, 2005, p.18). South Africa has ratified important international conventions prohibiting torture and protecting human rights, including the UN Convention against Torture. It has recognised the competence of the UN Committee against Torture (established under Article 17(1) of the CAT) and, in November 2006, it presented its delayed first report to the Committee.

During apartheid, torture and arbitrary deprivation of liberty were widespread and institutionalised. Today, the right to freedom from torture and the rights of arrested and detained persons are now well established in the constitution (UN Report, 2005, p.16). In addition, South Africa has established different institutions and accountability mechanisms to secure respect for human rights, and judges, lawyers and others visit prisons and other places of detention regularly.

But torture risks falling off the political agenda. Reports of torture in detention persist year after year. Accountability mechanisms are under-resourced and fulfil their mandates with varying levels of efficiency. The investigative regime remains weak. South Africa has not enacted the draft Combating of Torture Bill introduced in 2005.<sup>2</sup> Despite some successful prosecutions, attempted prosecutions of many alleged serious human rights violators have failed. And, arguably, the current public climate is not conducive to acknowledging the continued existence of torture and the political will to eradicate it is lacking.

The UN Convention against Torture recognises the need for a multi-faceted approach to combat torture combining prevention, education, accountability and victim rehabilitation. The focus of OPCAT is torture prevention. OPCAT was designed to complement other tools to combat torture, and it does not replace the need for thorough investigations into torture allegations, prosecution of torturers and redress for victims of torture.

The first step to revitalise South Africa's torture eradication efforts is OPCAT ratification. South Africa indicated during its candidature for election to the newly formed UN Human Rights Council in May 2006 that it would ratify the treaty.<sup>3</sup> It has yet to do so. Although, as a signatory to OPCAT, South Africa is already obliged to refrain from acts which would defeat the object and purpose of the treaty, ratification is vital. Ratification sends a symbolic message that South Africa continues to aspire to human rights and democratic principles. Most importantly, if implemented efficiently at national level, it would help foster a human rights culture to prevent torture and ill-treatment.

---

<sup>2</sup> A draft Criminalisation of Torture Bill was initially introduced in 2003. It has now been renamed and reintroduced as the Combating of Torture Bill in 2005.

<sup>3</sup> South Africa stated in an Aide Mémoire that it was "in the process of ratifying" the Optional Protocol and that "[i]t should be underlined that South Africa by its very nature and for historical reasons is among the countries within the United Nations that takes the international human rights agenda very seriously.. South Africa also outlined its other voluntary pledges and commitments with respect to the promotion and protection of human rights. Note 142/06 dated 2 May 2006 related to the candidature of South Africa to the UN Human Rights Council, with aide mémoire from the Permanent Mission of the Republic of South Africa to the Office of the President of the General Assembly, copy on file with author. South Africa became a signatory to the Protocol in 2006.

## Methodology and limitations of this report

This report is based on a review of official documentation and legislation and the perspectives of staff from existing oversight mechanisms and experts in the field.

Criteria derived from OPCAT, the Paris Principles and research by international human rights organisations were used to assess the institutions considered.

Legislation, documentation and reports in relation to each institution were analysed. Interviews were conducted with representatives of the Independent Complaints Directorate (ICD), Judicial Inspectorate of Prisons, South African Human Rights Commission (SAHRC) and the Gauteng Provincial Secretariat of Safety and Security as well as with experts in the fields of torture, penal reform and policing, mental health, asylum and immigration, national security and child care. Independent Complaints Directorate (ICD) representatives were interviewed in Gauteng and Kwa-Zulu Natal. Provincial Secretariat of Safety and Security and provincial health department representatives were interviewed in Gauteng.

Institutions' annual reports and other reports, civil society organisations reports, parliamentary portfolio committee reports and UN agencies' reports were reviewed.

Due to time constraints, not all oversight mechanisms or detention centres were reviewed. This report does not consider the Gender Commission, the Public Protector, Community Policing Forums or Parliamentary Portfolio Committees.



# 1

## THE OPTIONAL PROTOCOL

### How does OPCAT work?

The UN Convention against Torture requires South Africa to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>4</sup> OPCAT will help it to do this (RCT, 2005, p.10). Independent inspectorate bodies can help prevent torture and ill-treatment in detention. OPCAT is designed to facilitate effective implementation of standards to prevent both.

Torture most commonly occurs in detention, often during the initial phase. It is facilitated if the detainee is unable to communicate with lawyers, family or others on the outside.

The European Committee for the Prevention of Torture model (the "CPT") particularly influenced OPCAT. The CPT is a multi-disciplinary expert body whose experts are drawn from various member states. It visits places of detention in Council of Europe states in order to observe the treatment of detainees and make recommendations, as well as to establish a continuing dialogue with the authorities on the implementation of the recommendations. Amnesty International also noted that:

*... regular visits can have a deterrent effect on detention personnel and authorities (Amnesty International, 2003(b), p.5).*

OPCAT is the first UN mechanism to establish complementary international and national inspection arms.

The National Preventive Mechanisms ("NPMs") will be permanently based in-country. South Africa will need to create NPMs within one year of ratifying OPCAT. Article 19 of OPCAT sets out their mandate to:

- Regularly examine people deprived of their liberty ("detainees");
- Make recommendations to the relevant authorities; and
- Submit proposals and observations on existing and proposed draft legislation.

At the international level, OPCAT provides for the establishment of the Sub-Committee on the Prevention of Torture (the "SPT"). The SPT advises and assists States Parties and NPMs. Article 11 of OPCAT sets out its mandate to:

- Visit all places where people are deprived of their liberty;
- Make recommendations to State Parties regarding the protection from torture and ill-treatment of persons deprived of their liberty;
- Advise and assist the State Parties in their establishment and strengthening of the national preventive mechanisms; and
- Maintain direct contact with NPMs, offering them training and technical advice.

Dr. Silvia Casale, newly-elected chair of the SPT and criminologist, prison-visiting expert and former member of the CPT, has stated that:

*...the SPT will need, first and foremost, to develop an agreed sense of how to approach the issue of independence and how to develop criteria for what constitutes an independent NPM (Casale, 2007, p.4).*

This work has now started – the body's first meeting was held in Geneva in February 2007 after the first ten members of the SPT were elected on 18 December 2006 to serve four-year terms.<sup>5</sup>

Members of the SPT must be "persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty."<sup>6</sup>

---

4 Article 2(1) of the UNCAT.

5 OPCAT, article 9.

6 OPCAT, article 5(2).

## Do visiting mechanisms have to be invited?

Neither NPMs nor the SPT require an invitation or consent from states to visit. States parties are obliged to accept visits by both to any place of detention, to examine their recommendations and to enter into dialogue about their implementation upon ratification.<sup>7</sup>

## What places of detention can be visited?

Article 4(1) of OPCAT requires States to allow international and national mechanisms to visit *“any place under its jurisdiction and control where persons are or may be deprived of their liberty either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (herein referred to as places of detention).”*

Article 4(2) defines “deprivation of liberty” as:

*...any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.*

In accordance with this definition, places of detention will include the following (non-exhaustive) list:

- police stations;
- cells of magistrate’s and other courts;
- military detention centres;<sup>8</sup>
- unofficial or secret places of detention;
- detention centres run by intelligence agencies;
- all prisons, including pre-trial and sentenced prisons or centres;
- places outside prisons where prisoners are employed;
- psychiatric institutions;
- hospitals or clinics where prisoners or arrested persons are treated;
- centres for children (such as places of safety or rehabilitation centres);
- immigration detention and removal centres including centres for detained asylum seekers, refugees or internally displaced persons;
- refugee camps;
- extra-territorial processing centres;
- transit areas at international ports;
- airports;
- other places of administrative detention where people are not free to leave at will (such as drug treatment centres, old age homes, circumcision schools); and
- places outside South Africa where agents hold detainees.

## The national arm: what kind of institutions should be NPMs?

States Parties can set up new bodies as NPMS or they can “designate” an existing national body or bodies. They are free to decide which institutions to select and how to do this.

NPMs do not have to be government bodies. Examples of potential institutions include human rights commissions, ombudsmen, public defenders, parliamentary commissions, lay visitor schemes,<sup>9</sup> NGOs, court-established procedures and inspectorate schemes.<sup>10</sup>

States might select NPMs on the basis of thematic division (several national bodies each with a specific mandate to inspect a particular place of detention); geographical division (designation of several decentralised bodies); means of co-operation (ensuring that there is one co-ordinating body) or a combination of these methods (APT, 2006, pp. 78 - 94).

---

7 OPCAT, articles 12(a)&(d), 20(c) and 22.

8 Detention by the military may encompass the detention of soldiers, officers and other staff subject to military law and regulations, as well as the detention of civilians including as a result of “extraordinary renditions” effected pursuant to the “War on Terror”. See further Svanidze, E. (2007). For CPT reports commenting on military detention, see: Report on the CPT 1999 visit to Hungary, CPT/Inf (2001) 2, para. 171 and Report on the CPT 2001 visit to Greece, CPT/Inf (2002) 31, para. 113.

9 In England and Wales for example members of the public visit police stations to check on the treatment of detainees and conditions of detention.

10 Both South Africa and England and Wales have established statutory schemes to enable inspectors to visit prisons to assess and report on conditions of detention and other issues.

Whatever format is chosen, Article 18 of OPCAT sets out minimum requirements for all NPMs to ensure their effectiveness. States Parties must guarantee their functional independence; ensure that members have the required capabilities and professional knowledge; make available the necessary resources for NPMs to function effectively; strive for gender, ethnic and minority balance; and consider the UN Principles relating to the status of national institutions for the promotion and protection of human rights (the "Paris Principles").<sup>11</sup>

## OPCAT guidance on creating and designating NPMs

### Functional independence (OPCAT, Article 18(1))

Article 18(1) of OPCAT requires States Parties to guarantee the "functional independence" of NPMs. This means that an NPM should be able to demonstrate its independence of operation in practice as well as on paper.

Although drafters chose not to define "functional independence" under article 18(1), the protocol provides essential guidance as to what this encompasses in practice including:

- Legal establishment;
- Funding;
- Mandate;
- Powers to visit and gather information;
- Staffing;
- Protection of detainees and others;
- Making recommendations; and
- Interaction with the state.

Human rights experts interpret functional independence as meaning both that: (a) the opportunities for political interference as regards an institution's (i) legal basis for existence; (ii) administration and procedures; and (iii) funding should be limited; and (b) that an institution should be credible and effective in practice.

It is critical that an NPM can demonstrate effectiveness. Perceptions are important since an institution must engender trust and co-operation in order to be effective. It should have, and use to its full advantage, powers to visit detainees and detention centres, gather information, communicate with the state institutions and the public and protect the identity and safety of detainees.

The state should have limited power to amend an institution's powers, interfere in its operation or shut it down. Its founding mandate should be enshrined in law (ideally by means of entrenchment in a constitution or other methods limiting the ability of the political interference). An NPM should be able to draft its own rules of procedure without modification from the state authorities. The NPM's funding should not be cut as a punitive response to its work. Housing the NPM in a building away from the state is also helpful, as is ensuring separate administration.

Relevant issues to consider as regards independence of funding include:

- Who funds the NPM and where is the funding source specified.
- Is long-term funding provided?
- Does the institution have its own budget, separate to that of a ministry or government department. Is the budget voted on by the legislature (and thus accountable to voters) or allocated by the executive.
- Can the institution determine its own funding priorities and pay its own staff.
- Are accounts audited annually by independent auditors?

### Mandate (OPCAT, Article 4(1))

Article 4(1) of OPCAT requires visits to be undertaken "with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment".

The first step to considering an institution's suitability for NPM designation is therefore to consider what mandate it has to conduct visits to places of detention.

---

11 The Paris Principles are comprehensive guiding recommendations for national human rights instruments, endorsed by the UN General Assembly in 1993. (OHCHR, 2006). They are a useful guide to best practice in ensuring the independence of national human rights bodies (Amnesty International, 2003(b), p.10).

Relevant factors to consider might include:

- Legal basis establishing the institution (Constitution? Act of parliament? Presidential decree? Policy decision?)
- Main focus of visits?
- Institutional powers. (Can the institution summon witnesses and documents? Does it have quasi-judicial powers (for example to adjudicate complaints, bring litigation or to make orders for the release of a detained person or for payment of compensation)? Can it hand over its findings to prosecutorial authorities in order for criminal charges to be brought?)

### Places of detention visited (OPCAT, Article 4(1))

Article 4(1) requires states to allow visits by national preventive mechanisms to any place of detention under its "jurisdiction and control".

This includes both state and private-run facilities. Examples of the latter in South Africa include privately-run prisons and some childcare institutions or immigrant detention centres.

### Regular visits to detainees (OPCAT, Articles 1 and 19(a))

Article 1 states OPCAT's objective is to establish a system of "regular visits" to prevent torture and article 19(a) requires NPMs to have, at a minimum, the power to "regularly examine" the treatment of the persons deprived of their liberty in places of detention.

"Regularity" is not defined by OPCAT. In order to make an effective impact however, it is suggested that visits should be sufficient to allow for the monitoring of deterioration or improvement of treatment of detainees and conditions of detention. Legislation should confer on NPMs the right to determine visit frequency.

### Timing of visits and selection of detention centres (OPCAT, Article 20(e))

Article 20(e) of OPCAT requires states to grant NPMs the "liberty to choose the places they want to visit and the persons they want to interview".

Institutions should therefore be able to determine without hindrance which detention centres to visit, when to visit and who to interview. They should be able to undertake both planned and unannounced "spot" visits.

### Access to detainees and places of detention (OPCAT, Articles 20(c)&(d))

Article 20(c) of OPCAT requires States Parties to provide "access" to places of detention including "installations and facilities" and article 20(d) requires the opportunity for private interviews, without witnesses, with detainees or other persons who "may supply relevant information".

This means visits should not be restricted to cells but should cover all areas, such as accommodation blocks, holding areas, interrogation suites, isolation cells, punishment blocks, ablutions and sanitary areas, medical units, kitchens, exercise yards, courtyards, workshops, educational facilities and staff areas. (NPMs should ideally get the layout of detention centres before visiting). Visits should be undertaken without threat to the physical security of NPM delegates.

Those supplying relevant information may include:

- Family and friends of detainees;
- Detainees' lawyers;
- Former detainees;
- Staff; and
- Civil society organisations.

### Access to information about detention and detainees (OPCAT, Article 20(a) and (b))

Article 20 of OPCAT requires States Parties to provide NPMs with access to information on the:

- Number of people deprived of their liberty in places of detention;
- Number of places of detention;
- Location of places of detention;
- Treatment of detainees; and
- Conditions of detention.

NPMs will therefore have to be granted full access without hindrance to relevant documentation such as detainee files, custody or

other detention records, lists of detainees and maps or plans of detention centres. States Parties will have to co-operate and share information promptly upon request.

### **Independence of personnel (OPCAT, Article 18(1))**

Article 18(1) also requires States Parties to guarantee that NPMs have “independent” personnel. This is not defined.

However important factors, it is suggested, will include who employs personnel, how personnel are recruited and appointed and length of term. For example, the NPM should not employ government officials, such as prison, immigration or police officers and should be able to appoint all or some of its own staff and to consult widely in selecting staff. Is it required to consult Ministers during the appointment process. Do Ministers have the right of appointment or veto of appointments?

Equally important is the capacity of personnel for independent leadership and vision. Thus the leaders of an NPM should have sufficient political will and energy to address sensitive human rights issues. .

### **Experts (OPCAT, Article 18(2))**

Article 18(2) requires States Parties to ensure that NPM experts have the “required capabilities and professional knowledge” and to strive for “gender balance and the adequate representation of ethnic and minority groups in the country.”

In South Africa ensuring presence in all states and in both urban and rural areas will be particularly important as will ensuring that staff can communicate properly to detainees and staff in relevant languages.

The CPT appoints multi-disciplinary experts in their respective fields. Likewise, NPMs that employ a range of experts (e.g. previous detainees, advocates, forensic pathologists, doctors, psychiatrists, psychologists, human rights workers, academics or social workers) will be best equipped to consider all factors relevant in the prevention of torture and ill-treatment. They should have experience of, and receive training in international and national human rights standards as well as in investigative procedures.

### **Resources (OPCAT, Article 18(3))**

OPCAT requires States Parties to provide NPMs with “necessary resources” for their functioning.

### **Power to make recommendations and proposals and dialogue with state (OPCAT, Articles 19(b) and (c) and 22)**

Article 19 requires NPMs to be granted the power to make recommendations to the relevant authorities to prevent torture and other cruel, inhuman or degrading treatment or punishment and to improve conditions and treatment and to make proposals on existing or draft legislation.

In response, article 22 requires the State to examine recommendations and to enter into dialogue about possible implementation measures.

This will require a proactive, constructive and cooperative relationship. For example, institutions can inform the state promptly of the results of visits via oral and written feedback. Legislative proposals or recommendations should be actioned.

### **Safety, confidentiality and privilege (OPCAT, Article 21)**

OPCAT requires States Parties to establish a legal regime to guarantee the safety of those communicating with NPMs and to protect their identities and confidential data.

No sanctions (or other adverse consequences) should be implemented against persons or organisations cooperating with inspectorate bodies. Article 21(1) provides that “authorities or officials may not order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.”

Article 21(2) provides that confidential information collected by the national preventive mechanism must be privileged and that personal data must not be published without express consent.

### **Accessibility (OPCAT, Article 23)**

Article 23 requires States Parties to “publish and disseminate the annual reports of the national preventive mechanisms”.



## 2 WHAT IS TORTURE?

### International law: prohibition and criminalisation of torture

South Africa is bound by the prohibition of torture under both peremptory norms of international customary law and treaty law. Torture is a prohibited act and has been so for many years.<sup>12</sup>

The UN Convention against Torture is widely considered to be the primary source of the obligation on states to investigate, prosecute and punish acts of torture. However the prohibition against torture under international law can be traced back further than this (Amnesty International, 2001, p.25). It is a rule of international customary law, binding on all states, that every act of torture (whether committed in peace or in war) is prohibited. As a “peremptory norm” of customary international law (a rule of *jus cogens*),<sup>13</sup> the prohibition of torture carries special status under international law. States cannot contract out of the prohibition and the prohibition can not be overruled by treaty law, other rules of customary law, or by local custom (Amnesty International, 2001, p.28).

Under international law, every act of torture is also a crime.<sup>14</sup> Article 4 of the UN Convention against Torture requires states to ensure that all acts of torture, attempts to commit torture, and complicity or participation in torture, are offences under national criminal law punishable with appropriate penalties. South Africa is one of a number of states that has not criminalised torture or related offences in domestic law. This is problematic for several reasons (see below).

Torture is thus both a banned practice and a criminal act. But what is it exactly?

Under international law, torture can be an independent criminal act, a war crime, and a crime against humanity. There are certain definitional and jurisdictional differences between the crime against humanity of torture, the war crime of torture and the independent crime of torture.

Although there is no single definition of the independent crime of torture, the Convention against Torture, adopted by the UN General Assembly in 1984, is generally considered to provide an authoritative definition (Amnesty International, 2001, p.26).

### The independent crime of torture under international law

Article 1 of the Convention against Torture defines torture as follows:

1. *Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, whether such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent or incidental to lawful sanctions.*
2. *This article is without prejudice to any international instrument or national legislation which may or does contain provisions of wider application.*

---

12 See for example Article 16 of the Instructions for the Government of the Armies of the United States in the Field (Lieber Code) of 1863; the 1907 Regulations Respecting the Laws and Customs of War on Land; the Charter of the International Military Tribunal at Nuremberg of 1945; the Geneva Conventions (adopted in 1977); and the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture) adopted in 1975.

13 This view was expressed by the UN Special Rapporteur on Torture in 1986, supported by the UN Human Rights Committee in 1994 and reaffirmed by the International Criminal Tribunal for the former Yugoslavia in 1998 in the judgment in the case of *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, 10 December 1998, para. 153.

14 In 1998, an opinion of the Yugoslavia Tribunal affirmed that the independent act of torture is a crime, subject to universal jurisdiction, under both treaty law and international customary law. *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, 10 December 1998, para. 156. The Trial Chamber stated that “it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition on torture is that every State is entitled to investigate, prosecute, punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”

## Elements of the offence

The four main elements of the independent crime of torture under the Convention against Torture are thus:

- (1) The infliction of severe mental or physical pain or suffering;
- (2) The intentional or deliberate infliction of pain;
- (3) The pursuit of a specific purpose, such as gaining information, punishment, intimidation or other reasons based on discrimination; and
- (4) Is committed by or at the instigation, consent or acquiescence of a public official or person acting in official capacity.

The inclusion of "discrimination" means that severe physical or mental pain or suffering intentionally inflicted on a person because of, for example, their race, sexuality or gender, could constitute torture.<sup>15</sup> The test of severity is subjective and depends on the circumstances of the individual case (Pounder, 2005, p.301; APT 2002, p.25).

Two aspects of this definition are important to consider in the context of the work on preventing torture that South African NPMs will undertake.

### *Torture includes mental suffering*

Firstly, the UNCAT definition of the independent crime of torture includes the infliction of "severe mental pain or suffering" as well as "severe physical pain and suffering". This is frequently overlooked.<sup>16</sup> In practice, it is often difficult to draw a clear distinction between "mental" and "physical" torture. Torture often has both psychological and physical consequences (Allden, 2005, p.304).<sup>17</sup>

Mental suffering (which may or may not be the direct intention of the torturer) can be committed without the application of physical force. Examples of severe mental pain or suffering (which could have both physical and psychological consequences) could include: behavioural coercion (being forced to harm someone); violation of cultural taboos; being forced to witness torture, killing or other abuse; and the threat of future torture (Pounder, 2005; and Allden, 2005, pp.303-304).

### *Assistance and participation in torture*

Secondly, the definition covers assistance and participation in the independent crime of torture. Torture must be committed "by or with the consent or acquiescence of a public official or other person acting in an official capacity". The identity of the perpetrator is significant.

Those bearing criminal liability include not just direct perpetrators but also those who know about torture and fail to act, or who purposefully allow it to continue, or who consciously ignore information that should place them on notice of torture (CSPRI, 2006, para. 11). This is important as the failure to report torture or ill-treatment is often "an insurmountable obstacle to combating torture and a crucial contribution to continuing impunity" (Amnesty International, 2001, p.25).

The definition means that state officials can be criminally liable for failing to take positive measures to protect detainees from violence at the hands of other detainees. Criminal liability may exist even where the act of torture itself is carried out by a private individual, where it is committed with the consent or acquiescence of a public official (the "due diligence" principle).<sup>18</sup>

This is particularly significant in South Africa where research has documented the prevalence of inmate-upon-inmate rape in prison (Gear, 2005). In such a situation, correctional officials could be criminally liable for torture where, for example, they place two prisoners in a cell in the knowledge that one is likely to rape the other (for example gang members known to carry out rape) or where they fail to take measures to protect prisoners from rape having been put on notice of its occurrence.

---

15 The crime against humanity of torture, as defined in Article 7(2)(e) of the Rome Statute of the International Criminal Court, is also broader than the independent crime of torture, as defined in the UN Convention against Torture, in two significant respects. Firstly, torture does not have to be committed for one of the non-exhaustive list of purposes provided under the CAT definition. Secondly, with no reference to public officials or others acting in an official capacity in the definition, the crime against humanity of torture can be committed in peacetime by people who are not agents of the state or acting with the consent and acquiescence of state authorities (Amnesty International, 2001, p. 38).

16 The UN Special Rapporteur on Torture produced a (non-exhaustive) list of acts severe enough to amount to torture in 1986 (APT, 2002, p.25). As well as the acts commonly understood to constitute torture (beating, suffocation, burns, electric shocks, suspension, extraction of teeth or nails), the list specifies: sexual assault; threat of torture of family members; prolonged denial of food/water, hygiene [toilet or bathing], rest or sleep and medical assistance; isolation and sensory deprivation [for example by blindfolding, hooding or solitary confinement]; being kept in uncertainty as to time or space; total abandonment; administration of drugs in detention or psychiatric institutions; and simulated executions.

17 Physical torture can include blunt trauma (beating, whipping, kicking, punching), positional torture, crush injuries, stabbing, burning, electric shock and sexual assault (Allden p.303).

18 Note that the principle of "due diligence" has been applied in other contexts, such as the failure of the state to prevent sexual violence committed by private individuals. The state may be held liable for failing in its positive obligation to prevent private acts of violence (including sexual violence) that are sufficiently serious as to amount to torture. See Amnesty International (2004(b), p.74).

Individuals or groups to whom the government has outsourced roles can also be criminally liable as the definition encompasses those acting within a State Party's territory with its open or tacit consent. In South Africa this means that private prisons,<sup>19</sup> asylum and immigration centres (such as Lindela), children's institutions run by private companies, private security guards to whom policing functions have been directly outsourced by government and foreign soldiers within the State Party's territory could be liable.

## The prohibition on ill-treatment

The Convention against Torture requires States Parties to take measures to prevent not only torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1" (Article 16. (APT, 2002, p.57).

The Convention against Torture thus draws an intentional distinction between torture and "cruel, inhuman or degrading treatment or punishment" (henceforth "ill-treatment"). However ill-treatment is not defined (although like torture acts of ill-treatment must be committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity).

In practice, it may at times be difficult to make a clear distinction between acts or treatment amounting to torture and those amounting to ill-treatment (APT, 2002, p.25). Indeed, the European Convention on Human Rights links both concepts together, simply stating in Article 3 that "no-one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment" (without defining either term).

What is the difference between torture and ill-treatment? It has been suggested that Articles 16 and 1 mean that, unlike torture, ill-treatment does not have to be committed for a specific purpose and that it involves "significant" (rather than severe) mental or physical pain or suffering. (APT, 2002, p.58).

The European Court of Human Rights has developed a standard approach to differentiate the terms, with distinct but complex definitions for each term based primarily on a threshold of severity.<sup>20</sup> However, when assessing whether an act constitutes torture, European judicial bodies will consider all the circumstances since "a distinction between the three acts [cruel treatment or punishment, inhuman treatment or punishment, and degrading treatment or punishment] cannot simply be drawn by using a rather crude measuring stick of the level of pain and suffering caused" (APT, June 2002, p.39).

## Conditions of detention may amount to torture or ill-treatment

In the context of OPCAT, it is very important to note that cumulative conditions of detention can amount to ill-treatment and in some circumstances to torture (Pounder, 2005; and Allden, 2005, pp.303-304). Acts that may individually constitute ill-treatment rather than torture may collectively be construed to result in torture.

This is clear from case law and concluding observations of the UN Committee against Torture and the UN Human Rights Committee<sup>21</sup> as well as from European jurisprudence. The European Court and the European Commission on Human Rights have for many years found violations of Article 3 (prohibiting torture and inhuman or degrading treatment or punishment) to have arisen as a result of conditions of detention.<sup>22</sup> When assessing conditions of detention they have considered the cumulative effects of: overcrowding, inadequate sanitation, heating, light and sleeping arrangements, food, recreation and contact with the outside world (APT, 2002, p. 34).

---

19 In the prisons context, note that the Ministry of Correctional Services retains power to decide which categories of inmate will be sent to each prison – public and private. Private prisons operate under the ambit of the Correctional Services Act (111 of 1998).

20 To come within the scope of Article 3, an act of omission must first attain a "minimum level of severity.. (To assess this, the Court will consider factors including duration, physical and mental effects of treatment and sex, age and state of health of victim.. Once this "entry threshold" is satisfied, definitional characteristics that have emerged are as follows: **Torture** is an act or omission intentionally inflicted on a person **for a purpose**, which causes **severe and cruel** physical and mental suffering. Inhuman **Treatment or Punishment** is an act or omission **intentionally inflicted** which causes intense physical or mental suffering. **Degrading Treatment or Punishment** humiliates or debases a person, showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and causes **sufficiently severe** physical or mental suffering. See Morgan & Evans, 2001, pp. 59-67.

21 The act of torture can constitute a single isolated act or a number of such acts. See further. Wendland, L. (2002) p. 36 & 77, cited in CSPRI submission, para. 10.

22 Earlier cases include The Greek Case (1969) and Soering v UK, App.No. 14038/88, 7 July 1987 (see paras. 61, 68, 91, 104-106, 111). Violations of Article 3 arising from conditions of detention have been found in numerous cases in the past five years including: Nezhmerzhitsky v Ukraine (App.No. 54825/00) 5 April 2005 (conditions of detention and force-feeding); Karalevicius v Lithuania (App.No. 53254/99) 7 April 2005 (conditions of detention especially overcrowding); Iorgov v Bulgaria (App.No. 40653/98) 11 March 2004 and GB v Bulgaria (App.No. 42346/98) 11 March 2004 (conditions of detention for for prisoners sentenced to death); Ilascu and Others v Moldova and Russia (App.No. 48787/99) 8 July 2004 (ill-treatment and conditions of detention of first and third applicants amounting to torture); Mouisel v France (App.No 67263/91) 14 November 2002 (conditions of detention, including handcuffing, and refusal to release prisoner with terminal illness); Dougoz v Greece (App. No. 40907/98) 6 March 2001 (conditions of detention pending expulsion); Peers v Greece (App.No. 28524/95) 19 April 2001 (conditions of detention on remand); and Price v United Kingdom (App.No 33394/96) 10 July 2001 (conditions of detention for seriously handicapped).

## How important is the distinction between torture and ill-treatment for the work to be undertaken by NPMs?

### Distinction between torture and ill-treatment in preventive work

It should be remembered that both ill-treatment and torture are morally repugnant and that all forms of torture and ill-treatment are absolutely prohibited under international law.<sup>23</sup>

However with regard to the taking of **measures to prevent torture**, the distinction between torture and ill-treatment is arguably less important. This is because it is in general impossible to distinguish between measures aimed at the prevention of torture and those aimed at the prevention of ill-treatment (APT 2002 58). OPCAT's sole focus is prevention.

For the purposes of the UN Convention against Torture, the distinction is relevant in four important respects: criminalisation, universal jurisdiction, *non-refoulement* and non-derogability.

### Criminalisation

The Convention against Torture expressly requires States Parties to criminalise torture under national law but not ill-treatment. However, it should be noted that ill-treatment nevertheless constitutes a crime under international law (Amnesty International, 2001, p. 48)<sup>24</sup>

### Universal jurisdiction

Articles 5 and 7 of the Convention against Torture require States Parties to establish jurisdiction over acts of torture but not over acts of ill-treatment. This means that those suspected of committing acts of torture must be either prosecuted or extradited (APT, 2002, p. 28).<sup>25</sup>

### Non-refoulement

Article 3(1) of the UN Convention against Torture forbids States from sending or extraditing a person to another State where there are substantial grounds for believing that that person would be in danger of being subjected to torture (refoulement).<sup>26</sup> The provision does not apply to ill-treatment.

### Non-derogability

Article 2(2) states that torture is non-derogable (meaning that there is no justification for torture ever, not even in war or other public emergencies). However, with regard to public emergencies, it should be noted South Africa's own Constitution provides that both torture and ill-treatment are non-derogable. Other international instruments, such as the European Convention on Human Rights (Article 15), also provide that both torture and ill-treatment are also non-derogable.

## Current legal framework on torture and ill-treatment in South Africa

### Ratification of international treaties on torture & status of torture under national law

South Africa ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 10 December 1998. Enabling legislation is needed in order to invoke the treaty directly in national courts.

South Africa has ratified the Rome Statute to the International Criminal Court and enacted it into domestic law in 2002. This Act provides for the exercise of universal jurisdiction for the crimes of genocide, crimes against humanity and war crimes (Redress, 2006, p.25). This will only be useful in very particular circumstances, however.

South Africa has ratified a number of other international and regional treaties that ban torture and ill-treatment. These include the International Covenant on Civil and Political Rights (the "ICCPR") (Article 7); the UN Convention for the Elimination of All Forms of Racial Discrimination (Article 5); the UN Convention on the Rights of the Child (Article 37(a)); the African Charter (Article 5(b)); the Protocol of Rights for Women in Africa (Articles 3(4) and 4(1)); the African Children's Charter (Article 16(1)) and the Rome Statute to the International Criminal Court.<sup>27</sup>

---

23 See further, Amnesty International (2005). Torture and ill-treatment: the arguments, <http://web.amnesty.org/pages/stoptorture-arguments-eng>.

24 Amnesty International argues that ill-treatment constitutes an independent crime under international law. The Inter-American Convention to Prevent and Punish Torture states that states parties shall take effective measures to "prevent and punish other cruel, inhuman or degrading treatment or punishment within their jurisdiction" (Article 6). The 1975 UN Declaration against Torture states that well-founded allegations of other forms of cruel, inhuman or degrading treatment or punishment "shall be subject to criminal... or other appropriate proceedings.. See also the Geneva Convention, Article 3, and the Rome Statute, Article 7.

25 In South Africa, this means that torture prosecutions should be possible: for offences committed in any part of South African territory, including on board a ship or aircraft registered in South Africa; whenever the alleged offender is a South African national (irrespective of where the national is, for example if the offender is a member of the SANDF stationed abroad); and, if considered appropriate, when the victim is a South African national. See further Articles 5 and 7.

26 Article 3(1) of the UNCAT.

27 African (Banjul) Charter on Human and People's Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force October 21, 1986), acceded to by South Africa July 9, 1996, [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) (accessed July 10, 2006). See Article 18, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force April 24, 1970).

## Torture and ill-treatment are prohibited acts

Under the Constitution, the supreme law of South Africa binding on all legislative, judicial and executive bodies of the State at all levels of government, both torture and ill-treatment are unconstitutional. Section 12(1) of the Constitution (enshrined in the justiciable Bill of Rights) states that:

*Everyone has the right to freedom and security of the person, which includes the right... (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.*

Other related rights are also provided for in the Bill of Rights. All persons detained have 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" (s 35(2)(e)). Section 12(2) guarantees the right to bodily and psychological integrity, including the right to security of and control over the body. Section 10 provides for the right to human dignity, stating that, "Everyone has inherent dignity and the right to have their dignity respected and protected". Section 11 provides for the right to life. Section 28(1) (d) provides that children have the right to be protected from maltreatment, neglect, abuse or degradation.

The Constitution also provides that the courts must "have regard" in interpreting legislation to customary international law (which includes the jus cogens absolute prohibition on torture).<sup>28</sup> International law must be considered in the interpretation of the Bill of Rights and other national legislation (The Constitution of the Republic of South Africa, 1996, chapter 2, s 39(1)(b) and chapter 15, s 233.)

Acts deemed by the courts to amount to torture or to cruel, inhuman or degrading treatment have been prohibited. The case of *S v Makwanyane* 1995 (3) SA 391 (CC) (decided under the interim Constitution) held that the death penalty amounted to cruel, inhuman or degrading treatment. *S v Williams* 1995 (3) SA 632 (CC) held that corporal punishment constituted cruel, inhuman or degrading treatment (and resulted in the abolition of corporal punishment by parliament).

## Torture and ill-treatment are non-derogable

The Constitution also provides that the right not to be tortured or treated or punished in a cruel, inhuman or degrading way are non-derogable (s 37). The rights enshrined in the Bill of Rights may not be limited by law except to the extent that is reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors outlined in s 36.

## Torture is not a criminal offence

Torture and ill-treatment are not currently criminal offences in South Africa. This is a problem because:

- common law criminal offences do not include all the elements of the international crime of torture (for example, mental torture);
- common law criminal offences do not consider the official capacity of the perpetrator as a relevant or aggravating factor (although torture can be an aggravating circumstance in sentencing);<sup>29</sup>
- common law offences have a statute of limitations, setting a time limit within which to start a prosecution, implicitly prohibited by the UN Convention against Torture;
- torture is not subject to universal jurisdiction (see further below); and
- common law offences may fail to reflect the gravity of the crime of torture or to punish it adequately.

For now, torture must be prosecuted under other common law criminal offences such as assault, grievous bodily harm, indecent assault or rape. A draft Criminalisation of Torture Bill was prepared in 2003 and re-issued in 2005 as the Combating Torture Bill. Despite a process of public comment, these bills have not yet progressed through parliament. Torture is not an offence in The Defence Act, 1957 (Act 44 of 1957) or the Military Discipline Supplementary Measures Act, 1999 (16 of 1999).<sup>30</sup>

---

<sup>28</sup> Section 39 of the Constitution also strengthens the role of international law in the interpretive process, as it obliges courts to apply international law where it is applicable. By requiring a court to consider international law when interpreting the Bill of Rights, s 39(b) paves the way for South African courts to consult all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, including international conventions, whether general or in particular, establishing rules expressly recognised by States. Section 233 of the Constitution requires judges to strive to reconcile national law with international law standards without prejudice to the principle of the supremacy of the Constitution (Government of South Africa, 2005, p.26).

<sup>29</sup> *State v Madikane and Others* 1990 (1) SACR 377 (N) where police officers were convicted of culpable homicide and assault with the intent to do grievous bodily harm following the interrogation of suspects which led to the death of one of them. The application of electric shocks was held to constitute "a prolonged and deliberate torture that constituted a very serious threat on the deceased.. Torture was held to be "conduct which all civilised people find distasteful... and repulsive... I have come to the conclusion that this is indeed a case which calls for a severe sentence."

<sup>30</sup> These Acts, together with the Rules of Procedure to the Military Discipline Supplementary Measures Act 16 of 1999, deal with the jurisdiction and prosecution of military offences. Torture per se is not defined in these Acts.

## Remedies available for torture (CAT, Article 14(1))

The CAT requires an enforceable legal right to fair and adequate compensation for torture. There is no procedure for torture survivors to seek compensation for personal injury in criminal proceedings in South Africa although damages may be claimed in civil law (the remedy is the tort of delict). Section 38 of the Constitution also provides that “anyone listed in [Chapter 2 of the Bill of Rights] has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

## Torture not subject to principle of universal jurisdiction

South Africa has hitherto not complied with its legal obligation under Articles 5 and 8 of the Convention against Torture to ensure that torture offences are extraditable offences under national law subject to universal jurisdiction.<sup>31</sup>

## Non-refoulement

Removal to a country where there is a risk of a death sentence is unconstitutional (whether by deportation or extradition and regardless of consent) (*Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) at para. 43, para.61). The Refugees Act 1998 (Act 130 of 1998) gives effect to the UN Convention relating to the Status of Refugees.

## Other administrative measures to prevent torture

The SAPS has created a Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service (the “Prevention of Torture Policy”). The Prevention of Torture Policy prohibits torture, attempted torture, complicity in torture, or participation in torture.<sup>32</sup> It also sets out the measures to be taken to prevent torture and to deal with torture complaints and allegations. Standing Orders to implement the policy came into effect on 1 July 1999. (Contravention of a Standing Order constitutes serious disciplinary misconduct).

---

31 Under the Extradition Act 1962 (Act 67 of 1962) (as amended in 1999) a person cannot be extradited abroad from South Africa to face criminal charges for an act or omission that is not yet an offence under national law. An extraditable offence is one that, under the law of the Republic and a foreign state, is punishable with a sentence of imprisonment of at least six months (Article 8(1)). Article 8(2) provides that, where State Parties make extradition requests conditional on the existence of a treaty, and receives an extradition request from another State Party with which no such treaty exists, the CAT may provide the legal basis for extradition. Article 8(3) provides that States Parties which do not make extradition conditional on the existence of a treaty must recognize torture offences as extraditable offences between themselves subject to the law of the requested State.

32 The Policy states that “torture may include, but is not limited to any cruel, inhuman or degrading treatment or punishment... and may further include any act by which severe pain, suffering or humiliation, whether physical or mental is intentionally inflicted on a person for purposes of obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she has committed or is suspected of having committed, or intimidating him or her or a third person, when such pain, suffering or humiliation is inflicted by or at the instigation of or with the consent or acquiescence of a member [of the South African Police Service] or any other person acting under the authority or protection of the Service” (1(k)).

# 3 DOMESTIC VISITING MECHANISMS

## Detention in prisons: the Judicial Inspectorate of Prisons

### Background to establishment

The Judicial Inspectorate of Prisons (the "JIOP") was established by the Correctional Services Amendment Act 102 of 1997 (as amended by Correctional Services Act 111 of 1998).<sup>33</sup> Its purpose is to facilitate prison inspections to ensure humane treatment of prisoners.

The JIOP has broad statutory functions and powers to visit and inspect prisons, receive prisoner complaints and report on the treatment of prisoners in prisons and prison conditions (s 85(2)).<sup>34</sup> It has discretionary powers to investigate deaths in custody and review the imposition of terms of solitary confinement and orders for the use of mechanical restraints.

### Structure

The JIOP is controlled by the Inspecting Judge (who may be an active (seconded) or retired Supreme Court of Appeal or High Court judge) and who must inspect (or arrange inspection of) prisons. Judge Nathan Erasmus, the inspecting judge at the time of this study, commenced his term in December 2005, and he is the third person to occupy this position since its inception.

The JIOP effectively comprises two branches: the Office (prisons inspectorate comprising inspectors and other staff) and Independent Prison Visitors (or "IPVs") (individual complaints process).

Inspectors assist the Inspecting Judge to visit and report on prisons. There are two types of investigations: those conducted to obtain further information regarding a complaint; and those conducted when there is evidence of a trend or problem that requires further investigation (Jagwanth, 2004, p.24). All inspections are followed by a report containing findings and recommendations and sent to the Minister and Commissioner of Correctional Services, as well as relevant provincial commissioner and head of prison (ibid). The inspectorate has compiled individual profiles on each prison in the country in order to monitor trends and problems.

The Inspecting Judge can also appoint specialist assistants on a fixed term basis to assist with specific tasks, to whom are delegated the same powers, functions and duties as the Inspecting Judge.

Independent Prison Visitors (IPVs) are lay persons appointed to serve a particular prison or prisons by the Inspecting Judge after calling for public nominations and consulting with community organisations (s 92(1)). They are required to conduct regular visits to prisons in order to interview prisoners and record complaints from prisoners dissatisfied with internal complaint handling procedures. They forward urgent or confidential complaints on to the Inspecting Judge.<sup>35</sup> All those appointed by the Inspecting Judge are deemed to be independent contractors not "inspectors" (Interview, Director of JIOP, 19 February 2007).

### Restructuring

The bulk of this report was written before Inspecting Judge Erasmus initiated a widespread review of the work of the JIOP that had significant implications for the JIOP. Restructuring included the creation of visitor committees for each individual prison with full-time coordinators to produce and disseminate detailed quarterly updates on each prison. The reports will be forwarded to the inspecting judge. Experts are to be introduced as IPVs in certain prisons. Methodology and minimum standards are also being updated.

---

33 When the new Correctional Services Act 111 of 1998 was introduced, Chapter IX relating to the Judicial Inspectorate was one of the few sections which came into force on 19 February 1999. The remaining sections of the Act only came into effect in 2004. A new Correctional Services Amendment Act 25 of 2008, changes terminology of "prisons" to "correctional centres", "prisoners" to "inmates", and the "Judicial Inspectorate of Prisons" to the "Judicial Inspectorate of Correctional Centres". The "Independent Prison Visitors" are now also to be called "Independent Correctional Centre Visitors". However, since the new Act had not yet been brought into effect at the time of writing, the old terminology is used here.

34 An obligation to report on dishonest or corrupt practices in prisons was deleted from the Act by Correctional Services Amendment Act No. 32 of 2001, though this obligation still remains in terms of section 90(1) of the Act.

35 The Inspecting Judge may only receive and deal with complaints submitted by the National Council on Correctional Services, the Minister, a Visitors Committee, or in cases of emergency an individual prison visitor. He may also deal with any complaint on his own volition (s 90(2)).

## Factors indicating suitability for designation

### *Function of office*

The office of the Inspectorate is unique among the institutions considered in this report in that its core object and function relate very closely to those of NPMs.

Section 85(1) states that the JIOP "is an independent office under the control of the Inspecting Judge". Section 85(2) (as amended) defines the core purpose of the JIOP: "the object of the Judicial Inspectorate is to facilitate the inspection of prisons in order that the Inspecting Judge of Prisons may report on the treatment of prisoners in prisons and on conditions in prisons". The Correctional Services Act's Preamble recognises that one of the main purposes of the Act is to provide "for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services".

This suggests that, at least in structural terms, the office of the JIOP could be an appropriate body to undertake the specialised task of visiting prisons.

### *Frequency of visits*

Section 93(1)(a) requires "regular" IPV visits. The IPV Manual (which has no legal force) states that IPV's are to undertake a full site visit to the prison at least twice per month to include all the cells where prisoners are incarcerated.

The 2004/05 Annual Reports of the JIOP reported that during 2004, the 221 IPV's appointed visited prisons 9,948 times (interviewing a total of 573 941 prisoners) (Office of the Inspecting Judge, 2005, p.9). A 2004 study found that visits were conducted by IPV's between 1 and 4 times a month, with some visitors conducting visits several times a week (Gallinetti, 2004, p.22-23).

The JIOP believes that the frequency of IPV visits has a deterrent function in preventing torture and ill-treatment and largely encourages prisoner disclosure (Interview, Director of JIOP, 19 February 2007).

### *Access to all prisons (including private prisons) and to all parts of prisons*

The JIOP has statutory power to inspect all of South Africa's 240 prisons, including its 2 privately-operated prisons (situated in Bloemfontein and Makhado) established under s 103 of the Act, as well as its 20 farms and 13 youth facilities.

Section 90(1) provides that "[t]he Inspecting Judge inspects or arranges for the inspection of prisons in order to report on treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons." "Prison" is defined under the Act as follows:

*... any place established under this Act as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to detention in places under protective custody and all land, outbuildings and premises adjacent to any such place and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, protection, labour, treatment or otherwise, and all quarters of correctional officials used in connection with any such prison, and for the purposes of sections 115 and 117 [Aiding escapes and Escaping an Absconding] of this Act includes every place used as a police cell or lock-up.*

It is clear from s 90(1) that the Inspecting Judge and his inspectors, staff and assistants also have implied powers to visit any part of a prison, as required by OPCAT. IPV's have the statutory power to inspect all parts of those prisons though (subject to the limitation that such inspections must relate to the performance of their duties) under s 93(2).<sup>36</sup> Guidance for IPV's requires them to visit all parts of prisons each month (Interview, Director of JIOP, 19 February 2007). The JIOP reports that this does happen in practice.

### *Unannounced visits*

The Inspecting Judge has reportedly made unannounced visits to prisons, as required by OPCAT (Jagwanth, 2004, pp.13-14).

### *Involvement of civil society*

Community involvement is formally incorporated through the Independent Prison Visitors and Visitors' Committee schemes (the latter of which is due for expansion) (Interview, Inspecting Judge, 19 February 2007).<sup>37</sup> The IPV Manual states "the underlying purpose of appointing lay persons as IPV's is to facilitate and promote the community's interest and involvement in correctional matters" (JIOP, undated, p.13). The JIOP is planning to make greater use of IPV's and Special Assistants to involve experts in prison visits (Interview, Director of JIOP, 19 February 2007).

---

36 This provides that an IPV must be given access to any part of the prison and to any documentation or record in the related to the performance of his/her duties and s 93(3) requires Heads of Prisons to assist IPV's to perform their duties. Disputed requests for access are to be referred to the Inspecting Judge for a final decision, in terms of s 93(4).

37 The Inspecting Judge may establish a Visitors' Committee for a particular area consisting of the IPV's appointed to that area. The committee's functions are to consider unresolved complaints, promote community interests and involvement in correctional matters and submit minutes to the Inspecting Judge (s 94).

The JIOP has to date had an open relationship with, and JIOP staff regularly participate in conferences and workshops organised by, civil society.

The JIOP also receives inspection reports from attorneys that conduct prison visits annually on international human rights day (December 15th) in an initiative pioneered by the Law Society of South Africa.<sup>38</sup> Nevertheless a 2004 report recommended greater involvement of civil society in inspections through the increased use of special assistants (Jagwanth, 2004, p.55).

The Inspecting Judge also sits in an ex officio capacity on the National Council for Correctional Services that advises the Minister of Correctional Services on correctional policy.<sup>39</sup>

### *Resources*

Despite the lack of budgetary independence, the JIOP's total expenditure has increased year on year since 2002 (from R9,547,868 for the financial year 2003/2002 to R14.5 million for 2005/6). The JIOP also has its own separate office and administrative staff.

Current resources would not cover the costs of JIOP designation as an NPM particularly if the remit of the JIOP was broadened so as to encompass other places of detention.

However the JIOP has drawn up budget estimates for implementation (interview, Inspecting Judge, 19 February 2007). The JIOP has also planned to create separate funding allocations for full-time visitors committees that it plans to appoint for each prison headed by an independent chair (interview, Director of the JIOP, 19 February 2007). The resources issue is also currently being addressed courtesy of an ongoing parliamentary review of Chapter 9 institutions (interview, Director of the JIOP, 19 February 2007).

### *Perceptions of credibility and effectiveness*

The JIOP acknowledges that perceptions of independence are an important issue for effectiveness and believes that the body enshrines functional independence largely through the role of the Inspecting Judge (Interview, Director of JIOP, 19 February 2007).

Although wider dissemination of Annual Reports has been encouraged, the JIOP does send Annual Reports to all judges, magistrates and Heads of Prisons as well as posting them on the internet (interview, Director of JIOP, 19 May 2007). It is also planning to distribute quarterly updates on each prison to each judge.

### *Development of minimum standards*

Although a lack of minimum standards for use as a benchmark for inspections and investigations, based upon international human rights standards, has been identified as an issue, the JIOP reports that it is currently undertaking a review of existing standards and developing both these and methodology in the light of international human rights standards and with the assistance of outside bodies. Currently the IPVs submit a report on the prison developed from a checklist (interview, Director of JIOP, 19 February 2007).

### *Power to make inquiries and hold hearings*

For the purpose of an investigation, the Inspecting Judge may "make any enquiry and hold hearings". At hearings, the Judge is given the power of a chairperson of an inquiry under the Commissions Act 8 of 1947 (s 90(5)). However this power appears to have been sparsely used.

The Judge may also appoint persons with appropriate qualifications from outside the Public Service to assist in any specialised aspect of inspection or investigation (s 90(5) and (8)) – but must consult the Director-General of the Department of Public Service and Administration before doing so.

### *Presence and accessibility*

The JIOP's first Regional Office was opened on 1 October 2004 in Centurion, Pretoria, with 6 coordinators and 2 support staff (JIOP, 2005). It followed recommendations for more regional accessibility outside the Western Cape (Jagwanth, 2004, p.55, p.16). However it is unclear to what extent prisoners and their families and the public are aware of the existence and function of the JIOP.

## **Factors requiring further consideration before designation**

### *Regularity of visits*

Legislation is silent on the frequency of visits conducted by the inspections unit of the JIOP. Although IPV visits must be "regular", they are currently conducted in order to record prisoner complaints rather than to assess treatment or conditions.

---

38 De Rebus, November 2005, DR 11.

39 The National Council of Correctional Services consists of 2 judges, senior police, prosecutions and social development people, as well as members of the public appointed by the Minister(s 83).

### *Reporting obligations*

A report of each inspection must be submitted to the Minister of Correctional Services. The Annual Report must be submitted the President and the Minister of Correctional Services. The Minister must table annual reports in Parliament but is not required to table individual inspection reports (s 90(3), s 90(4) and s 90(4)(b)).

The JIOP claims that in practice some reports are submitted; 132 individual inspection reports were reportedly submitted to parliament during the first two months of 2007 (interview, Director of JIOP, 19 May 2007).

However the lack of any statutory requirement to publish or table promptly in parliament individual inspection reports is a crucial oversight that reduces the opportunities for civil society and the public to become informed about prison conditions. Wider dissemination of reports and recommendations has been encouraged (Jagwanth, 2004, p.55).

The CPT attributes much of its impact to publication of its reports. Although confidential, it has published its reports on most countries since a decision taken to that effect by the first countries to be inspected at the beginning of its work. Where countries are unwilling to have their reports published, the CPT has used the procedure of issuing public statements when their recommendations are not considered by member states (Stern, 1998, p.232).

### *Implementation of recommendations*

Although the current Inspecting Judge has stated that since he has come into office all his recommendations have been complied with, there is no legislative requirement for individual prison authorities, the DCS or the Minister of Safety and Security to respond to or implement the recommendations of the JIOP and reports do not appear to be routinely followed-up or monitored (Jagwanth, 2004, p.27).<sup>40</sup>

### *Sufficiency of powers*

#### *Power to review documents*

The legislation does not specify the Judge's general powers regarding the power to review (and if necessary remove) all documents, as required by OPCAT.<sup>41</sup>

#### *Power to interview persons in private*

The powers of the inspecting judge to interview prisoners, correctional officials, family members or others in private without witnesses are not explicitly provided for in the Act. Provision is made for IPV's to interview prisoners in private (s 93(1)(c)). However IPV interviews usually occur in the presence of prison officers although prisoners can request private consultations (Gallinetti, 2004, p.31; interview, Director of JIOP, 19 February 2007).

#### *Criminal offence for IPV's to remove documents from prison*

The legislation provides much more detail on the powers of IPV's. Legislation requires them to have access to any document or record (s 93(2)). However, IPV's are not generally allowed to take information out of prison (although it appears they may do so with permission from the Head of the Prison) (Gallinetti, 2004, p.41), in fact, it may be an offence to do so under s 119(1)(c) of the Act.<sup>42</sup>

### *Role of Inspecting Judge in review and imposition of discipline*

In 1963, the former ANC member (and current constitutional judge) Albie Sachs spent 168 days in solitary confinement in Cape Town (Sachs, 1990, pp.86-7). Upon reporting a complaint to the magistrate sent to hear complaints he was told that, "There is nothing I can do. ... My responsibility is merely to see that you are not being assaulted, that there are no Gestapo methods".

Unlike the prison visits of 1960's South Africa, an effective NPM may well want to comment on the punishment of solitary confinement – and other disciplinary offences - with a view to making recommendations on the prevention of torture.

---

40 The CPT requires interim responses from the state (including the prison authorities) on steps to be taken to implement recommendations.

41 However the Act does provide for the Judge to consider and review the record of disciplinary hearings where solitary confinement was imposed, or decisions regarding the imposition of mechanical restraints.

42 This provides that it is an offence for a person "without lawful authority [to] bring out of any prison, or convey from any prisoner any document or other article."

The Inspecting Judge has direct decision-making powers in respect of the imposition of solitary confinement and the use of mechanical restraints, which conflict both with his statutory duty to act independently and with the duty on the state under OPCAT to guarantee the functional independence of NPMs.<sup>43</sup>

Furthermore, the duty of the Inspecting Judge as an NPM to make recommendations to prevent torture and ill-treatment would conflict with his statutory duty to confirm punishment (such as solitary confinement) and this may be in breach of international human rights standards designed to prevent torture and ill-treatment that South Africa must adhere to.

Quite apart from the prohibition on cruel, inhuman and degrading punishment contained in the UN Convention against Torture, international human rights standards strictly regulate the use of confinement and mechanical restraints and both can amount to torture or ill-treatment in certain circumstances. Although statute prohibits the punitive use of restraints, instruments of restraint may be misused and the Judicial Inspector is in a key position to ensure compliance with these rules. Stern states, "it is in the punishments available that the prisons come nearest to crossing the borderline that separates legitimate prison treatment from torture" (Stern, 1998, p.213).

The UN Committee against Torture has recommended that, except in exceptional or severe circumstances, solitary confinement be abolished, particularly during pre-trial detention. Its use must be "strictly and specifically regulated by law and that judicial supervision be strengthened" (Committee against Torture, 1998 and 2002). Prolonged use of solitary confinement can result in severe mental distress and in mental illness including memory loss, hallucinations and psychosis.<sup>44</sup>

Rule 33 of the UN Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955, states that restraints other than chains or irons may only be used when strictly necessary and then only in tightly defined circumstances (as a precaution against escape during transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority, or on medical grounds in order to prevent a prisoner from injuring himself or others or from damaging property). The use of chains or irons as restraints is prohibited and other instruments of restraint, such as handcuffs, chains, irons and strait-jackets [not used], may never applied as a punishment.

#### *Lack of administrative and budgetary independence from the executive*

Although the office of the inspectorate is described as independent and the inspectorate has separate physical premises to those of the Department of Correctional Services, the Commissioner of Corrections retains considerable involvement in appointments and budgets. The Inspectorate is funded from the budget of the Department of Correctional Services (s 91).

The President appoints the Inspecting Judge and is not required to consult with either parliament or civil society. Although the Inspecting Judge appoints IPVs, inspectors and staff alone, he must decide on staff numbers ("staff complement") in consultation with the Commissioner and must consult the Director General of the Department of Public Service and Administration (and also, in the case of special Assistants, the Commissioner) before determining salary and conditions of both staff and inspectors (s 87(4) and s 89(1) and (4)). He must also consult with the Commissioner before appointing special assistants (s 87(1)).

Furthermore, the legislation contemplates the appointment of correctional officers as inspectors (albeit under the control and authority of the Inspecting Judge) and deems employees that are not correctional officers to be correctional officials "for administrative purposes" (s 89(3)). Currently 5 out of 47 inspectors are former correctional officers.

It has been suggested that the vesting of the functional independence of the JIOP in the role of the Inspecting Judge as a credible independent figure is inadequate and that greater financial and administrative separation is needed from the Department of Correctional Services (Jagwanth, 2004, p.36, p.55).

---

43 The Act states that solitary confinement can not be imposed without confirmation by the Inspecting Judge, who must review, and within three days, confirm, set aside or substitute the penalty after making his own consideration of the prisoner's health and considering reports of a nurse, psychologist or medical practitioner (s 25(1-2)). The Act does not stipulate a maximum period of use although the punishment must be discontinued if it poses a threat to a prisoner's mental or physical health in the opinion of a medical practitioner. The new Correctional Services Amendment Act 25 of 2008 abolishes the practice of solitary confinement. Instances of segregation may also be reported to the Judicial Inspectorate by prisoners for decision within 72 hours (s 30(7)).

The Inspecting Judge must also decide within 72 hours on the use of mechanical restraints other than handcuffs and leg irons upon receipt of an appeal from a prisoner (s 31(4-5)). He can uphold the use of restraints for up to seven days – far in excess of the requirement under international human rights standards that restraints be applied for only as long as is "strictly necessary". (Although restraints may not be imposed as punishment (but rather for the safety of a prisoner or any other person, the prevention of damage to any property, if reasonable suspicion exists that a prisoner may escape or if requested by a court) the Act allows them to be used for up to seven days or 30 days upon receipt of a report from a doctor of psychologist (s 31(3)(a-c)).

44 It is probably in accordance with this principle that s 25 providing for solitary confinement was repealed by Act 25 of 2008.

### *Inspection and reporting functions and use of experts*

The reports of the JIOP have been criticised as lacking detail, depth and critical analysis, with a heavy emphasis on statistics and overcrowding at the expense of detail on conditions in individual prisons.<sup>45</sup> The 2004/05 annual report for example contained no explanation for the large numbers of deaths in custody and did not explain the difference between classifications of “natural” and “unnatural” death presented. (The electronic reporting system was reportedly amended in September 2005 to allow for “short reports” on prison conditions (Jagwanth, 2004, pp.24-26; Office of the Inspecting Judge, 2006, p.9).

This may be attributed in part to an over-reliance on IPVs to gather information on prison conditions, who have varying levels of expertise and communication skills and who receive limited training.

Since its inception, the JIOP has reportedly made use of the power to appointment special assistants (e.g. with legal, medical or penological backgrounds as envisaged under s 87(1)) only twice, although the JIOP plans to address this (Jagwanth, 2004, p.9).

### *Ensuring safety of inmates and confidentiality of communications*

Legislation does not specify how inmates’ safety and confidentiality is to be preserved during inspection visits. The IPV system lacks confidentiality. Full disclosure is required to prison authorities although “confidential or urgent” complaints can be referred to the Inspecting Judge.<sup>46</sup>

The JIOP agrees that system can make it very difficult to deal with complaints confidentially but states that it has deviated from the process and that all allegations of assault are reported to the police. In a 2004 survey, some prisoners stated that it could be difficult to talk to IPVs because of the presence of warders and other prisoners (Gallinetti, 2004, p.28).

### *Minimum standards for inspections and training*

Setting standards for inspection is extremely important. The full promulgation of the Correctional Services Act 1998 on 31 July 2004 brought into force sections on admission, accommodation, nutrition, clothing and bedding, exercise, healthcare, contacts with community, exercise and treatment of mothers of young children. The JIOP welcomed this as providing clear guidelines with legal force to assess treatment of prisoners. Nonetheless, the Act (and its associating regulations) does not conform in entirety to international human rights standards on the treatment of detainees.

Continuing the process of reviewing the Act to ensure its conformity with international human rights standards would be an important step before designation.

Training should also be reviewed. IPVs undergo a 5-day induction training, have a training manual and must adhere to Minimum Standards of Service Delivery. However insufficiencies have been highlighted (Gallinetti, 2004, pp.61-62; and interview, Director of JIOP, 19 February 2007). More recently some IPVs have received training on torture, CAT and OPCAT.<sup>47</sup>

## South African Human Rights Commission

### Mandate

Inaugurated on 2 October 1995, the South African Human Rights Commission (“SAHRC”) was set up under Chapter Nine of the Constitution as an independent national institution to support constitutional democracy by assisting in post-apartheid transformation and delivery on fundamental rights.<sup>48</sup> Its governing principles and powers are provided for in the Constitution and its additional powers detailed in legislation (principally the Human Rights Commission Act of 1994 or the “SAHRC Act”). Section 184(1)(a) of the 1996 Constitution states that the SAHRC’s functions are to promote respect for human rights and a human rights culture, to promote the “protection, development and attainment” of human rights and to “monitor and assess the observance of human rights in the Republic.”

---

45 The 2002/03 Annual Report listed a total of 6,284 complaints received, of which 819 concerned deaths, 10,021 food, 17,764 health care, 593 hunger strikes, 302 mechanical restraints and 2,731 solitary confinement.

46 Although s 93(1) states that prisoners are to be interviewed in private, s 93(1)(d) states that IPVs must discuss complaints with the relevant Head of Prison or subordinate with a view to internal resolution. The IPV Rules Manual stresses the importance of consultations in private from other prisoners and staff but also is explicit in stating that the next step usually involves full disclosure to prison officials and recording in an official diary (the G365 Register).

47 CSVr and CSPRI provided short awareness sessions to members of the visitor’s committees on torture, UNCAT and OPCAT in December 2007.

48 See s 181(1)(b) (Establishment and Governing Principles) of Chapter 9 of the Constitution of the Republic of South Africa (State Institutions supporting Constitutional Democracy), Act 108 of 1996. The other “Chapter Nine” institutions are: the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

## Factors indicating suitability for designation

### *Constitutional mandate and independence*

As a Chapter Nine institution, the SAHRC is subject only to the Constitution and the law (s 181(2)). Its status is thus securely entrenched (modification of Chapter nine requires legislation passed by at least two thirds of the National Assembly). Provisions for appointment and removal of members (termed "commissioners") are provided for in the Constitution as a guarantee against political interference in the recruitment process.

Its independence is also enshrined both in the Constitution and in law. Section 181(2) of the 1996 Constitution states that Chapter 9 institutions are independent and must be impartial and exercise their powers and functions without "fear, favour or prejudice". The SAHRC Act complements this, requiring commissioners to serve impartially and independently (s 4(1)).

The Constitution also places a positive obligation on state organs to take action to ensure independence (and effectiveness) of Chapter Nine institutions through legislative and other measures (s 181(3) and SAHRC Act s 4(3)). The SAHRC Act makes it a criminal offence, punishable by up to 6 months' imprisonment, for a state organ (or their commissioners or employees) or others to "interfere with, hinder or obstruct" the work of the commission or its commissioners (s 4(2)).

Provisions also exist to ensure financial independence – a key aspect of functional independence – by preventing financial or other conflicts of interest from arising in the course of the Commission's work and requiring disclosure, should any such interest arise. (ss 4(4) & (5) of SAHRC Act).

### *Power to establish its own rules of procedure and direct operations*

The SAHRC can take steps to organise its own operations, including by establishing its own rules of procedure at investigations and meetings (subject only to the SAHRC Act) and by establishing and dissolving committees, composed of commissioners and others (s 12(5) of the SAHRC Act). The SAHRC has divided its Secretariat into: Legal Services; Research and Documentation; Education and Training; Media and Communications; Human Resources; and Finance and Administration. It can approach the President with regard to the exercise of its powers and duties or performance of functions (ss 5-6 of SAHRC Act).<sup>49</sup>

### *Wide powers to compel co-operation and disclosure*

Although the SAHRC's power to conduct visits to prevent torture is not enshrined in law, it has many other relevant powers.

It can undertake broad inquiries into allegations of breaches of fundamental rights, at its own initiative or upon receipt of a complaint. Where grounds are revealed, the SAHRC also has a legal obligation to assist complainants and others adversely affected to secure redress, including by arranging or providing funding for legal proceedings.<sup>50</sup>

The SAHRC has wide powers to ensure disclosure of relevant information during its investigations. It may require production of information that may be "reasonably necessary" in connection with such an investigation and subpoena persons to appear before it and to produce documents and articles that are relevant to an investigation.

It may also question competent and compellable witnesses under oath on any fact or matter (notwithstanding possible incrimination). Under section 10 of the SAHRC Act, Commissioners and staff also have power of entry and search of any premises in connection with investigations (on possession of a valid warrant or, in the case of commissioners and police officers, without a warrant upon consent of the property's controller or upon having reasonable grounds to believe that delay would defeat the object of search and entry and that the warrant would be issued). Those entering can use reasonable, necessary force. Commissioners can examine, copy, and remove documents or articles found.

The SAHRC Act also sets out certain procedural rules for hearings undertaken during the course of investigations (the SAHRC may determine procedure further according to the circumstances of each investigation, see s 9(6)). The law on privilege for witnesses in a criminal court applies to those questioned before the Commission (so witnesses can claim the right to silence). Persons appearing before the commission are entitled to legal representation. Persons under examination are entitled to review documents. Persons implicated in a matter under investigation have the right to be heard and to make submissions. Legal representatives may cross-examine other witnesses where it appears to the Commission that the person represented is being implicated. Incriminating answers or information are not admissible in criminal proceedings (except on charges of criminal perjury, s 9(3)(a)).

---

49 The Commission may, at any time, approach either the President or Parliament with regard to any matter relating to the exercising of its powers or the performance of its duties and functions.

50 Diverse investigations into violations of fundamental rights have been undertaken. Investigations have been undertaken into, among other issues, the Khomani San Community, farming communities, racism, integration and desegregation in schools, the SAPS and the Department of Justice and Constitutional Development, the death penalty, sexual offences against children and cultural initiations and practices.

In addition to undertaking investigations, the SAHRC can bring legal proceedings (in its own name or on behalf of an individual or group) and has done so, albeit less frequently (interview, Commissioner Wessels). It also has quasi-judicial powers to resolve disputes or rectify acts or omissions concerning fundamental rights by mediation, conciliation or negotiation (s 8 of the SAHRC Act).

In recent years, the SAHRC has developed particular expertise on educational institutions, ceding its previous active role on penal reform to the JIOP since the inception of the latter (Dissel, 2003, pp.37-39). The SAHRC has issued a number of decisions on fundamental rights although it has not made decisions on either the right to life or the rights of arrested, detained and accused persons.

### *Accountability, transparency and relationship with civil society*

The Constitution provides for a high degree of accountability to the people, via the National Assembly, to whom the SAHRC must report annually (s 181(5) of the 1996 Constitution).

Parliament and to some extent civil society are also involved in appointments. The commissioners of the SAHRC are to be appointed by the President on the recommendation of the National Assembly, which must recommend persons nominated by a proportional all-party assembly committee of the Assembly and approved by a majority vote. The Constitution makes discretionary provision for the involvement of civil society in the appointment process (although it is not clear to what extent this has happened in practice) (s 193(4-6)). SAHRC commissioners may be removed from office only where a majority of National Assembly make a finding of misconduct, incapacity or incompetence and adopt a resolution to that effect (s 194(1)).

The SAHRC is not dependent upon ministers to communicate its findings and appears to have a good relationship with civil society. It has the legal power to release to any person its findings, views or recommendations in respect of matters it investigates, as long as complainants are also provided with a copy (s 15(1) of the SAHRC Act). During open hearings on xenophobia in 2004, the SAHRC received a total of 34 oral and written submissions (SAHRC, 2004, p.15) and it frequently organises seminars, training and public awareness activities (including a round table conference on the OPCAT in 2006 and 2007).

Despite this, some commentators have suggested that it lacks coordination with other oversight organisations, notably the ICD and the JIOP (Lue-Dugmore, 2003). In 2007 the SAHRC established an ad hoc committee in terms of Section 5, to look into the prevention of torture. The committee is comprised of representatives from the SAHRC, ICD, JIOP, several non governmental organisations, and receives assistance from the international Association for the Prevention of Torture (APT).

### *Experts*

Section 193(2) of the Constitution requires consideration of the need for the SAHRC to broadly reflect the race and gender composition of South Africa during the appointment process. At present, four of the five commissioners are male. Commissioners currently reflect some variety in terms of professional knowledge and capabilities: currently comprising of academics, lawyers, theologians, and one psychologist. The SAHRC is required to have eleven commissioners however and has reported to parliament on the need to recruit more commissioners.<sup>51</sup>

### *Accessibility*

The SAHRC has established offices in most provinces to ensure its services are widely accessible (Western Cape, Eastern Cape, Limpopo, Kwazulu Natal, Free State, Mpumalanga and Northern Cape). It is not clear in practice whether the SAHRC is perceived to be accessible by those living in rural areas or with limited access due to reasons such as poverty, language or literacy. Since the ability of an NPM to receive input from detainees and their families and others is so critical, it is suggested that this is an area which needs to be reviewed in more depth before designation.

## **Issues requiring further consideration before designation**

### *Power to conduct visits*

Neither the Constitution nor legislation provides the SAHRC with the explicit power to regularly examine the treatment of persons deprived of their liberty. In broad terms at least, the Constitution does appear to provide the scope for this. The SAHRC's constitutional functions include human rights monitoring and the Constitution provides for the SAHRC to have the powers necessary to perform such functions, including (but not limited to) powers of investigation, research and securing of redress (s 181(2) and s 184(2) of the Constitution).

### *Capacity to conduct regular visits*

Currently, the SAHRC does not conduct regular visits to places of detention (Interview, Commissioner Wessels). There is at present no special unit within the SAHRC to monitor detention or conduct visits. The SAHRC conducts a huge range of activities including research, litigation and responding to access to information requests, walk-in complaints and inquiries. Legal officers carry more than 200 files each. The SAHRC does not believe that, given present resources, it can feasibly conduct regular visits as an "add-on" to its current activity programme and responsibilities (Interview, Commissioner Wessels).

---

<sup>51</sup> Interview with Commissioner Wessels, 18 September 2006.

Visits have been undertaken in the past to police stations, prisons and immigrant detention centres. For example, in 2000 the SAHRC visited police stations in Kimberley for a period of one year.<sup>52</sup> The SAHRC previously visited prisons regularly (reporting on conditions, inviting submissions from prisoners and staff and even developing a protocol for unannounced visits) but these visits appear to have ceased since the establishment of the JIOP (Dissel, 2003, p.36-7).

The SAHRC has not however conducted regular visits to psychiatric hospitals or children's institutions (although it has focused attention on schools and issued a decision in 2001 on the involuntary detention of an adult female in Sterkfontein Mental Hospital).<sup>53</sup> The SAHRC recently held oral hearings on the state of public health in South Africa.<sup>54</sup>

In accordance with s 7(1)(b) of the SAHRC Act (which requires the SAHRC to liaise with similar institutions, bodies or authorities with regard to, inter alia, complaint handling), the SAHRC has agreements with both the ICD and the JIOP to refer complaints of assault or other issues it receives concerning either the police or prisons to these bodies (CSPRI OPCAT, p.24). This may have negatively impacted upon its retention of institutional knowledge of issues relating to policing and prisons.

Previous experience suggests that the SAHRC has not always been able to live up to its stated commitments to visit detention. In 2003 it indicated that it intended to establish a permanent monitoring presence at Lindela in order to prevent unlawful detention and ensure that conditions of detention conform to minimum standards. NGOs however reported that visits were not undertaken regularly and that the SAHRC remained heavily dependent on civil society to glean information on conditions. The SAHRC itself acknowledged its "limited means" to make regular visits to Lindela although it did consider that it could visit often enough to make recommendations for structural improvements (2000, SAHRC, p.27).

The SAHRC's work on fundamental rights encompasses both investigation/accountability and prevention/education. It must develop information programmes on the SAHRC Act, Constitution and Commission; co-operate with other institutions and carry out studies on fundamental rights as directed by President, and may also litigate.

Furthermore, the SAHRC is responsible for access to information and discrimination issues. It has extensive responsibilities under the Promotion of Access to Information Act 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 to educate the public and civil servants on access to information and to receive equality plans from government departments (and request information from private institutions or persons) on equality.

### *Minimum standards*

The SAHRC does not appear to have developed minimum standards for detention based on international human rights standards.

### *Securing access to information*

The level of response from public agencies to requests or demands for co-operation by the SAHRC varies. The SAHRC has previously been denied access on occasions to Lindela detention centre by both the Department of Home Affairs and the private contractors managing the facility (SAHRC, 2000, p.57). The SAHRC also reported that the private contractors used their private status to avoid disclosing information requested including register lists (SAHRC, 2000, p.27). In an interview, the SAHRC stated that information requested from state organs was usually provided but that letters of demand have at times been required and the SAHRC has used its subpoena powers on at least three occasions (against the Head of the Defence Force, the Premier of the Northern Cape and the Director of Finance).<sup>55</sup>

Whether the failure of state organs to comply with their positive requirement to assist the SAHRC (or their delay in doing so) is due to a lack of respect for the SAHRC as an institution or reflects wider issues of governance and a lack of proper bureaucratic ethics is not clear. In either case, the issue would need to be addressed before designation of the SAHRC since unhindered access to places of detention and to information on detainees is critical.

### *Power to make recommendations*

The SAHRC lacks legal power to enforce its recommendations. The SAHRC has in the past made extensive recommendations concerning detention in prisons and immigration centres but has itself conceded that its own lack of follow-up has critically affected implementation of its recommendations arising from reports, investigations and complaints (Dissel, 2003, p.37-39; SAHRC, 2000, p.27).

---

52 Interview with Commissioner Leon Wessels, 18 September 2006.

53 See for example the report SAHRC (2001), Special Report: Findings in Relation to Sr Nthadi Kotsi, and the Matter of her Incarceration in Terms of the Mental Health Act. Johannesburg Office.

54 Hearings were held from 28 May to 1 June 2007  
[http://www.sahrc.org.za/sahrc/cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc/cms/publish/cat_index_26.shtml), accessed 1 June 2007.

55 Interview with Commissioner Leon Wessels, 18 September 2006.

### *Budgetary independence and security*

The government can influence the funding of both investigations and staff appointments and the source and nature of SAHRC funding was not specified in its inaugural instrument (the Constitution).

Neither the Constitution nor the SAHRC Act provide for long-term funding (although some security against financial interference is provided in the form of s 13(2) of the SAHRC Act, which provides that the remuneration of commissioners can not be reduced once they are in office). Remuneration of commissioners is determined by the President in consultation with the Cabinet and the Minister of Finance but the SAHRC can itself determine the salary and terms and conditions of its CEO and staff (s 13(1) and s 14(4) of SAHRC Act). The CEO is obliged to consult with the Public Service Commission and the Minister of Finance on staff appointments and must seek the concurrence of the Minister of Finance on investigation expenses (s 14(1) and s 16(1)).

### *Compliance with reporting obligations*

Section 184(3) of the Constitution requires the SAHRC to compel organs of state to provide annual information on measures adopted to realise particular rights enshrined in the Bill of Rights (housing, health care, food, water, social security, education and the environment). The SAHRC has further reporting annual obligations under the Promotion of Access to Information Act 2000 and must also report on the effects of unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

Commentators have noted that onerous number of issues to report on has negatively impacted on the level of detail and independent corroboration provided in s 184 annual reports (Dissel, 2003, p.37, p.40). At least in respect of penal issues, the SAHRC has only rarely appeared before the Portfolio Committee on Correctional Services (Ibid).

### *Compatibility of powers with Constitutional and international human rights standards*

Legislation does not protect detainee's safety or confidentiality. This is a significant omission.

Section 18 of the SAHRC Act creates several criminal offences (punishable by a maximum of 6 months' imprisonment). It is an offence to: refuse to take oath without just cause; give false evidence under oath (knowing it is false or not knowing or believing it is true); wilfully interrupt proceedings; refuse to answer questions under oath; defame the Commission or a member of Commission; do anything which would constitute contempt in an official court of law; do anything calculated to improperly influence the Commission; or act contrary to authority of entry or search warrants.

These provisions (particularly the criminalisation of defamation) raise issues in terms of compatibility with constitutional requirements of freedom of expression and the right to silence.

## **Detention in police custody**

### **Establishment of oversight mechanisms to monitor police**

Following the end of apartheid, the police were a major area of focus for transformation. Legal, administrative and judicial measures were put in place to bring this into effect. The repressive laws that facilitated torture and ill-treatment (such as the General Laws Amendment Act of 1963 permitting 90 day-detention without trial, and subsequently the Internal Security Act 1982 permitting indefinite detention without trial) were repealed and replaced. New police policies and standing orders sought to prevent torture and to regulate the use of force by police and the treatment of detainees from the moment of apprehension (see in particular the Policy on the Prevention of Torture and the Treatment of Persons in the Custody of the SAPS).<sup>56</sup> Finally, multiple mechanisms were set up to monitor the police (TRC cited in Government report, p.1 and 9). All of this is unsurprising, given that the police played such a major role in enforcing apartheid policy (Lue-Dugmore, 2003, p.1). As Lue-Dugmore states, such a policy:

*...pitted the police against the majority of South Africans. Policing characterised by brutal force in the repression of black people and opponents of apartheid was a critical feature of the organisational culture of the force. ... The culture of police force and institutional arrangements facilitated and encouraged the police to go beyond the legal framework and subsequently protected them from the consequences, thereby encouraging a culture of impunity. ... While the Apartheid Government did not release statistics on police brutality it is widely accepted that human rights violations were endemic... Between 1960 and 1990 there were an estimated 78,000 political detentions... (Lue-Dugmore, 2003, p.1)*

---

<sup>56</sup> See also Standing Orders (G) 341 (*Treatment of an arrested person until such person is handed over to the community service centre commander*); (G) 349 (*Medical treatment and hospitalization of a person in custody*); (G) 350 (*Use of restraining measures*); and (G) 361 (*Treatment of persons in the custody of the service from arrival at the police station*).

The range of mechanisms established specifically to oversee the police post-1994 include the:

- Independent Complaints Directorate;
- National and Provincial Secretariats of Safety and Security;
- Provincial and area police boards; and
- Community Police Forums (CPFs).<sup>57</sup>

This study focuses on two: the Independent Complaints Directorate and the National and Provincial Secretariats of Safety and Security.

The Parliamentary Portfolio Committee of Safety and Security and the South Africa Human Rights Commission also carry out policing oversight functions.

In addition, civil society continues to play an active role, with non-governmental organisations regularly reporting on both alleged police abuse and the effectiveness of police oversight. A project established in 2000 sought to establish a visiting programme to monitor torture and ill-treatment in police stations by lay persons in co-operation with the police (Kwa-Zulu Natal Campaign against Torture, 2002).

## Independent Complaints Directorate

### Mandate

The ICD's mandate extends to both the South African Police Service and the Municipal Police Services.<sup>58</sup> It was established by legislation (the South African Police Service (Act no 68 of 1995) (the 'SAPS Act')).

The ICD has both mandatory and discretionary duties. The ICD's mandate is set out in s 53(2) of the South African Police Service Act and s 18 of the Domestic Violence Act 1998. Section 53(2) states that the ICD:

- (a) *May mero motu [of its own accord] or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigation to the Commissioner concerned;*
- (b) *Shall mero motu or upon receipt of a complaint, investigate any death in police custody or as a result of police action. [s 53(8) compels the national or provincial commissioner to notify the directorate of all deaths in police custody or as a result of police action]; and*
- (c) *May investigate any matter referred to the Directorate by the Minister or member of the Executive Council.*

The Domestic Violence Act (Act No. 116 of 1998) subsequently widened the ICD's duties. Section 18 stipulates that the ICD must be informed of any failure by a member of the SAPS to comply with an obligation imposed by the Domestic Violence Act.<sup>59</sup> Such failure constitutes misconduct and the SAPS must institute disciplinary proceedings unless the ICD directs otherwise.

The ICD is required, upon receipt of a complaint, to investigate all cases of deaths in police custody and as a result of police action and, upon receipt of information relating to a failure by police to monitor the DVA, must decide whether disciplinary proceedings are to be initiated. It may in addition, upon receipt of a complaint, choose to investigate "misconduct" or other criminal offences allegedly committed by members of the SAPS and the MPS. It may also investigate allegations brought to its attention by the Minister for Safety and Security or a member of the Executive Council.

### Factors indicating suitability for designation

#### *Power to conduct regular visits to police stations*

A 2002 internal ICD review of the handling of torture-allegation cases stressed the importance of visits to police stations, cell inspections, inmate interviews and registry inspection (ICD, 2002).

The ICD in Gauteng currently conducts regular, unplanned visits to police stations to obtain information on conditions of detention such as access to medical care but it is not clear to what extent other regional offices are also undertaking such visits (interview, Head of ICD, Gauteng province, 2006). The purpose of such visits reflects part of OPCAT requirements.

---

57 According to Mistry and Klipin, the initial role of CPFs was to build better relations between the police and black communities, by bringing them into a structured forum. Thus they were arguably the most localised version of civilian oversight (Mistry and Klipin, 2004). The SAPS Act provides that provincial Commissioners should establish CPFs for each police station, broadly representative and chaired by a member of the local community, to meet regularly to discuss crime problems and other areas of concern. Section 18(1) underlines their role in building partnerships with police and improving transparency and accountability. CPFs are not generally viewed as functioning optimally, despite pockets of excellence. Most do not carry out police station visits (Duxita Mistry, interview, 2006).

58 See s 53 of the South African Police Service Amendment Act (83 of 1998), which amended the ICD mandate to include Municipal Police. Section 53 was extended to the Municipal Police by way of regulations: see section 64 of the SAPS Act, Regulation 9 and Annexure 5 of the Regulations for Municipal Police Services. According to the Institute of Security Studies however, it is "not clear the degree to which this is operational" (Mistry and Lue-Dugmore, 2006, p.16).

59 (or National Instructions referred to in subsection (3)).

In Gauteng, the ICD reported that it was hoping to visit all 128 police stations at least once every four months or alternatively to conduct visits together with the Provincial Secretariat of Safety and Security. The ICD stated that it could select the timing, frequency and location of visits and whom it wished to interview.

### *Powers granted to inspectors*

ICD inspectors are granted the same powers and immunities as police officers so have broad investigative powers (s 53(3)(b)).<sup>60</sup>

### *Receipt of complaints and initiation of investigations*

The ICD can initiate its own investigations without waiting for a formal complaint to be made. Complaints may be received from persons other than victims (e.g. witnesses or NGOs) and can be made in person or by telephone, letter or e-mail.

### *Legislative provisions on disclosure and confidentiality*

Legislation exists to protect complainants and prevent unauthorised disclosure of confidential information.

The Executive Director has the power to issue instructions (in consultation with the Minister of Safety and Security) regarding disclosure, recording and safe-guarding of information and evidence.<sup>61</sup> The Minister may also prescribe procedures for protecting the identity and integrity of complainants and witness protection.<sup>62</sup> It is a criminal offence punishable with up to two years' imprisonment for a member of directorate to wilfully disclose information that "he or she knows or could reasonably be expected to know would or may prejudicially affect the performance by the directorate or the Service of its functions".<sup>63</sup>

### *Legislative provisions on independence*

Extensive statutory provisions provide for ICD independence.

The SAPS Act provides for the formal separation of the ICD and the police (s 50(2)). Interference with the ICD or its staff by an organ of state or state employee is prohibited (SAPS Act, s 50(3)(a)). It is a criminal offence, punishable with up to two years' imprisonment, for any person to wilfully interfere with the ICD, its Executive Director or personnel, in the exercise and performance of powers and functions (SAPS Act, s 50(3)(b)). A positive obligation is imposed on the state to ensure the ICD's "independence, impartiality, dignity and effectiveness" by providing assistance as may be reasonably required (s 50(5)). The ICD also has a general power to compel police co-operation as necessary to achieve its objectives (SAPS Act, s 53(6)(d)) and a specific power to compel the Director of Public Prosecutions to provide necessary information (subject to a right of refusal on reasonable grounds) (SAPS Act, s 53(6)(f)).

### *Financial accountability*

The ICD is financially accountable; funded by monies appropriated from Parliament, it is required to account to Parliament for its expenditure (s 52(4) of SAPS Act). It administers its own budget (Mistry and Lue-Dugmore, 2006, p.12).

### *Training in international human rights standards*

Some training on relevant areas (human rights, law and criminal justice procedure) is provided to investigators (Interview with Head of ICD, Gauteng). However the ICD has highlighted this as an area for development (ICD, 2006(c), p. 17 and Mistry and Lue-Dugmore, 2006, p.25).

## **Issues requiring further consideration before designation**

### *Lack of constitutional entrenchment*

The ICD is not established under the current 1996 Constitution as a state institution supporting constitutional democracy (a "Chapter 9" institution) (although the SAPS Act makes reference to the interim 1993 Constitution<sup>64</sup>). Amending legislation is a process considerably easier to achieve than amending the Constitution.<sup>65</sup>

As such, its lack of constitutional entrenchment leaves it more vulnerable to possible abolition, or to modification or curtailment of its powers and, arguably, encroaches upon its independence (Mistry and Lue-Dugmore, 2006, p.11). This vulnerability was illustrated when Police Commissioner Jackie Selebi recently called for the ICD to be disbanded (Police Accountability Newsletter (19 May 2006).

---

60 Personnel granted powers by the Minister upon request by the Executive Director are to have immunities and privileges "as may be conferred by law on a member in order to ensure the independent and effective exercise and performance of their powers and duties." s 50(3)(b).

61 Section 53(7) SAPS Act.

62 Section 53(9), SAPS Act.

63 Section 53(5).

64 Section 222 of Interim Constitution of 1993 (Act No. 200 of 1993).

65 Alteration of the Bill of Rights or any other constitutional provision (except for s 74) requires a supporting vote of at least two thirds of the National Assembly and 6 provinces of the National Council of Provinces. See s 74(2) of the Constitution.

Section 206(6) of the 1996 Constitution refers to an “independent complaints body established by national legislation” to investigate police misconduct or offences but does not explicitly provide the ICD’s establishment or define the scope of its duties.<sup>66</sup> Within the ICD itself, there appears to be some support for its establishment as a Chapter 9 institution under the authority of either the President or the Minister of Justice (Interview with ICD, Gauteng).

### *No legislative requirement to conduct regular visits to police stations*

The ICD is not mandated by law to conduct regular visits to police stations. The ICD believes that such visits fall within its statutory mandate and but are a discretionary measure to proactively implement the ICD mandate (Interview, Head of ICD, Gauteng, ICD (2006)). The Portfolio Parliamentary Committee on Safety and Security has recommended review of this function.

### *Infrequent visits*

It is not clear to what extent all provinces currently undertake station visits and to what extent those visits conducted allow for ongoing monitoring of conditions. In Gauteng resources do not permit all police stations to be visited and resources are not currently available for monthly visits. A series of unannounced visits to police stations (targeting holding cells) occurred during the latter half of 2001, prompted by escape attempts (ICD, 2002).

### *Development of minimum human rights standards*

The ICD reported that the visits it conducted to police stations in 2001 sought to establish “whether minimum conditions in respect of incarceration of prisoners are applied” but provided no detail on these standards (ICD, 2002).

It is unclear whether in fact the ICD has developed minimum standards for use to assess centres for detention and, if so, whether they encompass internationally recognised norms (such as the UN Basic Minimum Standards for All Persons Deprived of their Liberty).

### *Wide scope of mandate*

Since 1997, 30,024 complaints have been received by the ICD. Its current backlog is 25,000 (ICD 2006(c) p.8).

The ICD has attributed its failure to meet targets in relation to complaint investigation to its wide mandate (ICD, 2006(c), p.3).<sup>67</sup> Parliament has suggested that the ICD’s mandate impedes the quality of investigations. Researchers have suggested the ICD should focus on deaths in custody, police brutality and domestic violence (Mistry and Lue-Dugmore, 2006, p.16).

The ICD has pledged to finalise all investigations into “deaths, acts of criminality and corruption” within 180 days (ICD, 2006(c), p.17).<sup>68</sup> It remains unclear whether it will be able to deliver on this.

The ICD’s difficulty in fulfilling its existing mandate raises serious questions as to how the ICD could realistically be expected to cope with designation as an NPM. Indeed, one expert was of the view that imposing station visits on the ICD without increasing capacity or reviewing mandate would set the organisation up for failure (Interview, Heads of ICD (KZN and Gauteng)). In Gauteng for example, there is at present only one monitor available to undertake visits to 124 stations. The monitor has other responsibilities including a large caseload.

### *Investigation of incidents of torture and ill-treatment*

At present the ICD has only a discretionary duty to investigate alleged criminal offences that could amount to torture (SAPS Act, s 53(2)(a)).<sup>69</sup> The police are not compelled to refer cases of misconduct or criminal action (which may include torture). Although the ICD has the power to initiate its own investigations, in practice it must therefore rely on cases of torture or ill-treatment being brought to its attention. Civil society organisations suggest that this has resulted in under-reporting of criminal offences and a distorted picture of police abuse.

---

66 Section 206(6) states that “on receipt of a complaint lodged by a provincial executive, an independent complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.”

67 A 2006 study found that each investigator in Gauteng has on average 160 to 170 dockets. The ICD opined that it needed 72 investigators to carry out its work effectively, whereas it had only 7 (Mistry and Lue-Dugmore, 2006, p.4, p.23). There is also some overlap with the mandate of the Provincial Secretariats (Interview, Head ICD (Gauteng); ICD, 2001).

68 According to the 2004/05 Annual Report, the ICD “finalised” 63% of investigations into deaths in custody, 41% of criminal cases and 44% of misconduct matters between April and September 2004. Its Strategic Plan 05-08 pledged a target to finalise 85% investigations [of cases received within that financial year] within 180 days of the financial year 2005/06 (ISS, 2006, p.27; Annual Report 2004-5).

69 Although some provincial ICD offices support a mandatory reporting requirement of allegations of criminal offences, misconduct and non-fatal police shootings (ICD interview, Gauteng).

The ICD appears to have no consistent method for distinguishing classifications of behaviour or applying the term "torture". The ICD has stated that its definition of torture is "similar" to that adopted by the South African Police Service.<sup>70</sup> The SAPS definition bears close resemblance to the definition of torture in the UN Convention against Torture.<sup>71</sup> Yet it has also stated that the failure to criminalise torture in domestic law limits torture to physical harm<sup>72</sup> (ICD, 2006(c)). In a report featuring 26 cases of actions identified as "torture", the ICD admitted that "in practice we sometimes find it difficult to distinguish between torture and other forms of assault and it is possible that some cases of torture may have been classified as assault" (ICD, 2002).

Consequently, ICD reports are confusing. Behaviour that could amount to torture is defined in terms of common law criminal offences alone in some reports.<sup>73</sup> In others, behaviour described as "torture" is listed alongside common law offences such as assault. Insufficient detail means that it is often hard to tell whether the conduct being described amounts to torture.<sup>74</sup> The ICD's most recent Annual Report provided no detail on "criminal" and "misconduct" classifications used to present statistics on complaints received. Furthermore, a statistical breakdown of causes of death in custody included the categories of "injuries sustained in custody" and "injuries sustained prior to detention", with no indication as to the nature of injuries or whether they were allegedly caused by police.

### *Relationship to executive*

The ICD is under the executive control of the Minister of Safety and Security.

The Minister must be consulted on key aspects of the ICD's work including appointment and terms and conditions of the directorate, issuance of instructions on dealing with complaints, information-handling and safeguarding and the making of findings (SAPS Act, s 53(3)(a) and s 53(7)).

The ICD's powers are subject to Ministerial approval since he or she, in consultation with the executive director, has discretion to decide whether to confer investigative powers on personnel (SAPS Act, s 53(3)(a) and Mistry and Lue-Dugmore, 2006, p.12).

The appointment process does not involve mandatory consultation with civil society. The Minister is required to consult with Parliament on the Executive Director's removal from office although nominations must be approved or rejected by the Parliamentary Portfolio Committee (SAPS Act, s 51(1-2)(4)). The ICD Executive Director resigned 2005 and since then the ICD has operated under the leadership of various acting executive directors. This has affected its capacity and leadership.

### *Lack of credibility*

Lack of credibility has been highlighted as a major issue. The UN Working Group recently stated that "people have little confidence in the effectiveness of the oversight on police and do not believe that police can be held accountable" (UN Working Group on Arbitrary Detention, 2005, p.20-21).

The ICD has acknowledged that credibility – or perceived credibility - has been an issue. A 2006 review noted that 70% of complainants interviewed "complained bitterly of the poor service they received from the ICD, including failure to inform complainants of progress, status or outcome of cases and lack of access, and that many thought investigations were biased in favour of the police" (ICD, 2006(b) p.12).

Although some believe that the ICD commands greater respect than Provincial Secretariats, many of those interviewed for this report thought that the ICD was not capable of conducting proactive investigations. In the view of one lawyer interviewed "passionate leadership could yield results, irrespective of resources and even if there were only one, two or three good people, an office and a phone.

### *Relationship with police*

Legislation provides for the formal separation of ICD and police.

However ICD reliance on police forensic expertise, inability to compel police co-operation with investigations and the employment of former police officers as investigators have been highlighted as issues encroaching on functional independence from the police.

---

70 Paper delivered at a workshop for the drafting of a plan of action to prevent torture and ill treatment in Africa, Cape Town, 12 February 2002. (<http://www.icd.gov.za/reports/2002/torturepaper.htm>)

71 Torture is defined as "Any act by which severe pain, suffering or humiliation, whether physical or mental, is intentionally inflicted on a person for purpose of obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating him or her or a third person, when such pain, suffering or humiliation is inflicted by or at the investigation of or with the consent or acquiescence of a member or any other person acting under authority or protection of the service."

72 However, in the same report, actions described as torture include instances of intimidation with animals as well as rape and other physical actions which can produce both physical and mental harm.

73 See for example the ICD Complainant review, p.11. Complaint categories included assault (13.36% of cases); "abuse of police powers" (0.92%); "attempted murder" (0.46%); "death in police custody" (0.46%) and "harassment" (3.23%). The categories were not defined further. Torture was not listed as a category for consideration. See also <http://www.icd.gov.za/about/brochure.htm>

74 For example, the Annual Report 2004/05 describes one allegation in the following terms: "members of the Landless People's Movement ... were allegedly arrested and tortured. ..." No further details on the allegations were provided.

The ICD employs high numbers of former police officers (around a third in Gauteng) and justifies the practice as engendering police co-operation and ICD efficiency. The ICD is currently reliant on the police Forensic Science Laboratory for its forensic expertise (Mistry and Lue-Dugmore, 2006, p.20).

Police officers are not required to inform the ICD of the outcome of their investigations. Delays in ICD personnel obtaining policing powers (granted only by the Minister under s 50(3) of the SAPS Act) contribute to lack of co-operation from the police in investigations. Without such powers, "investigators cannot go to crime scenes or perform other investigative functions and are effectively confined to the office" (Mistry and Lue-Dugmore, 2006, p.27; ICD 2002, p.3). Researchers recently recommended review of ICD supervision, citing an apparent unwillingness or inability on the part of the ICD to exercise its own powers to direct investigations and compel co-operation (Mistry and Lue-Dugmore, 2006, p.5, p.37).

Oversight models throughout the world vary, with some agencies conducting most or all investigations into police misconduct - some only supervising investigations conducted by the police, and others doing both.<sup>75</sup>

In South Africa, the ICD must investigate all deaths itself but it has discretion to refer investigations into misconduct or criminal offences to the relevant police Commissioner (SAPS Act, s 53(2)(a) & (b)). The ICD can monitor, set guidelines on and request and obtain information on such investigations and can also withdraw such referrals at any time (SAPS Act, s 53(6)(b)(c)). It can also simultaneously conduct its own investigations, even if the police investigation has closed (although it is required to consult with the investigation police officer in the case of a referred or pending investigation and with the Director of Public Prosecutions in the case of a matter submitted for decision by him or her) (SAPS Act, s 53(6)(e)). According to the ICD (Gauteng), complaints made directly to the police would normally be supervised rather than directed by the ICD, depending on the facts of the case (Interview, Head ICD (Gauteng)).

### *Inadequate access to experts*

Reliance on SAPS forensics and ballistics capacity severely inhibits and delays independent investigation (Mistry and Lue-Dugmore, 2006, p.19). As from the beginning of 2006, the ICD has no longer been able to rely on assistance from the Independent Medico-Legal Unit for independent medical examinations and post-mortems (due to funding cuts). The ICD is currently reliant on state pathologists provided by the Department of Health or on district surgeons unqualified to conduct autopsies (Interview, Head of ICD (Gauteng)).

Lack of diversity among staff, with an over-reliance on seconded police investigators and a bias towards legally-qualified persons, has also been highlighted as an issue (Mistry and Lue-Dugmore, 2006, p.25). Case analysts who record complaints are required to have a legal qualification and principal investigators must have a law or policing degree. The ICD has suggested that recruitment is affected by its relatively uncompetitive salaries (lower than those of both the police and the Scorpions<sup>76</sup>) (Interview, Head of ICD (Gauteng)). The most recent Annual Report indicated a vacancy rate of 19.5% among highly skilled supervisory staff (ICD, 2005, p.204-5).

### *Accessibility*

The ICD now has offices in each major city of South Africa's nine provinces.<sup>77</sup> However, lack of access for complainants from rural areas (combined with lack of community outreach) reportedly remains problematic, adversely impacting upon reporting and investigation quality and thus the reliability of indicators of police torture and ill-treatment. The lack of a toll-free reporting line compounds the problem (Interview, Head of ICD (Gauteng); ICD, 2006(b), p.13; Mistry & Lue-Dugmore, 2006, p.16, Lue-Dugmore, 2003). The Minister of Safety and Security has declared this unacceptable and has pledged to increase ICD presence in all 43 policing areas with satellite offices (ICD, 2006(c)).

### *Control of budget and resources*

The ICD is subject to financial controls that may affect its independence. The Executive Director is required to consult with the Minister of Safety and Security and obtain the concurrence of the Minister of Finance to obtain resources and logistical support to engage experts or others "to enable the directorate to achieve its objective" (SAPS Act, s 50(5)(h)). The ICD (Gauteng) considered that it would not be able to undertake systematic station visits without increased resources (Interview, Heads of ICD (KZN and Gauteng)).

---

75 For example, in the UK and Jamaica, the Independent Public Complaints Commission and Police Public Complaints Authority have the power both to supervise and to manage complaints. The IPCC was established on 1 April 2004 following disquiet around the independence of the disbanded Police Complaints Authority. It has a legal duty to oversee the whole of the police complaints system, created by the Police Reform Act 2002. The Act gives the IPCC a duty to raise public confidence. The IPCC can choose to manage or supervise the police investigation into a case and independently investigate the most serious cases. It retains control over investigations referred back to police and can approve investigating officers and control and direct investigations. Police have a statutory duty to comply with its findings on appeal including the enforcement of disciplinary action (IPCC 2006(d); ISS 2006, p.30, and Amnesty International 2001(a)).

76 (The Directorate of Special Operations (the Scorpions) is an investigative unit situated within the National Prosecutions Authority, employing the services of both investigators and prosecutors). However, the South African Police Service Amendment Bill, 30 of 2008 and the National Prosecuting Authority Amendment Bill, 23 of 2008 propose the disbandment of the Scorpions and the establishment of a new high-level investigation component within the Department of Safety and Security.

77 Pretoria (Head Office), Gauteng (Joburg), Western Cape (Cape Town), KwaZulu-Natal (Durban), Limpopo (Polokwane), Eastern Cape, Free State and Mpumalanga.

Although its budget has risen annually since the 1999/00 financial year,<sup>78</sup> the ICD has consistently stated that its resources are inadequate and have contributed to understaffing (with 4 investigating officers covering the whole of the Eastern Cape for example) and impacted upon morale and investigation quality (ICD, 2006(b), p.14; ICD, 2006(c), p.6; Mistry and Lue-Dugmore, 2006, p.21).

### *Making of recommendations and state's response*

The ICD can make recommendations to police commissioners on matters relating to investigations and to the Minister and MECs "on any matter investigated by the directorate or relating to the performance of the directorate's functions" (SAPS Act, s 53(6)(i)(j)). The wording is vague but does not exclude the making of recommendations on the treatment of detainees or the prevention of torture and ill-treatment.

The ICD has no power to enforce compliance with its recommendations. The police are under no obligation to report on steps taken to implement recommendations regarding ill-treatment and torture<sup>79</sup> and no disciplinary or criminal sanctions exist for non-compliance.<sup>80</sup>

The ICD stated that it did not have the resources to follow up all recommendations made (Interview, Head ICD (Gauteng); interview, Head ICD (Kwa-Zulu Natal); ICD, 2002). In practice, implementation of recommendations appears to rely heavily on the relationship between the ICD and the Provincial or Area Commissioner or Station Commander.

According to Mistry and Lue-Dugmore, the failure of the SAPS to comply with the recommendations of the ICD "renders the motivation for an independent investigation component redundant" (2006, p.37). It alleges that ICD recommendations for disciplinary action are "almost never" actioned (Mistry and Lue-Dugmore, 2006, p.29).

The Executive Director must consult with the Minister before issuing instructions on the making of recommendations (SAPS Act, s 53(7)).

### *Making of legislative proposals*

An NPM's post-visit recommendations may require legislative change (for example on the law pertaining to detention without charge) and so OPCAT requires an NPM to have the power to make legislative proposals on existing or draft legislation.

This is not specifically provided for in the SAPS Act, although arguably the ICD's power to make recommendations on "any matter investigated by the directorate" could encompass the making of legislative proposals.

At any rate, the Minister of Safety and Security has repeatedly characterised the ICD's mandate as excluding policy or law-making functions, suggesting that provincial secretariats are the appropriate bodies to undertake these functions.<sup>81</sup> Legislative or policy proposals have not been made in Annual Reports. Indeed, there appears to be a trend towards perceiving the ICD as a body whose role should be limited to the investigation of individual cases alone, despite acknowledgment that it is well placed to identify key trends<sup>82</sup> (Mistry and Lue-Dugmore, 2006, p.14; ICD, 2006(c), p.6).

### *Treatment of confidential information*

Protection from retaliation or threats of those interviewed will be key to ensuring the credibility of NPMs. It is not clear to what extent legislative provisions protecting complainants' safety and confidentiality are implemented in practice. The ICD in Gauteng stated complainants interviewed in custody did not always want to proceed with complaints once released and suggested that police intimidation of complainants may be a factor (Interview, ICD (Gauteng)).

### *Reporting obligations*

The ICD cannot publish or disseminate its annual reports independently of state. Annual reports must be submitted to the Minister for tabling in parliament by the Minister within 14 days,<sup>83</sup> but the Parliamentary Portfolio Committee on Safety and Security has expressed concern that its reports lack detail and accuracy (PMG, 2005). Other reports on activities may be compiled and submitted at the request of either the Minister or the Parliamentary Portfolio Committee.<sup>84</sup>

---

78 Budget allocations for financial years: 2004/05 - R42 114 000; 2003/04 - R37 043 000; 2002/03 - R31 902 000; 2001/02 - R26 715 000; 2000/01 - R25 512 000; 1999/00 - R24 089 000; 1998/99 - R27 760 000; 1997/98 - R15 491 000. See Mistry and Lue-Dugmore, 2006, p.23.

79 ICD Annual Reports state that the National Commissioner is however required to report to parliament every six months on steps taken as a result of ICD recommendations. Section 18 of Domestic Violence Act, No. 116 of 1998.

80 Recently amended Disciplinary Regulations (1 September 2005) do not require police to consult with the ICD when refusing to follow a recommendation to charge a police officer with misconduct (Mistry and Lue-Dugmore, 2006, p.30).

81 In October 2005, the Minister of Safety and Security stated on record to the Parliamentary Committee that the ICD did not have a policy making function.

82 The 2005 Report of the Parliamentary Portfolio Committee on the ICD queried the necessity of the Proactive Research Unit.

83 Section 54(a) SAPS Act.

84 Section 54(b), SAPS Act.

## *Transparency – relationship with media and civil society*

The ICD's relationship with the media and civil society is an area that requires development. Provincial ICD offices are currently not authorised to make policy statements to the media but can comment on individual cases (Interview, ICD (Gauteng)). A number of civil society organisations interviewed for the report stated that they had easily been able to obtain access to ICD personnel but civil society was reportedly not consulted on recent reform proposals (Mistry and Lue-Dugmore, 2006, p.3). The ICD frequently engages with civil society around its policies, practices and reporting on its progress.

## Secretariats of Safety and Security

### Establishment and role of Secretariats

The SAPS Act established a Secretariat for Safety and Security (the National Secretariat) and made provision for provincial governments to establish their own secretariats (Provincial Secretariats) (s 2(1)). The National Secretariat's mandate, powers and functions are set out in the SAPS Act. They are replicated at provincial level (s 3(5)). Their establishment was one of a series of measures prompted by the changing political environment. The first Secretary for Safety and Security was appointed in December 1995 and had equal "rank" to that of the National Commissioner (Lue-Dugmore, 2003, p.3).

Secretariats are accountable to the Minister who determines national policing policy. Their primary functions are to evaluate the functioning of the SAPS, to promote democratic accountability and transparency, to advise the Minister on policy and to perform other functions deemed necessary by the Minister to ensure civilian oversight. Cawthra argues that it is the distinction between the policy oversight (the Secretariat's function) and implementation (the national commissioner's function) that weakened the secretariats policy role, rather than strengthened it, and its power and influence has subsequently declined (Cawthra, 2005, p.10).

Provincial Secretariats are autonomous. The Gauteng Provincial Secretariat is composed of a Directorate on Monitoring Police Service Delivery, a Directorate on Community-Police Relations and a Service Evaluation and Research unit (focusing on analysing complaints registers).

### Factors to consider regarding designation

In general, the Secretariats do not appear to be the suitable mechanism to undertake preventive visits to police custody for OPCAT. Secretariats do conduct visits to police stations (in Gauteng 20 police stations have been identified as priorities for visits), advise the Minister on constitutional matters and compose a fairly mixed staff<sup>85</sup> (Interview, Duxita Mistry). However, they lack functional independence from the executive. The purpose and methodology of visits, inadequate powers of information-gathering and inadequate public reporting are also concerns from the perspective of designation.

### *Lack of constitutional entrenchment*

Like the ICD, the Secretariats of Safety and Security were established by legislation, not by the Constitution. The 1996 Constitution simply states that a civilian secretariat for the police service must be established by national legislation, without outlining its role, duties or functions. This leaves the Secretariats vulnerable to the risks of encroachment on independence through abolition or modification of powers.

### *Ability to implement mandate*

In Gauteng at least, it has still been necessary to raise money from local businesses for certain projects despite budget increases. The current budget is thus unlikely to cover the costs associated with undertaking preventive visits.

### *Visits to police stations not aimed at preventing torture*

Although legislation does not set out a duty to make visits to police stations, s 3(2) of the SAPS Act provides that Secretariat members have the power to enter any building or premises under the control of the SAPS. However the right of entry is limited to the extent "reasonably necessary for the performance of [their] functions ..." – functions which do not include making recommendations to prevent torture and ill-treatment. Furthermore, police officers are not obliged to permit full access, as required under OPCAT, but must instead provide only "reasonable assistance". This leaves police with a very wide discretion to refuse access.

Although the conditions of cells may be observed during the course of a visit, police station visits are conducted to assist service delivery – to profile human and logistical resources – not with a view to investigating or preventing torture and ill-treatment.<sup>86</sup> Data collected might typically concern absenteeism or sick leave, safeguarding of exhibits and dockets or display of name tags and numbers. The detailed data on detainees required by the OPCAT would not typically be collected (Interview, Duxita Mistry).

---

85 In Gauteng at least, the staff of 43 includes some ex-police officers, others are employed with more diverse backgrounds in areas including criminal justice research, NGO advocacy, consultancy and local government (Interview with Duxita Mistry).

86 "Service delivery" may include for example the failure to take a statement, to inform a victim of crime or complainant of the status of their case or to treat persons with respect and dignity.

There have been recent efforts to delineate the focus of both Secretariats and the ICD arising from concern about overlapping mandates (arising out of section 18(1) of the SAPS Act).<sup>87</sup> In accordance with an arrangement to be implemented in the next few months in Gauteng, complaints arising from service delivery received by the ICD are to be referred to the Provincial Secretariat. Cases received by the Provincial Secretariat concerning allegations of criminal offences, misconduct or deaths (which may encompass torture) will be forwarded to the ICD.

### *Planned visits with no detainee interviews*

It is a critical requirement of OPCAT that designated NPMs have the power and capacity to make unannounced visits and to interview detainees. In Gauteng at least, unannounced station visits are being phased out, and detainees are not interviewed. No provision is made in legislation for either visits or station visits.

### *Powers to obtain documentation and evidence*

Secretariat members have powers to obtain information and documents under SAPS control, but again this is qualified to the extent reasonably necessary for the performance of their functions. Police therefore have discretion to refuse access to information (such as maps, custody and medical records) that must be provided under OPCAT. The Provincial Secretariats are not empowered or equipped to undertake investigations of ill-treatment of persons following assault.

### *Relationship to executive*

In terms of legislation and practice, the Secretariats exhibit a lack of structural independence from the Ministry of Safety and Security. The Constitution specifies that the National Secretariat is under the direction of the Cabinet Minister responsible for policing (s 208) and its functions as listed in s 3 of the SAPS Act reflect this. Similarly each provincial secretariat is answerable to its Member of Executive Council (MEC) for Safety and Security. Secretariat heads are appointed by the Minister (or provincial MEC) and secretariats are required to consult on appointment of staff. The Minister makes regulations on functions. Mistry and Klipin found that:

*Civilian oversight ... has come to refer to the mechanisms through which the executive constrains or cajoles the service. ... Whereas the role of the secretariat appears to be prescribed by legislation, in practice its mandate and authority vis-à-vis the other executive wings is not clearly defined [and] ... is apparently subject to the Minister's discretion ... (Mistry and Klipin, 2004(a), p.2).*

### *Non-adversarial policy focus*

Mistry and Klipin also concluded that Secretariats were functioning purely to advise the Minister and were not carrying out all the functions provided for in current legislation (Mistry and Klipin, 2004(a), p.1). Their report suggested review of the implementation of existing legislative provisions and revisiting of current role, functions, structure. Public statements by the Minister suggest that he also sees the Secretariats as policy think-tanks. The approach of the Provincial Secretariat appears fairly non-adversarial. The risk is that, if designated, Secretariats would find it hard to reconcile their consultative approach to policy with the need for strong, outspoken leadership in communications with the state on prevention of torture issues.

### *Lack of credibility*

The Portfolio Committee criticised the National Secretariat in May 2002 for a lack of independence from the police, suggesting that it "act[ed] like a small unit of the SAPS thereby compromising its oversight of SAPS activities". The National Secretariat itself acknowledged the need to restore its credibility in a report to Parliament in February 2005.

Secretariats were drastically downsized from around 1999 with the shift in emphasis on law enforcement. Mistry et al concluded that, if the Secretariats were to function as intended, their importance must be re-asserted by national leadership and their role reviewed (Mistry and Klipin, 2004(a), p.9; Lue-Dugmore, 2003).

### *Powers of recommendation and legislative proposals*

Lack of power to make recommendations and legislative proposals relating to torture and ill-treatment is another critical factor adversely impacting on functional independence.

Section 3 of the SAPS Act provides for Secretariats to provide the Minister with advice "in the exercise of his or her powers and the performance of his or her duties and functions", to monitor the implementation of Ministerial policy and to provide the Minister with legal services and advice on constitutional matters.

Legislation does not specifically provide for the making of recommendations relating to the prevention of torture and ill-treatment or legislative proposals, although "constitutional matters" could of course encompass the right to freedom from torture and ill-treatment enshrined in the Bill of Rights.

---

<sup>87</sup> Section 18(1) of the SAPS Act states that the ICD must investigate police failure to perform their duty.

In practice, studies have found that Provincial Secretariats rarely draft recommendations and have them published and that, although influence varies among provinces, generally Secretariats have little impact at station level (Mistry & Klipin, 2004(a) & (b)). Secretariats report to the Minister and have no power to ensure police implement their recommendations (Lue-Dugmore, 2003). Annual reports by the Minister are the only forum through which information obtained through station visits is made public. Information obtained from station visits is primarily shared internally within the Provincial Secretariat for analysis of service delivery. It may also be shared with the relevant MEC as background information before visits.

## Detention under the Mental Health Care Act 2002

The detention of mental health care users in psychiatric hospitals, health establishments and care and rehabilitation centres is governed by the Mental Health Care Act 2002, Act 17 of 2002 (which came into force in 2005). There are about 10,000 beds in the state sector and 7,000 hired from the private sector for patients treated under the Act (Government of South Africa, 2006, p.32).

The Act's preamble recognises the need to protect those with "mental disabilities" from unfair discrimination. Around the world, those detained in psychiatric hospitals are in a particularly vulnerable position and require special protection. Risks include arbitrary detention, inadequate living conditions, ill-treatment, violence from other patients, unlawful restraint and seclusion practices, inadequate or inappropriate medication and therapy and uninformed consent to treatment (Amnesty International, 2004; 2002). The World Medical Association stresses that physicians should consider compulsory hospitalisation as exceptional and use it only when medically necessary (World Medical Association, 1995).

The new Act, initiated following a National Commission of Inquiry, radically reformed the regime governing detention and has reportedly reduced involuntary admission rates (interview, Dr. Zabow).<sup>88</sup>

No body is currently required to conduct regular visits to psychiatric hospitals and health establishments with a view to preventing torture and ill-treatment (although the South African Human Rights Commission could do so). However, the Act provides for some form of investigation of allegations of ill-treatment in the form of Mental Health Review Boards ("MHRB's"). These have other important powers of review, decision-making and appeal and have now been set up in all provinces (Minister of Health, 2006).

### The role of Mental Health Review Boards

The new Act shifted priorities for treatment to care in the community.<sup>89</sup> It distinguishes between the following categories of patient who may be "detained" for OPCAT purposes: involuntary and assisted mental health care users (previously committed patients)<sup>90</sup>, State patients, mentally ill prisoners and persons referred for psychiatric observation (under s 6(6) of the Criminal Procedure Act).

Assisted mental health care users are those deemed incapable of informed consent due to their mental health, but who do not refuse health interventions. Involuntary care, treatment and rehabilitation users are also deemed incapable of informed consent about treatment due to their mental health but either refuse intervention required for the protection of themselves or others, or risk damaging their finances or reputation as a result of their illness. Mentally ill prisoners are those in respect of whom an order has been issued in terms of s 52(3)(a) of the Act for care, treatment and rehabilitation at a designated health establishment. Finally, State Patients are classified as such by a court directive in terms of s 77(6)(a) or s 78(6) of the Criminal Procedure Act.

In the absence of consent, mental health care users may only be admitted as inpatients if authorised by a Mental Health Review Board (MHRB), a court order, or in an emergency as defined by s 9(1)(c) of the Act.

### Factors in favour of designation of Mental Health Review Boards

#### *Statutory requirement to investigate allegations of abuse*

MHRBs are under a statutory requirement to investigate allegations of degrading treatment and abuse defined under the Act. While not explicitly mentioning torture or cruel or inhuman treatment, section 11 (Exploitation and abuse) imposes a positive obligation on all people, bodies, organisations and health establishments providing care to mental health care users to protect them from "degrading treatment", as well as from exploitation, abuse, forced labour and punitive care. Unless admitted in an emergency, mental health care users must be informed of these and other rights. It is furthermore a criminal offence (punishable by up to 6 months' imprisonment) to neglect, abuse or treat a mental health care user in any degrading manner or to allow the user to be treated in such a manner (ss 70(1)(c) and (2)).

---

88 Section 28. The previous Mental Health Act 1973 provided for the indefinite detention and withdrawal of criminal charges of so-called "state patients" (those accused of committing criminal offences deemed incompetent to stand trial or lacking in criminal responsibility) and resulted in frequent reports of arbitrary detention. Many people committed for minor offences (such as cannabis possession) reportedly spent years in hospital in terms of this legislation. The old Act also provided for indefinite admission upon orders of a judge in chambers after a 42-day initial admission and certification period.

89 A total of 1,200 primary health care clinics were constructed and 966 hospitals rehabilitated between 1994 and 2004. See: South African Government Information, 13 September 2005, [www.info.gov.za/aboutsa/health.htm](http://www.info.gov.za/aboutsa/health.htm).

90 A mental health care user is the new term for patient under the Act. The Act defines a mental health care user as: "... a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health of the user, State patient and mentally ill prisoner and where the person is below the age of 18 years or is incapable of taking decisions, and in certain circumstances may include – (i) a prospective user; (ii) the person's next of kin; (iii) a person authorised by any law or court order to act on that person's behalf; (iv) an administrator appointed in terms of this Act; and (v) an executor of that deceased person's estate and 'user' has a corresponding meaning."

Persons witnessing degrading treatment and other abuses prohibited by section 11 must report them to MHRBs or lay a charge with the police (s 11(2) and Reg.7). Regulation 7 requires MHRBs so informed to "investigate the report or notification and if necessary lay a charge with the South African Police Service."

Since the wording of s 11(1) imposes a positive obligation on MHRBs as well as others to prevent abuse, it is suggested that MHRBs do not need to wait until external notification is received to undertake investigations.

### *Mixed composition of experts*

Statute requires some diversity in MHRB composition. The Act requires between three and five South Africans, including at least a mental health care practitioner; magistrate, attorney or admitted advocate; and a member of the community (s 20(2)). MHRBs may also consult (or obtain representations from) any person including expert individuals and bodies (s 19(2)).

In Gauteng, two review boards have operated since December 2005 covering Johannesburg and West Rand and the rest of the province respectively. Each includes a psychiatrist, social worker, advocate and community member.<sup>91</sup> KwaZulu Natal's 4 review boards have similar diversity (and cover eThekweni; King George V Hospital; Town Hill, Fort Napier and Umgeni Hospitals in uMgungundlovu; Madadeni Hospital in Amajuba; and Ngwelezane Hospital in Uthungulu).

### *Other factors promoting independence, transparency and accountability*

Despite structural and practical impediments to independence outlined below, some public involvement is provided for in the form of a requirement for the MEC for Health to publicly call for nominees before appointing members (s 20(3)). Although the members of MHRBs must comprise mental health practitioners, members may not participate in matters involving establishments where they practice (s 24(3)).

## **Factors requiring further consideration before designation of MHRBs**

### *No statutory power to undertake visits to detention*

Although MHRBs have the duty to investigate allegations of abuse under s 11 of the Act, s 19(1) of the Act (which sets out their powers and functions) does not provide for the power to make unannounced visits to any part of health establishments or to review treatment and conditions.

### *Power to investigate allegations and make recommendations on the prevention of torture and ill-treatment*

Neither the Act nor its accompanying regulations stipulate what powers MHRBs have to fulfil their statutory duty to investigate allegations of abuse and degrading treatment. It therefore appears that MHRBs do not have legal powers to visit health establishments, summon and examine persons and collect documents and evidence. Although MHRBs could interpret the positive obligation to prevent abuse under s 11(1) broadly, they have no explicit legal power to make recommendations on the prevention of torture and ill-treatment, with a corresponding lack of duty on the executive to consider such recommendations. Most of their powers are limited to taking action in individual cases (for example hearing appeals on involuntary admission).

### *Relationship to executive*

In statute and in practice, MHRBs are effectively creatures of the executive, which directly controls appointment and terms of service, budget and can even directly influence procedure. Some MHRBs are located within the provincial government.

Section 18 requires MHRBs to be established by the MEC for Health for each province to cover every health establishment providing mental health care, treatment and rehabilitation services (either one per health establishment or one covering a number of health establishments). The MEC must consult with the head of the provincial department for health but is not required to consult publicly (except with regard to nominations, see below). The MEC also determines members' term of appointment (s 20(4)) and may remove them from office, after an enquiry, on grounds including public interest and inability to perform duties effectively (s 21(1)). Although MHRBs may determine their own procedures for conducting business, MECs must select meeting chairs (s 24(1-2)).

### *Role of MHRBs in detention*

Of all the factors mitigating against the designation of MHRBs as NPMs, their powers of review, appeal and decision-making on detention are probably the most significant. As they are directly involved in authorising and reviewing detention, they lack the independence that is a key requirement of OPCAT. Once decisions to detain have been confirmed, assisted and involuntary patients can be detained for up to six months before any form of periodic review and thereafter reviews only take place once every year, increasing the risk of unlawful or arbitrary detention that is often a key factor in torture and ill-treatment.

---

<sup>91</sup> Interview with Deputy Director of Mental Health Services, Gauteng Health Department, 13 September 2006.

MHRB powers and functions are set out in s 19(1) of the Act. This states that they must:

- consider appeals against decisions of the head of a health establishment;
- make decisions with regard to assisted and involuntary mental health care, treatment and rehabilitation services;
- consider reviews and make decisions on assisted and involuntary mental health care users;
- consider 72-hour assessment made by the head of the health establishment and make further decisions to provide involuntary care, treatment and rehabilitation;
- consider applications for transfer of mental health care users to maximum security facilities; and
- consider periodic reports on the mental health status of mentally ill prisoners.

### *MHRB decisions on detention of assisted and involuntary patients*

The procedure for admitting assisted patients without consent is set out under ss 26-28 of the Act. After an application for admission is made (usually by a spouse or relative) and approved by the head of a health establishment, the decision (plus the findings of two mental health care practitioners) is sent to a Review Board within seven days (s 28(1)/Reg.8). The Review Board must within 30 days investigate both the patient's incapacity and the circumstances of care, decide on continuation of treatment or discharge and report to the patient, hospital head and provincial department (s 28(3)/Reg.9).

Involuntary patients can be admitted for an initial 72-hour observation and assessment upon approval of a written application by the head of health establishment (s 34(1)(b)). After this time, a request for further involuntary inpatient care must be submitted to the Review Board within 7 days for approval for decision within 30 days. If approved, that decision must be submitted to the High Court (Reg.11). (The user must also be transferred after the initial 72 hours to a psychiatric hospital).

### *MHRB decisions on transfer*

Both assisted and involuntary mental health care users can be transferred to maximum security facilities in certain circumstances on a decision of a MHRB. The head of a health establishment may request this where the person has "previously absconded or attempted to abscond or [has] inflicted or is likely to inflict harm on others in a health establishment" under s 39. The Review Board must not approve the request to punish the user.

MHRBs have the power to order transfer of State patients to another designated health establishment with maximum security facilities, where the State patient is "likely to inflict or has inflicted harm on others" (s 43(3)). State patients may only be admitted for mental health care by court order (in terms of the Criminal Procedure Act). Those accused of committing criminal offences may be admitted for 30-day psychiatric observation at a state psychiatric hospital on order of a court (s 42 and s 79(2) of the Criminal Procedure Act). Applications for discharge are made directly to a judge not to the Review Board under s 47.

Mentally ill prisoners can be transferred from prison to designated health establishments upon the order of a magistrate. MHRBs may order transfers between health establishments with maximum security facilities of a mentally ill prisoner, where he or she has "absconded or attempted to abscond or has inflicted or is likely to inflict harm on others" (s 54(2)).

### *MHRB decisions on appeals and periodic review*

The MHRB must determine appeals on behalf of assisted patients without consent within 30 days, as set out in s 29 and reg. 15. The MHRB must also consider appeals for involuntary patients lodged before decisions on further involuntary care are taken. Rejected appeals must be submitted to the High Court for judicial review (s 35(1)(4) and s 36).

For both assisted and involuntary appeals, the Review Board must obtain all relevant documentation and allow oral or written representations and may summon witnesses to give evidence or produce any book, record, document or other item.

Periodic reviews of assisted and involuntary patients are decided by MHRBs after an initial six months and thereafter annually (s 30/37). (Reviews of State patients are taken by the head of the national department not the MHRB under s 46).

Every 6 months, MHRBs must make recommendations on the care of mentally ill prisoners detained in health establishments and the return of prisoners to prison (s 55).

## Detention in children's institutions

This section deals with oversight of institutions where children may be detained pursuant to the Children's Act (38 of 2005), Child Justice Bill (B 49 of 2002), and the Criminal Procedure Act (Act 51 of 1977). At the time of writing the Children's Act and the Children's Amendment Act (Act 41 of 2007) (referred to collectively here as the Children's Act) had not yet come into force and the accompanying regulations were still under discussion. They are, however, virtually complete. The Parliamentary debates on the Child Justice Bill have also been concluded. Since the legislation has been adopted and will inevitably come into force, this will be used as the basis for the description below even though the Child Care Act 74 of 1983 was still in force at the time of writing. The Children's Act will come fully into force once the regulations have been finalised, likely to be early 2009. A similar approach is followed in respect of the Child Justice Bill, which provides for a date of promulgation of 1 April 2010.

The Children's Act introduces the term "child and youth care centre" which refers to a facility for the provision of residential care to more than six children outside the child's family environment, but excludes a partial care facility, drop-in centre, boarding school, school hostel or residential facility attached to a school, a prison or any other facility that is maintained primarily for the tuition or training of children other than an establishment for children ordered by a court to receive training or tuition.<sup>92</sup> If children are to be deprived of their liberty under the Children's Act, they will be detained at a child and youth care centre and the following institutions are now incorporated into the definition of a child and youth care centre: children's home, place of safety, secure care facility, school of industries, and a reformatory. The latter two institutions (school of industries and reformatory) will, within two years after the full promulgation of the Act, reside under the Department of Social Development rather than under the Department of Education.<sup>93</sup>

As has been the case up until the present, facilities may be established by the state or by accredited non-governmental organisations.<sup>94</sup> Both types of facility must be run in accordance with the Children's Act 2005 and minimum norms and standards determined by the Minister.<sup>95</sup> Both accredited institutions run by private organisations and those run by the state must also be registered with the provincial department of social development.<sup>96</sup>

The various forms of residential care programmes are defined in section 191(2). These programmes will distinguish (for instance) facilities for abandoned babies from those for children in conflict with the law requiring secure accommodation; even though all will be termed child and youth care centres. Existing state-run children's homes, places of safety, and secure care facilities, will be regarded respectively as child and youth care centres offering "programmes designed for the reception, development and care of children outside their family", "the reception and temporary safe care of children pending their placement", "the reception and temporary safe care of children to protect them from abuse and neglect, the reception, development and secure care of children awaiting trial or sentence", programmes providing for "the reception, development and secure care of children with behavioural, psychological and emotional difficulties" or for the reception, development and secure care of children in terms of an order under the Criminal Procedure Act, or in terms of an order under s 156(1)(i) of the Children's Act placing a child in a child and youth care centre which provides a secure care programme.<sup>97</sup>

Within the context of OPCAT further research and discussions are required to determine if the facilities<sup>98</sup> that are not child and youth care centres also fall within the ambit of the Protocol. Although attendance is voluntary, it may involve some restriction of liberty although this may only be for a limited time period, usually less than one day. It is rather unlikely that these institutions can be viewed as falling within the scope of the Protocol.

In respect of preventing torture and ill treatment, the Children's Act takes a four-pronged approach. Firstly, by establishing minimum norms and standards with reference to child protection<sup>99</sup> and for child and youth care centres.<sup>100</sup> Secondly, by placing a general responsibility on certain mandated professional persons who may have contact with children to report any suspected abuse or neglect to the appropriate authorities or the police.<sup>101</sup> Thirdly, by compelling the department of social development or designated child protection organisation to conduct an investigation into the reported suspicion of neglect or abuse of a child<sup>102</sup> or to conduct an inspection of a centre reasonably believed to be operating as an unregistered centre.<sup>103</sup> Fourthly, by providing for a compulsory Quality Assurance Process (QAP) of a child and youth care centre at prescribed intervals.<sup>104</sup>

---

92 s 191(1).

93 s 196.

94 s 197.

95 s194. These are to be found currently in the draft regulations, Annexure A part E (a) – (f).

96 s 197.

97 Other programmes may offer shared care, temporary protection to trafficked or sexually exploited children or temporary observation, assessment, counselling and reintegration. See s 191(2) read with s 196.

98 These are partial care facility, drop-in centre, boarding school, school hostel or residential facility attached to a school or any other facility that is maintained primarily for the tuition or training of children.

99 s 106.

100 s 194.

101 s 110(1-3).

102 s 110(5-6).

103 s 304(1).

104 s 211.

The new law also provides for a complaints mechanism for children in child and youth care centres, and for compulsory reportable incidents. These include physical and sexual abuse and neglect. The list of persons obligated to report in s 110(1) now also includes a very wide range of persons likely to encounter child abuse or deliberate neglect in the course of their work. Newly mentioned, by comparison to previous legal provisions, are traditional health practitioners, social services professionals, members of staff or volunteer workers at a partial care facility, drop in centre or child and youth care centre, to name a few categories of obligated reporters. They must report to a designated child protection organisation, provincial department of social development, or to a police official.

The Children's Act introduces a National Child Protection Register. Part A of the Register is intended to constitute a record of abuse or deliberate neglect inflicted on specific children, as well as to determine patterns and trends.<sup>105</sup>

Part B of the Register will contain the details of persons who have been found by a children's court, or any other court or tribunal, to be "unsuitable to work with children". Employment of such persons at facilities where they may have contact with children, such as child and youth care centres, is proscribed, and prior to employment of any new staff member, an inquiry will have to be directed to the Director General: Social Development by the prospective employer to ascertain whether the potential employee's name is contained on the Register. Existing staff will be subjected to a screening process within 12 months of the promulgation of the Act.<sup>106</sup>

## Routes to detention

Children can be detained in a child and youth care centres as a child in conflict with the law,<sup>107</sup> or as a child in need of care and protection.<sup>108</sup>

### *Children in conflict with the law*

At the time of writing the Child Justice Bill (49B of 2002) was before Parliament and was nearly finalised. Again the approach is followed that the passing of the Bill is inevitable and that the provisions will follow the provisions of the Child Justice Bill. Importantly, the Child Justice Bill now also uses the terminology of a "child and youth care centre" and no reference is made to the range of institutions that formerly existed for children in conflict with the law. The Bill makes provision for unsentenced and sentenced children to be placed in a child and youth care centre.

### *Unsentenced children*

Section 27(a) of the Child Justice Bill stipulates that a police officer can place certain children in a child and youth care centre prior to the child's first court appearance if the centre has a vacancy and it is accessible. However, this provision applies to all children between the ages of 10 and 14 years of age and only to children older than 14 years of age charged with a Schedule 1 or 2 offence. In effect this excludes children older than 14 years charged with serious offences, as per Schedule 3, from placement in a child and youth care centre.

Section 29 of the Child Justice Bill provides for placement of a child after first appearance and prior to finalisation of the trial in a child and youth care centre. The placement of such a child must, however, be supported by a recommendation from a probation officer, emanating from the assessment of the child,<sup>109</sup> providing information in respect of the availability or otherwise of accommodation for the child in question, as well as the level of security, amenities and features of the centre.<sup>110</sup>

Once a decision has been made to detain a child, either in a correctional centre or a child and youth care centre, this decision must be reviewed on every subsequent court appearance with reference to the following:<sup>111</sup>

- determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate;
- enter the reasons for the detention or further detention on the record of the proceedings;
- consider a reduction of the amount of bail, if applicable;
- inquire whether or not the child is being treated properly and being kept in suitable conditions, if applicable;
- if not satisfied that the child is being treated properly and being kept in suitable conditions, order that an inspection or investigation be undertaken into the treatment and conditions and make an appropriate remedial order; and
- enter the reasons for any decision made in this regard on the record of the proceedings.

In effect, the subsequent appearances of the accused child function as an oversight mechanism, not only in respect of the original decision to detain the child but also in respect of the conditions of detention.

---

105 Chapter 7 Part 2. Disclosure may only be made: (a) for the purpose of protecting the interests, safety or well-being of a specific child; (b) within the scope of that person's powers and duties in terms of the Act or any other legislation; (c) for the purpose of facilitating a police investigation following a criminal charge involving abuse or deliberate neglect of a specific child; (d) to a person referred to in section 117 on written request by such person; or (e) when ordered by a court to do so.

106 See in general Chapter 7 Part 2 sections 118 – 128 and the accompanying regulations thereto.

107 s 71 of the Criminal Procedure Act and Child Justice Bill.

108 s 156, s 158 and 167(1)(b).

109 s 40(1).

110 s 40(2).

111 s 32.

In the case of a child who has been remanded to prison to await trial, the matter may not be postponed for more than 14 days at a time. This extends to 30 days where the child is referred to a child and youth care centre. The obligatory re-appearance functions to fulfil the constitutional obligation to ensure deprivation of liberty for the shortest appropriate period of time.

### *Sentenced children*

A child justice court that convicts a child may sentence that child to compulsory residence at a child and youth care centre providing the programmes referred to in s 191(2) of the Children's Act.<sup>112</sup> The maximum period that a child may be sentenced to a child and youth care centre is five years or until the child turns 21 years of age.<sup>113</sup> The CJB also creates the mechanism whereby a child who has been convicted of a serious offence (schedule 3) and who would ordinarily have been sentenced to imprisonment, may serve the first part of his sentence (five years or until the age of 21 years) in a child and youth care facility and then be transferred to a correctional centre. This is, however, subject to confirmation by the sentencing court.<sup>114</sup>

The CJB sets down a number of procedural safeguards to ensure that child and youth care centres are used judiciously as a sentencing option and also, importantly, that the sentence is indeed implemented and that the child is not left languishing in a police cell waiting to be transferred.<sup>115</sup>

### *Children in need of care*

Children may be removed to child and youth care centres (or other care facilities) by court order or by a designated social worker or police officer in certain circumstances in accordance with the procedures specified for emergency removals.<sup>116</sup> The relevant section specifies that a child may be placed in temporary safe care, which may be in a child and youth care centre but not necessarily so (temporary safe care placement may be with individual persons, such as relatives or foster parents).<sup>117</sup> Different care orders are available<sup>118</sup> but all other options must be inappropriate before resort can be had to placement in a child and youth care centre.<sup>119</sup> A court may order that a child be placed in a child and youth care centre if it appears to a court that he or she is in need of care and protection.<sup>120</sup> The court must determine the youth and care centre offering the residential care programme best suited to the child. "Care" explicitly includes securing the right of children enshrined in the Bill of Rights to be detained only for the shortest appropriate time and as a last resort.<sup>121</sup> A placement in a child and youth care centre must be determined in conjunction with a permanency plan for the child, also referred to in the Act as an order aimed at securing stability on a child's life.<sup>122</sup>

---

112 CJB s 76(1).

113 CJB s 76(2).

114 s 76(3)(c).

115 s 76(4).

116 s 152. There must be reasonable grounds for believing that the child is in need of care and protection; needs immediate emergency protection; that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being. The best interests of the child must be the determining factor in any decision. Misuse of the power is grounds for disciplinary proceedings.

117 The regulations spell out the prescribed criteria with which persons, premises, places or facilities to be used as temporary safe care must comply: see draft regulation 63.

118 Children's Act 2005, s 46(1).

119 s 158(1).

120 By virtue of a temporary safe care order or other order. See sections 47, 151, 152 and 154. Section 156(1) provides that a children's court can make a variety of orders where it finds that a child is in need of care and protection including placement in a designated child and youth care centre that provides a residential programme suitable to the child's needs. A child "in need of care and protection" is one in a situation contemplated by s 150(1), that is, who:

- (a) has been abandoned or orphaned and is without any visible means of support;
- (b) displays behaviour which cannot be controlled by the parent or care-giver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a Care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

Whether heard during the course of court proceedings or upon evidence from any person, the question of whether the child is in need of care and protection must always be determined according to the standard of the best interests of the child (s 151(8)).

121 "Care" includes: securing fulfilment of the child's rights enshrined in the Bill of Rights, providing the child with "living conditions ... conducive to the child's health, well-being and development", safeguarding and promoting well-being, protecting against "maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harms of hazards" and ensuring the best interests of the child are paramount. See Children's Act 2005, Interpretation and Objects. Indeed, all proceedings, decisions and actions relating to children must be interpreted so as to fulfil the Bill of Rights, among other things. Children's Act 2005, Section 6(2).

122 s 157 (1)(a) and (b).

## Oversight mechanisms

### *Departmental Quality Assurance Process*

Section 211 of the Children's Amendment Act provides for the "Quality Assurance Process" (QAP) as a means of ensuring regular inspections of child and youth care centres. The provincial head for social development must ensure that a QAP is carried out in respect of each child and youth care centre as prescribed in the regulations, currently within four years of registration, and thereafter repeated periodically at intervals of no more than four years (regulation 104). After completion of the process, involving a team connected to the child and youth care centre as well as a team not connected to the centre, the management board of the child and youth care centre must submit a copy of the organisational development plan, which is the concluding document of the process that must be agreed, to the MEC for social development. The QAP was developed during the 1990s as a much more developmental form of inspection - a diagnostic and remedial tool designed to identify organisational weaknesses and recommend and oversee implementation of a developmental plan.<sup>123</sup> Section 211(1)(d) of the Act provides for a mentor to oversee the implementation of the plan by the management of the centre. This person will be recommended by the team who is not connected to the centre.

The regulations spell out that the mentor is thereafter appointed by the Department of Social Development, that such person may be a staff member of the department or an employee of a NGO, but that such person must be appointed within 10 days of the organisational development plan being presented to staff and management of the child and youth care centre.<sup>124</sup>

Further to this, regular review of progress must take place (draft regulation 14), and this must occur within 12 months of the organisational development plan having been presented to management and personnel, although this period can be extended in exceptional circumstances for a time bound period. Although the legislation is not yet in force, QAPs are already underway.

### *Factors in favour of designation of QAP process*

#### *Developing practice*

The QAP process is already underway and appears to have replaced other forms of inspection. The courts have now ordered QAPs on two occasions (for Luckhoff School of Industries<sup>125</sup> and George Hofmeyr School of Industries<sup>126</sup>) and an order was sought in 2006 for a QAP to take place for children detained in Weskoppies psychiatric institution.<sup>127</sup>

In the case of George Hofmeyr, the order followed legal action taken on behalf of children from the school allegedly ill-treated and unlawfully removed to police cells by the school. The High Court ordered the MEC for Education, in consultation with the MEC for Social Development, Mpumlanga, to undertake the QAP in April 2005. As a result of the process, the QAP's recommendations were made an order of the court and the Child and Youth Care Agency for Development was appointed to oversee reform. (The court simultaneously ordered other measures such as the appointment of an advisor to support the management team of the school and a curator ad litem to represent the affected children's interests.)<sup>128</sup>

#### *Role of QAP in preventing torture*

QAPs have been requested via court applications on grounds of breaches of child care legislation and regulations that, while not explicitly mentioning torture, provide for the protection of children from abuse. The judge that made the order for a QAP for Luckhoff School of Industries stressed that rights conferred by regulations in the Child Care Act gave effect to rights conferred by the Constitution (notably the right of every child to protection from abuse, neglect, maltreatment or degradation).

#### *Mixed composition of experts*

Inspections consist of visits and monitoring by multi-disciplinary teams comprising governmental and non-governmental experts on children's rights and child and youth care. The trend developing is for supervision by the court (as in both the Luckhoff and George Hofmeyr cases) or possibly by the SAHRC (as requested in the Weskoppies case). QAP teams have in practice interviewed both staff and children. Participation of children in the QAP is required by draft regulation 104(9)(b), as well as where relevant, their families and communities.

#### *Regularity of visits provided for in legislation*

It is the responsibility of the provincial head of social development to ensure that inspections are carried out "regularly" (s 211(1)). As mentioned, the draft regulations prescribe an interval period of four years. This may be insufficient to monitor trends in conditions for children over time.

---

123 Interview, Dr Ann Skelton, August 2006.

124 Draft regulation 104(13).

125 *Centre for Child Law and Others (Applicants) v MEC for Education and Others* (Respondents), Case Number 19559/06, decision of 30 June 2006, Pretoria High Court.

126 *Centre for Child Law and 11 others v MEC for education, Mpumlanga and others* TPD C0052/05, order given on 03/03/05.

127 Interview, Dr Ann Skelton, August 2006.

128 Interview, Anne Skelton, August 2006.

## *Factors requiring further consideration before designation of QAP process*

### *Lack of transparency*

The results of development QAP reports are not automatically made public. Reports have previously been obtained by NGOs upon a letter of demand to the provincial head of social development. Reports could also be accessed under the Promotion of Access to Information Act 2000 and its accompanying regulations although this can be a very lengthy procedure. (The Act provides for the right of access to any information held by the state and any information that is held by another person and that is required for the exercise of protection of any rights).<sup>129</sup>

### *Lack of functional independence*

DQAPs are carried out, funded and monitored by the same departments responsible for overseeing and funding children's institutions. They therefore lack the independence from the executive that is a key requirement for an NPM. This may be offset to some extent by the active role the courts have taken in directing the process and by the mix of governmental and independent experts that are required to be appointed under the Children's Act. However the involvement of the courts is dependent upon specific applications and may therefore be limited in accordance with the resources of children's advocate organisations.

### *Development of minimum standards for inspections*

The criteria for evaluation applied thus far have been the recognised policy and standards for the residential care and treatment of children.<sup>130</sup> These must be consistent with international human rights standards governing the treatment of detained children. The draft regulations to the Children's Act require that the purposes of development QAP are to "monitor adherence to the minimum norms and standards pertaining to child and youth care centres set out in Annexure A,"<sup>131</sup> to take decisive and appropriate action where departures from the norms, standards and law occur, to ensure protection of the rights contained in the Constitution and other relevant statutes, and finally to take decisive and appropriate action where violations of the latter occur (draft regulations 104(6)(e) and (f)).

Behaviour management practices (or discipline of children), which can be highly relevant to OPCAT, are provided for extensively in draft regulation 85, which contains a list of 15 prohibited behaviour management practices.

### *Other forms of statutory inspection of children's institutions*

#### *Investigations following reports received under section 110 of the Children's Act*

Section 110(1) of the Children's Act obliges a wide range of stakeholders<sup>132</sup> to report suspected abuse or neglect in the prescribed manner to the department of social development or a police official. If such a report is made to a police official, he/she must firstly ensure the safety and well-being of the child if it is at risk and thereafter, within 24 hours notify the provincial department of social development or designated child protection organisation of the suspected abuse or neglect and the steps that had been taken.<sup>133</sup> The Department of Social Development or designated child protection organisation to whom the report has been made must ensure the safety of the child; make an initial assessment of the report and if the report is substantiated, initiate proceedings for the protection of the child. If the report is not completely unfounded, the child's required particulars must be submitted for inclusion in the National Child Protection Register.<sup>134</sup> Once the investigation has been completed, a report must be submitted to the provincial head of social development who is responsible for overall monitoring of progress on the case.<sup>135</sup> The Act provides for a number of remedial measures to be taken to ensure the safety and protection of the child.<sup>136</sup>

#### *Inspections under section 304 of the Children's Act*

The Children's Act 2005 provides only obliquely for inspections of facilities as such inspections were traditionally conceptualised and utilised in the past. Section 304 provides for the inspection of and reporting on child and youth care centres, partial care facilities, shelters and drop-in centres by person authorised to do so by the Director General, a provincial head of social development or a municipality on the grounds that there is a reasonable suspicion that such facility is being used as an unregistered child and youth care centre, partial care facility, shelter<sup>137</sup> or drop in centre. The purpose is to determine whether the mentioned facility complies with any structural, safety, health and other requirements as may be required by any law, and whether the provisions of this act are being met. Various powers are granted such authorised person.

---

129 Open Democracy Advice Centre (ODAC) is advising citizens how to access their right to information under the Act – Alison Tilley COO and Melvis Pieterse, Fieldworker, interview, August 2006.

130 Interview, Dr Ann Skelton, August 2006

131 Annexure A contains norms and standards relating to: size of facilities and ratios of staff to children; details concerning safety and risk; assessment; care plans and reunification services; minimum standards for isolation of children and access to adequate health care, schooling and education.

132 Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre.

133 s110(4).

134 s110(5).

135 s110(6).

136 s110(7).

137 Note that the chapter on shelters that was envisaged when Act 38 of 2005, and of which s 304 forms part, was adopted, was subsequently deleted in the new amendment Act and shelters (as commonly known) are now subsumed under the overarching chapter dealing with child and youth care centres.

It is clear that these are not regular inspections, rather they are specifically mandated ad hoc visits to inspect compliance (largely) with safety requirements, and to facilitate detection of unregistered facilities. Indeed, since regulation 104(5) provides specifically for QAP to be ordered after receipt of a well founded complaint by a child residing in a child and youth care centre or any other person,<sup>138</sup> it is evident that these inspections are not the form of ongoing monitoring tool contemplated by OPCAT, although there is no doubt that an unscheduled visit might yield reports of torture or inhuman, degrading or cruel treatment or punishment; however, it is clear from the scheme of the Act that such occurrences would have to be followed by criminal sanctions, including those relating to “failing to stop operating an unregistered facility” as provided for by section 305(f) or (g).

### *Complaints and reportable incidents*

The draft regulations provide for a list of reportable incidents. These must be reported to the manager and the management board as soon as possible, but by not later than one hour after the incident is discovered (regulation 86(1)). The full list is provided in draft regulation 86(3), and includes, for instance, any situation in which restraint, isolation, or a prohibited behaviour management measure is used, allegations of physical, emotional, sexual or verbal abuse; interventions by security personnel or the South African Police force, the death or injury of a child, any criminal charge or conviction of a service provider, volunteer or other adult involved with the centre, and any other unusual circumstances likely to affect the safety or well being of any child at the centre.

Children are granted the right to express dissatisfaction with the service provided to them, and the draft regulations specify that their concerns and complaints must be addressed without delay or reprisal. Draft regulation 87(2) sets out the requirements for a written complaints procedure, which must amongst others, be accessible to children, be structured in such a manner that it does not cause or steepen conflict, allow fair procedures, encourage restorative justice interventions where appropriate, and be aligned with the system in place for reportable incidents.

### *Monitoring under the Child Justice Bill<sup>139</sup>*

Section 94 of the Child Justice Bill provides for the formal establishment of an Intersectoral Committee for Child Justice and its mandate is described in sections 95 and 96. It must meet at least twice annually, and furnish the Minister of Justice and Constitutional Development with written reports of these meetings. It is the task of the Intersectoral Committee to develop a draft national policy framework that would:

- ensure a uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice;
- guide the implementation and administration of the legislation;
- promote cooperation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system; and
- enhance service delivery as envisaged in this Act by the development of a plan within available resources.<sup>140</sup>

The National Policy Framework must include guidelines for:

- the implementation of the priorities and strategies contained in the national policy framework;
- measuring progress on the achievement of the national policy framework objectives;
- ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and the legislation;
- monitoring the implementation of the national policy framework and this Act;
- the establishment of an integrated information management system to enable effective monitoring, analysis of trends and interventions, to map the flow of children through the child justice system and to provide quantitative and qualitative data.

The Intersectoral Committee is required to collect very specific sets of data, for example information on the numbers of children arrested (aged 10, 11, 12, and 13) and the outcomes of such cases where convictions ensured, and to furnish these to the Minister, 5 years after commencement of the Act.

Although the Intersectoral Committee does not have a direct oversight function, it is hoped that its monitoring of systemic performance will yield valuable information and avoid the detention of children. Having been established unofficially for some years now, it already enjoys some experience and credibility in this respect.

---

<sup>138</sup> This sub regulation also provides for contemporaneous notification of the South African Human Rights Commission of such QAP process being ordered.

<sup>139</sup> Introduced as B49 of 2002.

<sup>140</sup> s 93(1).



# 4

## GAPS IN OVERSIGHT PROVISION

### Gaps in oversight: immigrants and refugees

There is a critical need for an independent inspectorate agency to prevent torture and ill-treatment of those arrested and detained under the Immigration and Refugee Acts (see below for an outline of the legal grounds of detention).

The government has outsourced its centralized detention facility for undocumented migrants, Lindela, to a private company. It has established a second centre at Musina in Limpopo.<sup>141</sup> No statutory body exists to oversee detention under the provisions of the Immigration Act in such centres or in border posts, airports and hospitals.

Detention in police stations falls under the remit of the ICD (covered elsewhere in this report). People arrested under the Immigration Act (including asylum seekers)<sup>142</sup> are usually initially detained in police stations before transfer to a detention centre, (HRW, 2005, p.42). This will be the case where for example police doubt a person's immigration status or a delay exists in determining this. The exception to this appears to be individuals arrested under the Immigration Act but who are suspected of endangering national security. Such persons are usually to be detained in police stations.

### Situation of children

Children merit special attention because of their particular vulnerability and because their legal situation is often particularly complex. The detention of children is subject to strict legal and constitutional safeguards. Enshrining s 28 of the Constitution, the Refugees Act states that children must only be detained as a measure of last resort and only for the shortest appropriate period of time.<sup>143</sup> The Immigration Regulations specify that unaccompanied minors may not be detained. Children may be moved between different types of institution and are subject to childcare and immigration legislation.

In spite of these provisions, children have been detained at Lindela.<sup>144</sup> Children have also been detained at "places of safety" such as Dyambo place of safety located next to Lindela (see further below).<sup>145</sup> Placement of children in places of safety is covered by other inspection processes outlined in this report. Less commonly, children may be sent to shelters<sup>146</sup> or guardians (in informal placements) rather than being placed with the Department of Social Welfare (HRW, 2005, p.49). These placements would be considered "detention" for purposes of OPCAT (if children are sent there following an administrative or legal ruling and are not free to leave). Neither shelters nor guardians are currently subject to forms of inspection established under new legislation.

### Vulnerability of non-nationals to torture in detention

A number of national and international bodies have made isolated visits to Lindela<sup>147</sup> and their reports suggest that torture and ill-treatment remain serious concerns. All have recommended the establishment of an inspectorate system to safeguard detainees' rights and monitor conditions.

---

141 Sunday Times, 24 July 2006.

142 Asylum seekers sometimes are sent there, despite the requirement that "reasonable grounds" must exist before the detention of any asylum seeker and despite the fact that refugees are protected from detention under SA law. HRW, 2005, p.42.

143 Refugee Act, s 29(2). Section 28(1)(g) of the Constitution protects all children from detention, unless it is a measure of last resort, in which case children must be kept separately from detained persons over 18 years old. In September 2004 the Pretoria High Court ruled that unaccompanied foreign children must be dealt with under the provisions of the Child Care Act rather than the Immigration Act (HRW, 2006, p.114-115; SAHRC, 2004, p.37). See also *The Centre for Child Law v The Minister of Home Affairs and Others* 2005(6)SA 50(T).

144 This appears partly due to a lack of cooperation between the Department for Social Services and the Department of Home Affairs and to the failure to implement s 32(1) of the Refugees Act, that provides that unaccompanied children should be brought before a Children's Court for inquiries to assess needs and make care arrangements (HRW, 2005, p.48, Centre for Child Law).

145 Following action by Lawyers for Human Rights and the Centre for Child Law on behalf of unaccompanied children, the Pretoria High Court ruled on 13 September 2004 that the detention of children in Lindela was unlawful, invalid and should cease immediately and ordered DHA not to admit unaccompanied children at Lindela. 92 unaccompanied children were found to be detained with adults at Lindela. <http://www.childlawsa.com/dumping.html>

146 Human Rights Watch reported in 2005 that shelters for children in need of care were often reluctant to admit refugee and asylum-seeking children due to lack of identification and problems with family reunification (HRW, 2005, p.50).

147 See for example: Human Rights Watch. (1998). *Prohibited Persons: Abuse of undocumented Migrants, Asylum-Seekers, and refugees in South Africa*, Washington, USA; *Access to Justice: Focus on Refugee and Asylum Seekers*, Human Rights Committee Quarterly Review, March 2001; Human Rights Watch. (2005). *Living on the Margins – Inadequate protection for refugees and asylum seekers in Johannesburg*; and Human Rights Watch. (2006) *Unprotected Migrants – Zimbabweans in South Africa's Limpopo Province*. In addition, the Public Protector has not undertaken investigations into immigration detention centres, but has undertaken one investigation into a Refugee Reception Centre. (Unless arrested and detained during the course of a visit, asylum seekers presenting at Refugee Reception Centres are not in detention. Although required to be present at such centres in order to process their asylum applications under the Refugee Act, they are free to leave.)

The SAHRC has repeatedly cited the lack of an inspectorate system with statutory power to monitor, report and (where necessary) intervene as a major hindrance to ensuring respect for the rights of detainees (SAHRC, 2000, p.27). It has recommended that such a body should have clearly defined powers and duties to inquire into both specific incidents and general conditions and should develop minimum standards for arrest, detention and treatment of detained immigrants<sup>148</sup> (SAHRC, 1999; SAHRC, 2000, p.9-10). The relationship between the Department of Home Affairs and its private contractors is also highlighted as an important issue (ibid).

Once in detention, detainees are enormously vulnerable to prolonged administrative detention, ill-treatment and, in the case of asylum seekers, forcible return.<sup>149</sup>

Hundreds of cases have been reported of the detention without judicial review (pending deportation) of undocumented foreigners beyond the thirty-day limit (UN Report, 2005, paras. 77-79, p.21; HRW, 2006, p.28).<sup>150</sup> Vulnerability is increased enormously because those detained are isolated: from lawyers (it is rare to access legal aid so people are unable to contest the validity of their detention), from families and from outside inspectorate bodies (UN Report, 2005, para. 47, p.15).

The UN Working Group on Arbitrary Detention has strongly emphasized the link between the arbitrary, unlawful use of administrative detention and subsequent ill-treatment or torture.

Violations of procedures for arrest, detention and deportation of non-nationals, including asylum seekers, by police and immigration officials<sup>151</sup> must be understood as "widespread and systematic rather than idiosyncratic and anecdotal" (HRW, 2006, p.9, p.22<sup>152</sup>).

### Legislative provisions to protect human rights

The failure to establish an independent inspectorate body is strange in the light of efforts made in both the Immigration and Refugees Acts to protect human rights and develop minimum standards to do this. The Refugees Act explicitly states that refugees (but not asylum seekers) enjoy "full legal protection". The Immigration Act does not explicitly prohibit the torture and ill-treatment of persons detained under its provisions. However the Act and its Regulations stipulate that those detained under its provisions must be held "in compliance with minimum prescribed standards [on accommodation, nutrition, and hygiene] protecting his or her dignity and relevant human rights<sup>153</sup> irrespective of the place of detention."<sup>154</sup>

The Immigration Regulations contain important provisions (even though they do not completely conform to international human rights standards such as the UN Basic Principles for All Forms of Detention and Imprisonment). Detainees must be provided with adequate space and ventilation, access to basic health facilities; a bed, mattress, and at least one blanket; an adequate balanced diet with well-prepared food served at defined intervals, with not more than 14 hours between the evening meal and breakfast the next day; and the means for every detainee to keep his or her person, clothing, bedding and room clean and tidy. Male and female detainees (unless spouses), detained minors who are not with their parents or guardians, and detainees in different security risk or health categories should all be kept separately).

### Legal grounds for detention under Immigration and Refugee Acts

Both the Refugees Act (Act No. 130 of 1998) and the Immigration Act (No. 13 of 2002 as modified by the Immigration Amendment Act No. 19 of 2004) provide for detention.

The Refugees Act prohibits detention of persons in terms of the Act for longer than is "reasonable and justifiable". Any detention exceeding 30 days must immediately be reviewed by a High Court judge and at the expiry of every 30 days thereafter.<sup>155</sup>

The Immigration Act provides for the arrest, detention, and deportation of "illegal foreigners". An "illegal foreigner" is a non-citizen or permanent resident in South Africa in contravention of the Immigration Act, including a prohibited person.<sup>156</sup>

---

148 The SAHRC also favours such a body handling complaints and being empowered to litigate individual cases.

149 The UN Working Group noted that it was almost impossible for persons fleeing persecution to claim refugee status in detention and that asylum seekers had been arrested, sent to Lindela and deported without recourse (para. 79..

150 Refugees Act s 29(1) and Immigration Act s 34(1)(d). The Refugees Act provides that detention must be "reasonable" and should not be for longer than 30 days unless reviewed by a judge – s 29(1).

151 The UN found that, in a reversal of the onus of proof, a person could be arrested on the grounds that he or she is "not carrying identity documents, has a particular physical appearance, does not speak any of the main national languages fluently, or fits a profile of suspected undocumented migrants" (UN Report, 2005, para. 49, p.15). Human Rights Watch has found that persons with dark skin or those who do not "sound" South African – including asylum seekers with valid documentation – are particularly vulnerable (HRW, 2005 p.36 and pp. 39-40). Legally established South Africans and foreigners (from other African countries) have had residence papers destroyed and have even been detained for forced deportatio. ( Masuku, 2006).

152 HRW stated that, "The number of deportations from South Africa has grown significantly in recent years, as Department of Home Affairs (DHA) statistics indicate: 44,225 (1988), 96,515 (1993), 151,653 (2002), approximately 155,000 (2003), 167,137 (2004); although not made available to us, we were informed that there were still higher numbers for 2005." (HRW, 2006,) [http://hrw.org/reports/2006/southafrica0806/5.htm#\\_Toc142188103](http://hrw.org/reports/2006/southafrica0806/5.htm#_Toc142188103)). Also, South Africa deported mor. than 97,433 Zimbabweans in 2005, compared with 72,112 in 2004. The Department of Home Affairs reported that 51,000 illegal Zimbabweans were deported between January and June of 2006, (Sunday Times, 23 July 2006).

153 Immigration Act, s 34(1)(e).

154 Immigration Act, s 34(1)(e) and Immigration Regulations, s 28(5) and Annexure B.

155 Refugees Act, s 29(1).

156 Immigration Act, as amended by Immigration Amendment Act, Definitions and Interpretations. Prohibited persons include "anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends."

Anyone who fails to provide valid documents identifying him or herself as a citizen, permanent resident or legal foreigner can be arrested without a warrant by a police or immigration officer and detained in order to determine identity.<sup>157</sup> Before detaining, the police or immigration officer is supposed to take "reasonable steps" to ascertain legal status.<sup>158</sup> Upon detaining an individual on suspicion of being an illegal immigration, police must issue an affidavit specifying reason for arrest and must turn the individual over to an immigration officer within 12 hours.<sup>159</sup> Persons detained for purposes of verification of identity or status must be released within 48 hours.<sup>160</sup>

Illegal foreigners may be detained pending deportation at a "place administered by the Department of Home Affairs".<sup>161</sup> Detention for deportation purposes may not exceed 30 days without a warrant. The court can extend the detention for up to 90 days.<sup>162</sup> A person detained for deportation must however be informed in writing of the decision to deport and of their right to appeal under the Act.<sup>163</sup> The person may request confirmation of the decision to detain by a court warrant. If not issued after 48 hours, the person must be released.<sup>164</sup> The detained person must be informed of both of these rights.<sup>165</sup>

---

157 s 41(1). It is an offence to enter, remain in or depart from South Africa in the country without the proper permit and papers (as provided for under the Act) (s 49(1)(a)).

158 Immigration Act, s 41(1). This includes accessing relevant documents that may be readily available, contacting relatives or other persons or accessing Home Affairs records. See Immigration Regulations, s 32. The Immigration Regulations came into force on 1 July 2005.

159 Immigration Regulation No. 487, under Immigration Act, regulation 43(2).

160. s 34(2).

161 s 34(1), Immigration Regulations, s 28(1).

162 s 34(1)(d). The Immigration Regulations require an immigration officer intending to apply for the extension of the detention period to give written notice to the detainee of his or her intention within 20 days following the detainee's arrest, to provide the detainee an opportunity to make representations in this regard within three days of receiving the notice, and within 25 days following the arrest of the detainee, to submit an application with the court clerk for the extension of the period of detention. See s 34(1)(d) and Immigration Regulations, s 28(4).

163 s 34(1)(a).

164 s 34(1)(b).

165 s 34(1)(c).



# 5 PART 5: MODELS AND RECOMMENDATIONS

## Conclusion and recommendations

OPCAT implementation should form part of a package of measures to implement South Africa's international and domestic legal obligations to prevent and punish torture and ill-treatment. OPCAT has come into force at a critical time, internationally and nationally.

Contrary to assumptions that torture disappeared along with the end of apartheid, reports indicate that the practice continues today in South Africa as in many other countries – in prisons, police stations, psychiatric and children's institutions.

Increasingly, attempts are made to justify torture on the basis that it is a "lesser evil" than other crimes. The USA has attempted to justify increasingly coercive interrogation methods and to drastically restrict the definition of torture as part of its "war on terror". This has set the tone for a changing and increasingly harsh international climate that has already affected law and practice in many jurisdictions.<sup>166</sup>

The utilitarian argument in favour of torture may hold particular sway in South Africa given dominant concern about violent crime levels dominate and must be vigorously challenged.

## Summary of recommendations

### ■ Recommendation to the State: Ratify OPCAT

### ■ Recommendation to the State: Take comprehensive measures to address torture

South Africa must avoid being influenced by both a hardening international climate and domestic pressure to tackle crime into adopting a very restrictive definition of torture or otherwise restricting the implementation of the CAT.

OPCAT implementation should form part of a package of measures to prevent, investigate and punish torture and ill-treatment.

South Africa's other obligations under the UN Convention against Torture should be implemented as a priority, including:

- Criminalisation of torture.
- Mandatory prompt, impartial investigations of all incidents of torture and ill-treatment where reasonable ground exists.<sup>167</sup>
- Constant review of custody rules and practice for all those under any form of detention, arrest or imprisonment.<sup>168</sup>
- The right of individuals to complain about torture or ill-treatment to competent authorities and for prompt, impartial investigation.<sup>169</sup>
- The right to legal redress including compensation and rehabilitation.<sup>170</sup>
- Training on the prohibition against torture for all involved in the custody, interrogation or treatment of anyone subject to arrest, detention or imprisonment.<sup>171</sup>

### ■ Recommendation to civil society and media: Place torture back on the national agenda

Torture must be put back on the public agenda. Increasingly restrictive approaches to defining torture and ill-treatment should be vigorously challenged using utilitarian, moral and legal arguments. The assumption that torture has completely disappeared must be challenged. The occurrence of torture outside of police stations or prisons should be highlighted. In order to pave the way for a constructive relationship between the state and NPMs, publicity campaigns should explain OPCAT's key features (including requirements to give unconditional access). The first NPM report produced will have huge symbolic importance in establishing the NPM/s as a credible body or bodies able to improve conditions in detention and should be widely publicised.

---

<sup>166</sup> In the UK for example, a government amendment to a terrorism bill drafted in the aftermath of the London bombings of July 2005 (rejected by the House of Commons) proposed that persons detained on suspicion of having conducted, or been engaged in planning, terrorism crimes should be detained for up to 90 days without charge. An amendment finally voted through permitted 28 days of detention without charge, thereby doubling the maximum 14 days detention without charge permitted under the Terrorism Act 2000. The Terrorism Act became law on 30 March 2006. Even persons suspected of the serious crimes of murder, rape and complex fraud may only be detained for four days without charge.

<sup>167</sup> Article 12.

<sup>168</sup> Article 11.

<sup>169</sup> Article 13.

<sup>170</sup> Article 14.

<sup>171</sup> Article 10(1).

## ■ **Recommendation to the State and NPMs: Ensure NPMs are effective & functionally independent**

The state must ensure the functional independence and effectiveness of NPMs. It should focus in particular on the following:

### **Requirement 1: Use OPCAT to strengthen existing oversight mechanisms**

OPCAT implementation should be carried out in conjunction with a simultaneous review and strengthening of existing institutions and mechanisms.

### **Requirement 2: Appoint the right people**

Appointees must be people of fiercely independent integrity and resilience, capable of firmness where required. Appointees must be capable of challenging the authorities while maintaining a courteous and constructive dialogue with the State.

### **Requirement 3: Ensure funding is adequate**

Funding must be sufficient. Current institutions are already struggling with resources allocated and will not be able to take on additional functions without increased resources.

### **Requirement 4: Develop minimum standards for inspections**

NPMs should all use a coherent methodology and standards. The norms or standards to be applied by NPMs must be developed as a priority in conjunction with the SPT.

Minimum standards must be developed with a view to preventing torture and ill-treatment. The mandate of NPMs should concern anything that could have an impact on this. The state should consult widely in order to develop minimum standards; with the SPT, worldwide experts on torture and the CPT. A flexible approach should be adopted to the development of minimum standards, with regard had to the evolving case law, findings and standards of international and regional human rights bodies, treaties and courts.<sup>172</sup>

NPMs should be free to use the terms torture and ill-treatment in a manner that is not consistent with domestic criminal law (including the Combating of Torture bill) and boundaries should not be placed on the development of their approach to torture and ill-treatment.

### **Requirement 5: Use experts**

NPM members should possess special competence in relevant areas. NPM delegations should be free to involve outside experts in its visits.

### **Requirement 6: Ensure relationship with the state has maximum impact**

Visits in themselves may achieve little. What happens after them is vital as:

*[V]isits themselves are unlikely to prevent torture and inhuman or degrading treatment from occurring, although doubtless they will exercise a certain deterrent function. The real purpose of the visit is to pave the way for a dialogue with the state concerned. (Morgan et al., 2001, p.29)*

NPMs must ensure their visits have maximum impact. They must communicate the results of visits to all levels of state authorities promptly, including via immediate oral feedback to the authorities in charge of the detention centre. Issues of access must be agreed before visits are undertaken.

States Parties are required to publish the annual reports of NPMs under Article 16(1) and this must happen promptly. Unlike the SPT, NPMs are not required to communicate findings to States Parties confidentially (Article 23). South Africa should therefore undertake to publish detailed individual inspection reports (translated into relevant South African languages) which identify root causes of problems, formulate SMART recommendations, set priorities and highlight best practice (MDAC, 2006, p.11).

The State should respond proactively and proactively to reports and report on action taken to implement recommendations.

All the above should be accomplished while maintaining confidentiality and protecting privacy of detainees. Detainees and others must be protected from retaliation (whether real or perceived) and other sanctions. A discussion should take place between the state, SPT, civil society and NPMs to determine the scope of the Article 21(2).

### **Requirement 7: Coordinate activities and involve civil society**

The state should ensure that NPMs co-operate in order to be effective. NPMs should involve and cooperate with civil society

### **Requirement 8: Audit all places of detention in South Africa**

An audit should be conducted of all detention centres in South Africa.

---

<sup>172</sup> Relevant case law should include, inter alia: the UN Committee against Torture, the ECHR, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on Torture, the UN Human Rights Committee, the African Commission on Human Rights, the Special Rapporteur on Prisons and Conditions of Detention in Africa, the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights. Guidelines to be considered should include: the UN Principles and Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Istanbul Protocol"), the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the "Robben Island Guidelines"), the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, the UN Standard Minimum Rules for the Administration of Juvenile Justice and the European Prison Rules.

## National Preventive Mechanism Models

- This section presents four suggested alternative models for consideration for a national preventive mechanism/s. Whichever model is chosen.
- Key recommendations outlined above should be addressed to ensure functional independence and effectiveness.
- Existing oversight institutions should be strengthened as part of OPCAT implementation. The success of the format adopted will depend on how current institutions function.
- A package of measures to fulfil South Africa's legal obligations to prevent, investigate and criminalise torture should be implemented.
- Selection of NPM/s must involve consultation, coordination and cooperation. Support for the selected institution/s must be earned.

### MODEL 1: SAHRC COORDINATES EXISTING INSPECTORATE BODIES

- SAHRC co-ordinates existing mechanisms. A funded secretariat is established and dedicated to administration, documentation and support, arranging and preparing for visits, recruiting ad hoc experts, receiving communication and communicating with the SPT. The SAHRC develops minimum standards. The secretariat would take the lead in developing and disseminating minimum standards and providing technical expertise.
- Existing mechanisms carry out visits.
- The JIOP's remit is broadened to cover other forms of detention. Alternatively, the SAHRC or a new body could take responsibility for these areas.

#### Advantages:

- Opportunity to proactively strengthen existing institutions.
- Coherent development of minimum standards and methodology.
- Maintains and develops existing institutional expertise.

#### Challenges:

- Co-ordination of different inspectorate bodies.
- Funding to ensure adequate resourcing needed, particularly for JIOP.
- Perceived lack of credibility of some current oversight mechanisms.
- Legal reform required to support its establishment.

### MODEL 2: DESIGNATING A SINGLE BODY, BY EXTENDING THE JUDICIAL INSPECTORATE'S REMIT

- The remit of the JIOP is extended to encompass all forms of detention.

#### Advantages:

- Opportunity to proactively strengthen existing institutions.
- Core function of JIOP relates closely to OPCAT.
- Preventing overlapping mandates with a single body.
- Coherent development of standards/methodology.
- Use of existing institutional expertise.
- Existing JIOP legislation facilitates use of multi-disciplinary experts.

#### Challenges:

- Existing funding and resources would need to be increased.
- Functional independence as regards funding.
- Internal restructuring may be required.
- Legal reform required.

### **MODEL 3: CREATION OF NEW INDEPENDENT INSPECTORATE**

- A new inspectorate is created dedicated solely to fulfil OPCAT requirements.
- The body employs ad hoc expert individuals and bodies.
- JIOP is tasked with dealing with prisoners' complaints only.

#### **Advantages:**

- Addressing concern regarding functional independence of existing bodies.
- Increasing existing institutions capacity.
- Coherent development of standards/methodology.

#### **Challenges:**

- Difficulties in building support and credibility for a new institution.
- Funding a new institution a political challenge.
- Losing the opportunity to strengthen existing institutions.
- Requires legal reform.

### **MODEL 4: SAHRC COORDINATES INDEPENDENT EXPERTS**

- Creation of SAHRC secretariat with functions outlined in Model 1.
- Visits undertaken by independent experts rather than existing institutions on a contract basis or grant system.
- Wide-ranging experts cover all relevant sectors (e.g. criminal justice, forensic medicine, psychiatry and mental health, child care, education and gender).

#### **Advantages:**

- Flexibility to engage appropriate, wide-ranging experts.
- Coherent development of standards/methodology.
- Dealing with issues of geographical reach.
- Cost-effective.
- Bypassing current structural weaknesses of institutions.
- Proactive means to involve civil society.

#### **Challenges:**

- Strong secretariat required.
- Loss of "critical friend" role for civil society.
- Losing opportunity to strengthen existing inspectorates.
- Risk of lack of institutional memory.
- Other costs (for example secretariat and existing institutions) continue.

Finally, although useful lessons can be learnt from international and national visiting mechanisms, the model that South Africa adopts should not be imported wholesale. As the UN High Commissioner of Human Rights has stated:

*It is important to stress ... that in the course of its involvement in the work of national institutions, the United Nations has come to realize that no single model of national institution can, or should, be recommended as the appropriate mechanism for all countries to fulfil their international human rights obligations. Although each nation can benefit from the experience of others, national institutions must be developed taking into account local cultural and legal traditions as well as existing political organization (OHCHR, 2006).*

# 5 APPENDICES

## Abbreviations

APT	Association for the Prevention of Torture
CAT	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CJB	Child Justice Bill
CPT	European Committee for the Prevention of Torture
CSPRI	Civil Society Prison Reform Initiative
DQAP	Departmental Quality Assurance Process
ECPT	European Convention for the Prevention of Torture
ICD	Independent Complaints Directorate
ICRC	International Committee of the Red Cross
IPV	Independent Prison Visitors
JIOP	Judicial Inspectorate of Prisons
NPM	National Preventive Mechanism
MEC	Member of Executive Council
MHRB	Mental Health Review Boards
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the UN Convention against Torture
QAP	Quality Assurance Process
RCT	Rehabilitation and Research Centre for Torture Victims
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SAPS	South African Police Service
SPT	Sub-Committee for the Prevention of Torture
UN	United Nations
UNCAT	UN Committee against Torture

## List of References

- Allden, Kathleen. (2005). Torture: Psychological assessment, in *The Encyclopaedia of Forensic and Legal Medicine*. Academic Press.
- Altbeker, A. (2005). *The dirty work of democracy – a year on the streets with the SAPS*. Cape Town: Jonathan Ball Publishers.
- Amnesty International. (1997). *Refugees: human rights have no borders*. London: Amnesty International.
- Amnesty International. (1998). *Fair trials manual*. London: Amnesty International.
- Amnesty International. (2000). *Take a step to stamp out torture*. Oxford, United Kingdom: Alden Press.
- Amnesty International. (2001). *End impunity: Justice for the victims of torture*. Oxford, United Kingdom: Alden Press.
- Amnesty International. (2001). *Killings and violence by police: how many more victims?* [On-line]. Available Internet: <http://web.amnesty.org/library/index/engamr380032001>.
- Amnesty International. (2002). *Bulgaria: far from the eyes of society, systematic discrimination against people with mental disabilities*. [On-line]. Available Internet: <http://www.amnesty.org/library/index/ENGEUR150052002>
- Amnesty International. (2003(a)). *The pain merchants: security equipment and its use in torture and other ill-treatment*. [On-line]. Available Internet: <http://www.amnesty.org/library/In dex/ENGACT400082003>
- Amnesty International. (2003(b)). *Preventing torture worldwide – the Optional Protocol to the Convention against Torture*. [On-line]. Available Internet: <http://www.amnesty.org/library/print/ENGIOR510022003>
- Amnesty International. (2004(a)). *Romania: urgent reforms needed of psychiatric hospitals*. [On-line]. Available Internet: <http://www.amnesty.org/library/index/ENGEUR390032004>.
- Amnesty International. (2004(b)). *It's in our hands: stop violence against women*. Oxford, United Kingdom: Alden Press.
- Amnesty International. (2004(c)). *Preventing torture at home: a guide to the establishment of National Preventive Mechanisms*. [On-line]. Available Internet: <http://web.amnesty.org/library/In dex/ENGIOR510042004>.
- Amnesty International. (2005). *Torture and ill-treatment: the arguments*. [On-line]. Available Internet: <http://web.amnesty.org/pages/stoptorture-arguments-eng>.
- Amnesty International. (2006). *Annual Report*. Oxford, United Kingdom: Alden Press.
- Amnesty International. (2006). *Making the prevention of torture and ill-treatment a priority*. [On-line]. Available Internet: <http://web.amnesty.org/library/In dex/ENGACT400072006?open&of=ENG-313>
- Amnesty International. (2006). *Elections to the Human Rights Council - Background information on candidate countries*, AI Index: IOR 41/006/2006, 1 May 2006. [On-line]. Available Internet: [www.amnesty.org](http://www.amnesty.org)
- Amnesty International. (2006). *South Africa: Government must investigate circumstances of "disappeared" Pakistani's transfer* (Press Release), AI Index: AFR 53/001/2006 (Public). [On-line]. Available Internet: [www.amnesty.org](http://www.amnesty.org)
- Association for the Prevention of Torture. (2001). *Compilation under international law: definitions of torture*. [On-line]. Available Internet: <http://www.ap.t.ch/un/definitions.html>
- Association for the Prevention of Torture. (2002). *Monitoring places of detention: a practical guide for NGOs*. Geneva: APT.
- Association for the Prevention of Torture. (2004). *Monitoring places of detention: a practical guide*. Geneva: APT.
- Association for the Prevention of Torture. (2006). *Establishment and Designation of National Preventative Mechanisms under the Optional Protocol to the UN Convention against Torture*. Geneva: Association for the Prevention of Torture.
- BBC News. (2005, 15 June). *Concern over prison suicide spate*. BBC News. [On-line]. Available Internet: <http://www.newsvote.bbc.co.uk/mpapps/pagetools/print.news.bbc.co.uk/1/hi/uk/4096327.stm>
- Bruce, D. (2003) Gripes or Grievances? What the Independent Complaints Directorate statistics tell us (or not). *SA Crime Quarterly* 4.
- Bruce, D. (2006). *Staggering under the burden: ICD policies on the receipt of complaints and on investigations and their negative impact on the ICD, on public confidence and on police discipline*. Johannesburg: Centre for the Study of Violence and Reconciliation [On-line]. Available Internet: <http://www.csvr.org.za>
- Cawthra, G. (2005). *Security Governance in South Africa*, paper for the Friedrich Ebert Stiftung Security Governance Project.
- Centre for Human Rights. (2005). *Compendium of key human rights documents of the African Union*. Pretoria: Pretoria University Law Press.
- The Centre for Child Law. (2003). *Child Justice Bill Synopsis*. Pretoria: Centre for Child Law. [On-line]. Available <http://www.childlawsa.com/docs/CJB%20synopsis.PDF>
- Child Justice Alliance. (2003). *Fact sheet on the Child Justice Bill*. [On-line]. Available Internet: <http://www.childjustice.org.za/downloads/Fact%20Sheets.doc>
- Child Justice Alliance. (2003). *Submission on the Child Justice Bill*. [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/CJA.htm>.
- Cohen, S. (2001). *States of denial: knowing about atrocities and suffering*. Cambridge, England: Polity.
- Commonwealth Human Rights Initiative. (2005). *Police Accountability: Too important to neglect, too urgent to delay*. [On-line]. Available Internet: [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2005/default.htm](http://www.humanrightsinitiative.org/publications/chogm/chogm_2005/default.htm)
- Community Law Centre. (2003). *Submission on the Child Justice Bill*. [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/CLCwrittensub.htm>
- Council of Europe. (2002). *Preventing ill treatment: an introduction to the CPT*. Strasbourg, France: Council of Europe.

CSIR Crime Prevention Centre. (2003). Submission on the Child Justice Bill. [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/csir.htm>

Centre for the Study of Violence and Reconciliation. (2003). Child Justice Bill (2002). [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/CSVR.htm>

Centre for the Study of Violence and Reconciliation. (2006). Submission by the Centre for the Study of Violence and Reconciliation to the United Nations Committee against Torture in response to "Republic of South Africa – First Country Report on the Implementation of the Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment of Punishment" dated 2002. Johannesburg: Centre for the Study of Violence and Reconciliation.

Cullinan, K. (2005). Bara psychiatric staff do their best to stabilise acute patients. [On-line]. Available Internet: [www.health-e.org.za](http://www.health-e.org.za)

Department of Health (Kwa-Zulu Natal). (2005). Establishment of Mental Health Review Boards. [On-line]. Available Internet: <http://www.kznhealth.gov.za/mediarelease/Mentalhealth.pdf>

Department of Health (Western Cape). (2006). Valkenberg Hospital: the new admission unit. [On-line]. Available Internet: <http://www.capegateway.gov.za/eng/pubs/news/2006/may/133552>

Department of Justice and Constitutional Development. (2001). Interim protocol for the management of children awaiting trial. Pretoria: Department of Justice and Constitutional Development.

Department of Social Development. (2006(a)). The Department of Social Development's Strategic Plan 2006/09. [On-line]. Available Internet: [http://www.socdev.gpg.gov.za/strategic\\_plan.htm](http://www.socdev.gpg.gov.za/strategic_plan.htm)

Department of Social Development. (2006(b)). Minister Skweyiya introduces Children's Amendment Bill, Media Statement, 25 July 2006. [On-line]. Available Internet: <http://www.socdev.gov.za/media/2006/july/cbill.htm>

De Rebus – South African Attorneys' Journal (November 2005). LSSA prison visits hailed as 'sterling work'. [On-line]. Available Internet: <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>

De Vos, P. (2003). Prisoner's rights litigation in South Africa since 1994: a critical evaluation. Cape Town, South Africa: CSPRI.

Dissel, A. (2003). A review of civilian oversight over Correctional Services in the last decade. Cape Town, South Africa: CSPRI.

European Committee on the Prevention of Torture. (2002). Report on the 2001 visit to Greece. [On-line] Available internet <http://www.cpt.coe.int/en/states/grc.htm>

European Committee on the Prevention of Torture. (2002). Report on the 1999 visit to Hungary. [On-line] Available internet <http://www.cpt.coe.int/en/states/hun.htm>

Fernandez, L. (2003). Optional Protocol to the Convention against Torture and Other Cruel and Inhumane Treatment (Research Paper No. 2). Cape Town: CSPRI. [On-line]. Available Internet: [http://www.communitylawcentre.org.za/cspri/publications/publications1/OPCAT\\_No\\_2.pdf](http://www.communitylawcentre.org.za/cspri/publications/publications1/OPCAT_No_2.pdf)

Fick, N. (2006). Enforcing fear: police abuse of sex workers when making arrests. SA Crime Quarterly 16.

Gallinetti, J. (2004). Report on the evaluation of the Independent Prison Visitors (IPV) system. Cape Town, South Africa: CSPRI.

Gear, S. and Ngubeni, K. (2005). Daai Ding: Sex, Sexual Violence and Coercion in Men's Prisons. Centre for the Study of Violence and Reconciliation: Johannesburg. [On-line]. Available Internet: <http://www.csvr.org.za/papers/papsgkn.htm>

Giffard, C. (2000) The torture reporting handbook. Essex, United Kingdom: the Human Rights Centre, University of Essex.

Government of South Africa. (2005). Initial periodic report to the UN Committee against Torture on South Africa's obligations under the UN Convention against Torture. [On-line]. Available Internet: <http://www.ohchr.org/english/bodies/cat/cats37.htm>

Government of South Africa, A National Human Resources Plan for Health (2006)

Council of Europe, Directorate of Human Rights (ed). (1969). The Greek case Yearbook of European Convention on Human Rights, Vol. 12 (1969). Brill.

Hacker, K. (2006). Report on the inspection of Johannesburg prison on 9 December 2005. Copy on file with author. Summary report [On-line]. Available Internet: <http://www.jaa.org.za/content/index.cfm?navID=4&itemID=116>

Hari. J. (2006, July 3). The real prisons scandal is yet to come. The Independent.

Hooper, J. (accessed 13 September 2006) Forensic Psychiatry in South Africa. [On-line]. Available Internet: <http://bama.ua.edu/~jhooper/southaf.html>

Human Rights Committee. (2001). Access to Justice: Focus on Refugee and Asylum Seekers. HRC Quarterly Review, March.

Human Rights Watch. (1994). Prison conditions in South Africa. [On-line]. Available Internet: <http://www.hrw.org/reports/1994/southafrica/1.htm>

Human Rights Watch. (1998). Prohibited Persons: Abuse of undocumented Migrants, Assylum-Seekers, and refugees in South Africa, Washington, USA [On-line] Available internet: <http://www.hrw.org/reports98/sareport/>

Human Rights Watch. (2001). Protectors or pretenders? Government human rights commissions in Africa. [On-line]. Available Internet: <http://www.hrw.org/reports/2001/africa.html>

Human Rights Watch (2001). South Africa: sexual violence rampant in schools. [On-line]. Available Internet: [http://www.hrw.org/english/docs/2001/03/27/safric324\\_txt.htm](http://www.hrw.org/english/docs/2001/03/27/safric324_txt.htm)

Human Rights Watch. (2005). Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg. [On-line]. Available Internet: <http://hrw.org/reports/2005/southafrica1105/>

Human Rights Watch. (2006). Unprotected Migrants – Zimbabweans in South Africa's Limpopo Province Vol 18 (6A). [On-line]. Available Internet: <http://www.hrw.org/english/docs/2006/southafrica0806/>

Independent Complaints Directorate. (1997). Annual Report 1996/7. South Africa: ICD. [On-line] Available internet: <http://www.icd.gov.za/reports/index.html>

Independent Complaints Directorate. (2001). Report on the 16 days of activism of no violence against women 25 November to 10 December 2001. [On-line]. Available Internet: <http://www.icd.gov.za/reports/index.html>

- Independent Complaints Directorate. (2002). Paper delivered at a workshop for the drafting of a plan of action to prevent torture and ill treatment in Africa, Cape Town. [On-line]. Available Internet: <http://www.icd.gov.za/reports/2002/torturepaper.htm>
- Independent Complaints Directorate. (2003). Annual Report 2002/3. South Africa: ICD. [On-line]. Available Internet: <http://www.icd.gov.za/reports/index.html>
- Independent Complaints Directorate. (2004). Annual Report 2003/4. South Africa: ICD. [On-line]. Available Internet: <http://www.icd.gov.za/reports/index.html>
- Independent Complaints Directorate. (2005). Annual Report 2004/5. South Africa: ICD. [On-line]. Available Internet: <http://www.icd.gov.za/reports/index.html>
- Independent Complaints Directorate. (2006)(a). About the ICD. [On-line]. Available Internet: <http://www.icd.gov.za/about/brochure.htm>
- Independent Complaints Directorate. (2006)(b). Analysis of complaints received by the ICD. [On-line]. Available Internet: <http://www.icd.gov.za/reports/2006/Complainants%27%20level%20of%20satisfaction%20report%20.pdf>
- Independent Complaints Directorate. (2006)(c). ICD Strategic Plan 2006 - 2009. [On-line]. Available Internet: [http://www.icd.gov.za/documents/2006/StragicPlan2006\\_2009.pdf](http://www.icd.gov.za/documents/2006/StragicPlan2006_2009.pdf)
- Independent Police Complaints Authority. (2006)(d) What we do [On-line]. Available Internet: [http://www.ipcc.gov.uk/index/about\\_ipcc/what\\_do.htm](http://www.ipcc.gov.uk/index/about_ipcc/what_do.htm)
- Jagwanth, S. (2004). A review of the Judicial Inspectorate of Prisons in South Africa. Cape Town, South Africa: CSPRI.
- Jali, T. S. B. (Judge). (2006). Commission of Inquiry into Allegations of Corruption, Maladministration, Violence or Intimidation within the Department of Correctional Services, Approved by the President of the Republic of South Africa by Proclamation No 135 of 2001, Final Report [On-line]. Available internet: <http://www.dcs.gov.za/Documents/Jali/JALI%20COMMISSION.pdf>, accessed on 7 February 2007.
- Jefferson, A., Rytter, T., Worm, L. and L. Mandel (Eds.). (2005). Preventing Torture in places of detention through systems of regular visits – monitoring, documentation and research, conference report, International Conference, 25-27th May 2005. Rehabilitation and Research Centre for Torture Victims. Copenhagen, Denmark: RCT.
- Kale, R. (1995). South Africa's Health: new South Africa's mental health. British Medical Journal, 310, 1254-1256.
- Kwa-Zulu Natal Campaign Against Torture. (2002). Report for the KwaZulu Natal Provincial Office of the South African Police Services on the findings of the pilot project to monitor six police stations in the Durban area for incidents of torture. Durban, South Africa. (unpublished copy on file with author).
- Long, D. (2002). Guide to jurisprudence on torture and ill-treatment – Article 3 of the European Convention for the Protection of Human Rights Geneva: APT.
- Lue-Dugmore, M. (2003). South Africa: An examination of institutional models and mechanisms responsible for: the administration of justice and policing; the promotion of accountability and oversight; and a review of transformation strategies and initiatives developed in relation to the administration of justice and safety and security. Cape Town: Institute of Criminology, University of Cape Town.
- Masuku, T. (2006). Targeting Foreigners: Xenophobia among Johannesburg's police, ISS Crime Quarterly no. 15, 19-26.
- McGraw, E. (2005). A merger mystery. Inside Time, May 2005.
- McQuoid-Mason, D.J. and Dada, M.A. (2004). Guide to forensic medicine and medical law. Durban: Independent Medico-Legal Unit.
- Mental Disability Advocacy Centre. Inspect! Inspectorates of Mental Health and Social Care Institutions in the European Union 2006. [On-line]. Available internet: <http://www.mdac.info/conference/documents/Inspect%20report.pdf>
- Ministry of Health. (2006). Decisive actions against lack of human rights for mental health, press release, 13 July 2006. [On-line]. Available: <http://www.doh.gov.za/mediaroom/index.html>
- Mistry, D. and Klipin, J. (2004(a)). South Africa: strengthening civilian oversight of police in South Africa: the national and provincial secretariats for security. Institute of Security Studies, Occasional Paper 91.
- Mistry, D. and Klipin, J. (2004(b)). Keeping the police in check: Assessing the secretariats of safety and security. SA Crime Quarterly, No 10 December 2004.
- Mistry, D. and Lue-Dugmore, M. (2006). Overview of the Independent Complaints Directorate in light of proposals to restructure the Directorate. Institute of Security Studies. [On-line]. Available Internet: <http://www.iss.org.za>
- Morgan, R. and Evans, M. (2001). Combating torture in Europe: the work and standards of the European Committee for the Prevention of Torture. Germany: Council of Europe Publishing.
- Morgan, R. and Evans, D. (2001). The Prevention of torture in Europe: the CPT's standards on police and pre-trial custody. Geneva: APT.
- Morgan, R. (2006). The utilitarian case for and against torture. Unpublished article on file with author.
- Muntingh, L. and Fernandez, L. (2006). Civil Society Prison Reform Initiative (CSPRI) Submission to the UN Committee against Torture in response to "Republic of South Africa – First Country Report on the implementation of the Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment". Cape Town: CSPRI.
- National Department of Health. (2003). The Mental Health Care Act 2002 – training guidelines for the South African Police Services. [On-line]. Available Internet: [http://www.who.int/mental\\_health/policy/en/training\\_guidelines\\_for\\_south\\_african\\_policy.pdf](http://www.who.int/mental_health/policy/en/training_guidelines_for_south_african_policy.pdf)
- Nevill, C. and Dissel, A. (2006). Children awaiting trial in prison: reversing the trends. Article 40, Volume 8, 11-15.
- NICRO. (2003). Submission on the Child Justice Bill. Bill 49/2002. [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/NICRO.htm>
- Odongo, G. and Gallinetti, J. (2005) The treatment of children in South African prisons – a report on the applicable domestic and international minimum standards. Cape Town, South Africa: CSPRI.
- Office of the High Commissioner for Human Rights (OHCHR). (2006). Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights. [On-line]. Available internet: <http://www.unhchr.ch/html/menu6/2/fs19.htm>

Office of the Inspecting Judge. (undated). Rules Manual, available on line, <http://judicialinsp.pwv.gov.za/DOCUMENTS/manual%20IPV%207th%20Ed1.doc>, accessed on 7 February 2007.

Office of the Inspecting Judge. (2003). Annual Report 2002/2003: Prisoners and Prisons. Cape Town, Judicial Inspectorate of Prisons.

Office of the Inspecting Judge. (2005). Annual Report 2004/2005: Prisoners and Prisons. Cape Town, Judicial Inspectorate of Prisons.

Office of the Inspecting Judge. (2006). Annual Report 2005/2006: Prisoners and Prisons. Cape Town, Judicial Inspectorate of Prisons.

Open Democracy Advice Centre. (2006). Promotion of Access to Information Act. [On-line]. Available internet: <http://www.opendemocracy.org.za/Promotion%20of%20Access%20to%20Information%20Act.pdf>

Parliamentary Monitoring Group (PMG). (2005). Report to the Committee on Safety and Security on Budget Vote 22 of the Independent Complaints Directorate (ICD), [On-line]. Available internet: <http://www.pmg.org.za/docs/2005/050622icd.htm>, accessed on 7 February 2007.

Police Accountability Newsletter. (19 May 2006). Not Surprising Cops Don't Want to be Monitored. [On-line]. Available Internet: [http://www.policeaccountability.co.za/CurrentInfo/ci\\_detail.asp?art\\_ID=580](http://www.policeaccountability.co.za/CurrentInfo/ci_detail.asp?art_ID=580)

Pounder, D.J. (2005). Torture: Physical Findings, *The Encyclopedia of Forensic and Legal Medicine*. Academic Press.

Public Protector. (2001). Report on an investigation into allegations of undue delay, unlawful and improper conduct and prejudice in the rendering of services at Braamfontein refugee reception office (now Rosettenville premises) in terms of section 182 (1) (b) of the Constitution of the Republic of South Africa, Act 108 of 1996, and section 8 (1) of the Public Protector Act, 23 of 1994. [On-line]. Available internet : [http://oldwww.parliament.gov.za/pls/portal30/docs/FOLDER/PARLIAMENTARY\\_INFORMATION/PUBLICATIONS/REFUGEE/A/REFUGEE.DOC](http://oldwww.parliament.gov.za/pls/portal30/docs/FOLDER/PARLIAMENTARY_INFORMATION/PUBLICATIONS/REFUGEE/A/REFUGEE.DOC).

Ramsbotham, D. (6 July 2006). House of Lords Debates – Police and Justice Bill. London: Hansard.

Redress. (2005). Reparation for torture: South Africa. [On-line]. Available Internet: <http://www.redress.org.uk>

RCT. (2005). Regulations Respecting the Laws and Customs of War on Land (1907), Conference Report: Preventing Torture in Places of Detention through Systems of Regular Visits.

Safety and Security Portfolio Committee. (26 October 2006). Independent Complaints Directorate Annual Report: briefing. Minutes of the meeting. Parliamentary Monitoring Group. [On-line]. Available internet: <http://www.pmg.org.za/minutes/20051025-independent-complaints-directorate-annual-report-briefing>.

Safety and Security Portfolio Committee. (2 November 2005). Independent Complaints Directorate Annual Report: briefing continued. Minutes of the meeting. Parliamentary Monitoring Group. [On-line]. Available internet: <http://www.pmg.org.za/minutes/20051101-independent-complaints-directorate-annual-report-briefing-continued>

Sachs, A. (1990). The jail diary of Albie Sachs. London, United Kingdom: Paladin.

Sawyer, J. (2005). Article 3. In Emmerson, B. and Summerskill. (Eds.). Human Rights Practice. London: Sweet and Maxwell.

SayStop Diversion Programme for Young Sex Offenders. (2001). Submission on Child Justice Bill. [On-line]. Available Internet: <http://childjustice.org.za/submissions/SAYstop.htm>

Sloth Nielson, J. (2003). Submission to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill 49/2002 [On-line]. Available Internet: <http://www.childjustice.org.za/submissions/SlothNielsen.htm>

South Africa Government Information. (2006). Health. [On-line]. Available Internet: <http://www.info.gov.za/aboutsa/health.htm>

South African Government Information (2005) [www.info.gov.za/aboutsa/health.htm](http://www.info.gov.za/aboutsa/health.htm)

South Africa Human Rights Commission. (1999). Illegal? Reports into the arrest and detention of suspected undocumented migrants. [On-line; [http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml)].

South Africa Human Rights Commission. (2000). Lindela: At the crossroads for detention and repatriation. [On-line [http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml)].

SAHRC. (2001). Special Report: Findings in relation to Sr Nthadi Kotsi, and the matter of her incarceration in terms of the Mental Health Act. Johannesburg Office. [On-line]. Available internet: [http://www.sahrc.org.za/sahrc\\_cms/downloads/Sr%20Nthadi%20Kotsi.doc](http://www.sahrc.org.za/sahrc_cms/downloads/Sr%20Nthadi%20Kotsi.doc), accessed on 2 February 2007.

Steinberg, J. (2005) Prison overcrowding and the constitutional right to adequate accommodation in South Africa. Johannesburg: Centre for the Study of Violence and Reconciliation. [On-line]. Available Internet: <http://www.csvr.org.za/papers/papjonn2.htm>

Stern, V. (1998). A sin against the future: Imprisonment in the world. London: Penguin.

Sunday Times. (24 July 2006). Refugees Flood in as Mugabe Triumphs.

Svanidze, E. (2007). The Optional Protocol to the UNCAT: Preventive mechanisms and Standards, Background Paper.

The Guardian. (March 17 2006). Time called on inspectors. The Guardian. [On-line]. Available Internet: [www.guardian.org](http://www.guardian.org)

Tutu, D. (Chair) and others. (1998). The Truth and Reconciliation Report. Volume 2. [On-line]. Available Internet: [http://www.doj.gov.za/trc/trc\\_frameset.htm](http://www.doj.gov.za/trc/trc_frameset.htm)

United Nations Committee against Torture. (1998). Concluding Observations: Norway: 27/05/98. [On-line]. Available Internet: <http://www.unhcr.ch/tbs/doc.nsf/0/be1f6de3163484b2c1256bd000576543?Opendocument>

United Nations Committee against Torture. (2002). Conclusions and Recommendations of the Committee against Torture: Luxembourg: 12/06/2002. [On-line]. Available Internet: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3a384083c432eff1802566020032e8e8?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3a384083c432eff1802566020032e8e8?Opendocument)

United Nations General Assembly Resolution A/RES/57/199 09/01/2003.

United Nations High Commissioner for Human Rights. (1996). International human rights standards for law enforcement: a pocket book on human rights for the police. Geneva: United Nations.

United Nations Working Group on Arbitrary Detention. (2005). Report of the Working Group on Arbitrary Detention, 62nd session of Commission on Human Rights, Visit to South Africa (4-19 September 2005), E/CN.4/2006/7/Add.3 29 December 2005. [On-line]. Available Internet: <http://www.un.org/>

US Department of State. (2006). Country reports on human rights practices – 2005 South Africa. [On-line]. Available Internet: <http://www.state.gov/g/drl/rls/hrppt/2005/61593.htm>

Vogt, S. and Wadham, J. (2003). Deaths in custody: redress and remedies. London: Liberty.

Wendland, L. (2002). A handbook on state obligations under the UN Convention against Torture. Geneva: APT.

World Medical Association. (1995). Statement on ethical issues concerning patients with mental illness. In (Ed). Amnesty International. (2000). Ethical codes and declarations relevant to the health professions – a compilation of selected ethical and human rights texts. (4th Ed.). London: Amnesty International.

South African Police Service. (1999). Policy on the Prevention of Torture and the Treatment of Persons in the Custody of the SAPS.

## Legislation and International Instruments

African (Banjul) Charter on Human and People's Rights, adopted by the Organisation of the African Union June 27, 1981. [On-line]. Available internet: [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) (accessed 2006, July 10)

African Commission on Human and People's Rights. (2003). Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa (The Robben Island Guidelines). Geneva: Abrax.

Charter of the International Military Tribunal at Nuremberg (1945), signed 8 August 1945.

Child Care Act 1983 as amended.

Child Justice Bill B49 of 2002.

Children's Act 38 of 2005.

Children's Amendment Act 41 of 2007.

The Constitution of the Republic of South Africa Act No. 108 of 1996.

Council of Europe (2006) European Prison Rules, (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

The Correctional Services Act 111 of 1998 and Correctional Services Amendment Act 25 of 2008.

Criminal Procedure Act 51 of 1977.

The Extradition Act of 67 1962, as amended in 1999.

Immigration Act 13 of 2002, as amended by the Immigration Amendment Act 19 of 2004, and Immigration Amendment Act 3 of 2007.

Instructions for the Government of the Armies of the United States in the Field (Lieber Code) (24 April 1863).

Interim Constitution (Constitution of the Republic of South Africa, 1993).

National Prosecuting Authority Amendment Bill, 23 of 2008.

Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002), Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, Entered into force on 22 June 2006.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

The Refugees Act 130 of 1998.

Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

South African Police Service Amendment Act 83 of 1998.

South African Police Services Disciplinary Regulations, 2006 (GN R643 in GG 28985 of 3 July 2006).

South African Police Service Amendment Bill, 30 of 2008.

The Terrorism Act (2006), United Kingdom Act of Parliament.

United Nations. (1955). United Nations Standard Minimum Rules for the Treatment of Prisoners. adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977). [On-line]. Available Internet: [http://www.unhcr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhcr.ch/html/menu3/b/h_comp34.htm)

United Nations Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The "Beijing Rules"), adopted by General Assembly Resolution 40/33 of 29 November 1985.

United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, General Assembly Resolution 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

## Cases

### *South African cases*

*Centre for Child Law and Others (Applicants) v MEC for Education and Others (Respondents)*, Case Number 19559/06), decision of 30 June 2006, Pretoria High Court

*Centre for Child Law v The Minister of Home Affairs* (2004) SA 50 (T)

*Centre for Child Law and Others v MEC for Education and Others* (2008) SA 223 (T)

*Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)

*S v Madikane and Others* (1990) SA 377

*S v Makwanyane* (1995) (3) SA 391 (CC)

*S v Williams* (1995) (3) SA 632 (CC)

### *International cases:*

*Dougoz v. Greece*, ECtHR No. 40907/98, 06/03/2001.

*GB v Bulgaria*, ECtHR No. 42346/98, 11/03/2004.

*Karalevičius v Lithuania* ECtHR No. 53254/99, 07/07/2005.

*Ilaşcu and Others v Moldova and Russia* ECtHR. No. 48787/99, 07/07/2004.

*Iorgov v Bulgaria* ECtHR No. 40653/98, 11/03/2004.

*Mouisel v France* ECtHR, No. 67263/91, 14/11/2002.

*Nezmerzhitsky v Ukraine* ECtHR No. 54825/00, 05/04/2005.

*Peers v Greece* ECtHR No. 28524/95, 19/04/2001.

*Price v United Kingdom* No. 33394/96, 10/07/2001.

*Prosecutor vs. Anto Furundzija*, (Case no. IT-95-17/1-AR73), judgment, 10 Dec 1998.

*Soering v UK* ECtHR, No. 14038/88, 07/07/1989.

## List of Interviewees

Interview Director of JIOP (19.02.07) and (19.05.07)

Interview with Commissioner Leon Wessels, South African Human Rights Commission. (18.09.06)

Interview with Deputy Director of Mental Health Services, Gauteng Health Department (13.09.06)

Interview with Duxita-Mistry, researcher (2006)

Interview Dr Zabow, 2006.

Interview with Dr Anne Skelton, Centre for Child Law (August 2006)

Interview Head of ICD, Gauteng Province (2006) and Kwa-Zulu Natal Province

Interview with Alison Tilley COO and Melvis Pieterse, Open Democracy Advice Centre, interview, August 2006

# OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Entry into force 22 June 2006.

## PREAMBLE

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional Protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

## PART I

General principles

### *Article 1*

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

### *Article 2*

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

### *Article 3*

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

### *Article 4*

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

## **PART II**

Subcommittee on Prevention

### *Article 5*

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.
4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee on Prevention may be nationals of the same State.
6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

### *Article 6*

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
  - (a) The nominees shall have the nationality of a State Party to the present Protocol;
  - (b) At least one of the two candidates shall have the nationality of the nominating State Party;
  - (c) No more than two nationals of a State Party shall be nominated;
  - (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

### *Article 7*

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
  - (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
  - (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
  - (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
  - (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:
  - (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
  - (b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;
  - (c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

### *Article 8*

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

### *Article 9*

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if re-nominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

### *Article 10*

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:
  - (a) Half the members plus one shall constitute a quorum;
  - (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
  - (c) The Subcommittee on Prevention shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

## **PART III**

Mandate of the Subcommittee on Prevention

### *Article 11*

The Subcommittee on Prevention shall:

- (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) In regard to the national preventive mechanisms:
  - (i) Advise and assist States Parties, when necessary, in their establishment;
  - (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
  - (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
  - (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;
- (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

## *Article 12*

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

- (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

## *Article 13*

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

## *Article 14*

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:
  - (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
  - (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
  - (c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
  - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;
  - (e) The liberty to choose the places it wants to visit and the persons it wants to interview.
2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

## *Article 15*

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

## *Article 16*

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

## **PART IV**

### National preventive mechanisms

#### *Article 17*

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

#### *Article 18*

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

#### *Article 19*

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

#### *Article 20*

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
- (c) Access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- (e) The liberty to choose the places they want to visit and the persons they want to interview;
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

#### *Article 21*

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

#### *Article 22*

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

#### *Article 23*

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

### **PART V**

Declaration

#### *Article 24*

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

### **PART VI**

Financial provisions

#### *Article 25*

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

#### *Article 26*

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

### **PART VII**

Final provisions

#### *Article 27*

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

#### *Article 28*

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

### *Article 29*

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

### *Article 30*

No reservations shall be made to the present Protocol.

### *Article 31*

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

### *Article 32*

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

### *Article 33*

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

### *Article 34*

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

### *Article 35*

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

### *Article 36*

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State;
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

*Article 37*

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

CENTRE FOR THE STUDY OF VIOLENCE  
AND RECONCILIATION

4th Floor, Braamfontein Centre  
23 Jorissen Street, Braamfontein

P O Box 30778, Braamfontein, 2017

Tel: +27 (11) 403 5650  
Fax: +27 (11) 339 6785

[www.csvr.org.za](http://www.csvr.org.za)



**CSVr**  
The Centre for the Study of  
Violence and Reconciliation