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JUSTICE FORUM

Submission by the Detention Justice Forum to the Portfolio Committee on Justice and Correctional Services on the Correctional Services Amendment Bill

B14-2023

14 July 2023

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Introduction

1. The Detention Justice Forum ("DJF") is a coalition of non-governmental organisations and individuals working to ensure that the rights and well-being of those who are detained are respected and upheld, as enshrined under the South African Constitution, laws, and regional and international human rights norms and standards. Our membership includes organisations with varied individual focuses and degrees of engagement in the penal and broader detention and human-rights sectors. For example, member organisations' *foci* span from direct service provision and (former and current) detainee support and empowerment, to advocacy, legal analysis, litigation, and policy development. Our diversity brings complementary insights and experiences to the table. More information about DJF and our work is available at https://detentionjustice.org.za.

2. The DJF welcomes this opportunity to provide input on the Correctional Services Amendment Bill, B14-2023 (the "Bill"). This Bill seeks to amend the Correctional Services Act 111 of 1998 (the "Act") to give effect to the judgment of *Sonke Gender Justice NPC v the President of the Republic of the Republic of South Africa*[1] (''Sonke Judgment''). This submission sets out our members' views on the Bill for consideration.

3. Our submissions can be summarised as follows:

    a) While this Bill does on the face of it comply with the Sonke Judgment by providing for amendments to sections 88A(1)(b) and 91 of the Act, in the absence of the more comprehensive draft bill on the restructuring of the Judicial Inspectorate for Correctional Services (the JICS Bill) and both Bills being enacted together, this Bill, as a standalone, falls short of providing for the overall functional and operational establishment of the Judicial Inspectorate for Correctional Services ("JICS") as a separate independent body as contemplated by the Sonke Judgment.

    b) The Bill also seeks to amend the provisions on segregation and places an obligation on Department of Correctional Services (DCS) officials to inform inmates of the right to appeal their segregation. Although we welcome the imposition of this obligation on the part of DCS to inform inmates of their right to appeal segregation, the provisions in clause 2(a) require some bolstering as well as clarification. In strengthening the provision, we recommend that emphasis be placed on the fact that the inmate must be informed immediately of their right to appeal. Secondly, provision need to be made for an expedited appeal procedure in cases where an inmate reconsiders their initial position not to appeal. Lastly, the provisions on segregation warrants further investigations on whether the current provision in section 30(5)

[1] *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* (CCT307/19) [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (4 December 2020), accessed here: http://www.saflii.org/za/cases/ZACC/2020/26.html

of the Act allowing for segregation to be extended to 30 days is in compliance with Rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR).[2]

c) Similarly, we submit that the provisions in clause 3(a) of the Bill should be strengthened to ensure that inmates are informed immediately of their right to appeal the use of mechanical restraints. The Committee's attention is also drawn to the provisions enabling the extended use of mechanical restraints even when in segregation. It is proposed that the Committee invites more detailed submissions on the extended use of mechanical restraints and whether this does not violate South Africa's obligations under UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[3] and the UNSMR.

d) We recommend that there should be clear provisions on the appointment criteria, including an appointment and dismissal process of the CEO. This includes referencing the requirements of the candidate's experience, knowledge, a detailed appointment process, term of appointment and dismissal procedure. The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT)[4] is an instructive international instrument in this regard. In terms of OPCAT, personnel appointed as part of the NPM (of which the JICS is part of) must be independent and have the required capabilities and professional knowledge.

e) We commend and support the amendment of section 91 of the Act,[5] however we are concerned this amendment does not sufficiently address the concerns regarding the current financial independence (or lack thereof) of JICS from DCS in that reference is still made to monies being pooled with the DCS departmental vote. There are no guarantees that the monies appropriated by Parliament for JICS will be ringfenced specifically and exclusively for the use of JICS.

f) Although JICS is a part of the National Preventive Mechanism ("NPM"), we note no reference in this Bill to the requirements of the OPCAT, including several areas in terms of the functional and operational independence of JICS which could be further strengthened. There is no specific reference to the role of JICS in the NPM. In the absence of the JICS Bill, it remains difficult to comment on whether JICS role as a part of the NPM has been adequately addressed.

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[2] United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.

[3] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465.

[4] UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199.

[5] i.e. Provisions noting that the expenses of JICS and the remuneration and other conditions of service of members of JICS are defrayed from monies appropriated by Parliament for this purpose; the preparation of and provision of the estimate revenue and expenditure of JICS; and the designation of the CEO as the accounting officer of JICS in terms of the Public Finance Management Act.

g) Regarding the mandatory reporting obligations of the DCS to the Inspecting Judge to investigate or instruct the National Commissioner or any other appropriate authority

i. The list of cases of mandatory reporting needs to be expanded and should not be drafted as a closed list of cases to be reported to the Inspecting Judge.

ii. This provision does not make it mandatory for the Inspecting Judge to investigate the listed mandatory reporting obligations of the DCS, which contain serious human rights violations. The Committee is reminded of South Africa's obligations under UNCAT and in particular Article 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

iii. In comparison to the investigating powers of other similar bodies such as the Independent Police Investigative Directorate ("IPID"), JICS powers appears weak and need to be strengthened. We recommend that JICS be granted similar powers to that of IPID to investigate complaints independently; sufficient legislative authority to make binding recommendations and decisions, as well as monitor the progress in the carrying out of such recommendations and decisions by the DCS. All efforts must be made to ensure that investigations are conducted by impartial and independent authorities, as required by UNCAT.

4. Our submissions are dealt with in detail below.

Part A: Overall comments to the Bill

Use of binary pronouns

5. We note that the Bill uses the gender-binary pronouns of "his" and "her" only. We recommend that this Bill be used as an opportunity to amend the Act to provide for the use of gender non-binary pronouns of "they/them/theirs" throughout the Act.

Interaction between the Bill and the JICS Bill

6. In the Sonke Judgment, the Constitutional Court highlighted the importance of JICS being an independent body, specifically:

> "[52] Independence is an inherent characteristic of a successful oversight, or watchdog, entity and is crucial in ensuring the effective oversight of correctional facilities. In the context of an oversight entity like the Judicial Inspectorate, independence requires that it must be able to

perform its functions, free from the influence of the executive body it is mandated to scrutinise. Moreover, even if we accept that the Department as a whole is generally committed to assisting the Judicial Inspectorate, the facts and statistics presented in the papers and in the Judicial Inspectorate's annual reports over the past decade reveal that the rights of inmates remain threatened by, among other things, "bad apples" and rogue operators within the Department, whose conduct takes place in spaces that are well-hidden from public view.

[53] To effectively scrutinise correctional centres and remand detention facilities, an oversight body should maintain an arms-length relationship with the Department. It should be sufficiently insulated from undue influence or "capture" by the very departmental officials whose conduct it is charged with monitoring. In addition, it must gain the confidence and trust of inmates. Inmates' confidence in the work done by a correctional centre oversight body will depend largely on the extent to which that body is perceived as being independent.

[54] It follows that establishing the Judicial Inspectorate, without also ensuring that it has adequate independence to perform its oversight role effectively, does not constitute a reasonable step to protect the rights of incarcerated persons."

7. In an application filed by the Minister of Justice and Correctional Services and the National Commissioner of Correctional Services for the extension of the order in the Sonke Judgment until December 2023, the applicants noted the existence of the JICS Bill which deals far more extensively with the establishment of an independent JICS.[6] The applicants also noted that the introduction of the JICS Bill into Parliament is dependent on the approval of the Minister of Finance (through National Treasury) for the establishment of JICS as a national government component with its own funding model. The application further notes that this Bill was drafted in the event that the JICS Bill did not go through the necessary processes timeously.

8. In an affidavit filed by the JICS in response, the Inspecting Judge noted that it was always contemplated that in order to give effect substantively to the Sonke Judgment, both the JICS Bill and this Bill would be enacted together.[7] Further, the Inspecting Judge expressed grave concerns with the approach of enacting standalone amendments to the Act as contemplated in this Bill.

9. Given the narrow scope of the proposed amendments to the Act contemplated in this Bill and the need for more comprehensive regulation if JICS is to be a standalone government entity as is contemplated in the JICS Bill, we make the following comments:

[6] Applicants' Founding Affidavit dated 14 October 2022 under CCT 307/19.
[7] JICS Answering Affidavit dated 27 October 2022 under CCT 307/19.

a) While this Bill does on the face of it comply with the Sonke Judgment by providing for amendments to sections 88A(1)(b) and 91 of the Act, it falls short of providing for the complete functional and operational establishment of JICS as a standalone independent body as contemplated by the Sonke Judgment. We note that the JICS Bill has to date not been released for public comment. Accordingly, it is impossible to fully comment on whether this Bill substantively remedies the defects identified in the Sonke Judgment.

b) Although JICS is a part of the National Preventive Mechanism (NPM), we also note no reference in this Bill to the requirements of OPCAT, including several areas in terms of the functional and operational independence of JICS which could be further strengthened. There is no specific reference to the role of JICS in the NPM.

c) In the absence of the JICS Bill, it remains difficult to comment on whether the role of JICS as a part of the NPM has been adequately addressed.

Part B: Clause-by-clause comments on the Bill

Clause 2 - Segregation of inmates

10. Members of the DJF have in the past raised concerns regarding the practice of solitary confinement under the name of segregation.[8] The Act was amended in 2008 to remove, in name only, “solitary confinement” from the statute. The result was that solitary confinement can still be practiced under the guise of "segregation.”[9] The 2008 amendments removed important protective measures. Previously, solitary confinement, as a disciplinary measure, could only be implemented with approval of the Inspecting Judge.[10] These provisions were tighter and ensured effective monitoring and oversight.[11] At present, an inmate placed in segregation "may refer" the matter to the Inspecting Judge.[12] The result is that very few such appeals have been lodged with the Inspecting Judge.[13]

[8] Civil Society Prison Reform Initiative, ‘Solitary Confinement and Segregation’ (Bellville, South Africa: Civil Society Prison Reform Initiative, July 2015); K Petersen, S Mahomed, and T Lorizzo, ‘Solitary Confinement - A Review of the Legal Framework and Practice in Five African Countries’ (Bellville, South Africa: Africa Criminal Justice Reform, October 2018), 10.

[9] Civil Society Prison Reform Initiative, ‘Solitary Confinement and Segregation’; K Petersen, S Mahomed, and T Lorizzo, ‘Solitary Confinement - A Review of the Legal Framework and Practice in Five African Countries,’ 10.

[10] Civil Society Prison Reform Initiative, ‘Solitary Confinement and Segregation’.

[11] Civil Society Prison Reform Initiative.

[12] Correctional Services Act, s 30(7).

[13] Civil Society Prison Reform Initiative, ‘Solitary Confinement and Segregation’, 2.

11. The Bill seeks to amend the provisions on segregation and places an obligation on DCS officials to inform inmates of the right to appeal their segregation. The provision states that 'an inmate who is subjected to segregation **must be informed of the right to appeal** and may refer the matter to the Inspecting Judge.'[14] Although we welcome this obligation on the part of the DCS to inform inmates of their right to appeal a segregation, it does not have equal protective impact as the Act read prior to the 2008 amendment which in effect required the authorisation of the Inspecting Judge to implement solitary confinement, as the wording was then.

12. Furthermore, the below provisions in clause 2(a) are weak or need clarification:

    a) The first deals with the urgency in which an inmate must be informed of their right to appeal. In strengthening the provision, we recommend that emphasis be placed on the fact that the inmate must be informed **immediately** of their right to appeal.[2] It would indeed be preferable if the inmate confirmed in writing that they have been informed of this option and that they choose to or refrain from exercising the option. 'Immediately' in this context would mean preferably prior to implementation, or failing that, at least within the first hour.

    b) The possibility furthermore exists that an inmate may initially choose not to appeal, but may change their mind and should thus be able to do so. Over time the impact of segregation may intensify and under such circumstances an expedited appeal procedure needs to be provided for.

    c) The Inspecting Judge 'has a period of 72 hours to decide regarding the segregation of an inmate.' The question then is whether the confinement of an inmate is suspended (if an inmate appeals the decision) pending the outcome of the Inspecting Judge's decision, or whether the inmate is segregated until such time that the Inspecting Judge decides? There is also a real risk that, if implementation is permitted whilst awaiting the Inspecting Judge's decision, that the 72-hour period may be abused and that inmates may be placed repeatedly in confinement for periods shorter than 72 hours.

13. Further, the segregation of inmates can easily be used by officials to torture inmates or subject them to ill and degrading treatment. Segregation may also be used to hide injured inmates, especially if such injuries were the result of actions by officials. Since Independent Correctional Centre Visitors ("ICCVs") operate at all correctional centres, we submit that they can fulfil an essential monitoring function by (a) verifying the circumstances and reasons for segregation, and the physical and mental health of the inmate, (b) ensuring that they are informed of their right to appeal, (d) informing their legal representative or family of their situation, and (e) monitoring that

[14] Clause 2(a), the Bill.

the inmate is seen daily by a medical practitioner and the head of correctional centre and every four hours by a correctional official, as is required by section 30(2)(a) and (b) of the Act.

14. Attention is furthermore drawn to section 24(5)(d) of the Act providing that segregation may be imposed to undergo programmes: "in the case of serious or repeated infringements, segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity and restriction of amenities as contemplated in paragraphs (b) and (c)." Section 24(5)(c) in turn provides for a "restriction of amenities not exceeding 42 days". The implication is that this may be interpreted to mean that segregation can be imposed for a period of 42 days.

15. The Committee is reminded that the UNSMR prohibits prolonged solitary confinement and to this end set the standard as follows:

> "Rule 44: For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."

16. The 22-hour rule then sets a higher bar than what the Act currently provides for in section 11, presuming that exercise is done with other inmates, or that there are other forms of meaningful contact for at least two hours per day: "Every inmate must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily. If the weather permits, this exercise must take place in the open air."

17. The current provision in section 30(5) allowing for segregation to be extended to 30 days would then appear to fall foul of Rule 44 of the UNSMR.

Clause 3 – Mechanical restraint of inmates

18. The amendments in clause 3 of the Bill, which deals with the restraint of inmates are similar to clause 2 (segregation of inmates). As such, we believe that the provisions in clause 3(a) of the Bill should be strengthened to ensure that inmates must be informed **immediately of their right to appeal.**

19. The Committee's attention is also drawn to the provisions enabling the extended use of mechanical restraints even when in segregation. Section 31(3)(a) of the Act allows the head of correctional centre to order the use of mechanical restraints in segregation for a period of up to seven days. Section 31(3(c) empowers the National Commissioner to extend this for a period of up to 30 days "after consideration of a report by a correctional medical practitioner or psychologist". The first issue is that the National Commissioner should do more than 'consider' the report from the medical practitioner or psychologist. It is submitted that the medical

practitioner or psychologist must declare the inmate mentally and physically fit to undergo extended segregation in mechanical restraints. This was indeed the nub of the issue in the Jacob Zuma medical parole decision taken by the National Commissioner at the time.[15] The second issue is that if an inmate is already in segregation (i.e., in a single cell) the chances are indeed remote that they will escape. The use of mechanical restraints, especially for an extended period, then seems to be nothing more than punitive and that such coercion may indeed amount to torture as defined in the Prevention and Combatting of Torture of Persons Act 13 of 2013. If the concern is that the person may harm themselves, or that they are experiencing an intense and prolonged psychotic episode, then the lengthy use of mechanical restraints seems misplaced and that an urgent psychiatric intervention is rather called for. The third concern is that the authority to extend the use of mechanical restraint in segregation for up to 30 days has been delegated to the Area Manager, or one level above the head of correctional centre.[16] Given the potentially harmful consequences of such an extreme punishment, it seems almost reckless to delegate this authority to an Area Manager.

20. A former UN Special Rapporteur on Torture (Prof. Nowak) regarded the deprivation of liberty as key to understanding and defining torture: "It is the powerless of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure".[17] Therefore, any mental or physical pressure exerted on a person deprived of his or her liberty must be seen as an interference with the dignity of that person.[18] The use of mechanical restraints when a person is already in a single cell requires a thorough questioning of the motives and justification.

21. It is submitted that the Committee invites more detailed submissions on the extended use of mechanical restraints and whether this does not violate South Africa's obligations under UNCAT and the UNSMR.

Clause 4 - Appointment of the Chief Executive Officer

22. We welcome the amendments in the Bill strengthening the appointment and disciplinary provisions of the Chief Executive Officer ("CEO"). The Bill removes reference to the National

[15] *National Commissioner of Correctional Services and Another v Democratic Alliance and Others* (with South African Institute of Race Relations intervening as Amicus Curiae) [2022] ZASCA 159; [2023] 1 All SA 39 (SCA); 2023 (2) SA 530 (SCA); 2023 (1) SACR 492 (SCA) (21 November 2022), accessed here: http://www.saflii.org/za/cases/ZASCA/2022/159.html

[16] Government Gazette, Vol. 566 Pretoria, 2 August 2012 No. 35561, Correctional Services Revised Regulations.

[17] Nowak, M. and McArthur, E. (2006) 'The Distinction between torture and cruel, inhuman or degrading treatment'. Torture, Vol. 16 No. 3, p. 151

[18] Nowak, M. and McArthur, E. (2006), p. 151.

Commissioner handling the appointment of the CEO and matters relating to misconduct and incapacity of the CEO. However, a few challenges exist.

23. Firstly, the Bill does not include minimum criteria or skills and experience required for the CEO in comparison to other independent or oversight institutions such as the Public Protector and Auditor General of South Africa ("AGSA").[19] Given the nature of the work, it would not be unreasonable to set requirements in respect of qualifications and experience related to human rights, criminal justice, imprisonment and so forth. Secondly, a detailed appointment and dismissal procedure for the CEO is also lacking. Much has been said in recent years about the transparency of appointment procedures relating to criteria, the identification and selection process of candidates. The Committee is encouraged to reflect on these.

24. It is important that the appointment process of the CEO is independent and free from political control over the department it is supposed to oversee. The OPCAT is an instructive international instrument in this regard.[20] In terms of OPCAT, personnel appointed as part of the NPM (of which the JICS is part of) must be independent and have the required capabilities and professional knowledge.[21]

25. We therefore recommend that there should be clear provisions on the appointment criteria, including appointment and dismissal process of the CEO. This includes referencing the requirements of the candidate's experience, knowledge, a detailed appointment process, term of appointment and dismissal procedure.

Clause 5 - Expenses of the Judicial Inspectorate

26. We commend and support the amendment of section 91 of the Act to:

    a) Provide that the expenses of JICS and the remuneration and other conditions of service of members of JICS are defrayed from monies appropriated by Parliament for this purpose;

    b) The preparation of and provision of the estimate revenue and expenditure of JICS; and

    c) The designation of the CEO as the accounting officer of JICS in terms of the Public Finance Management Act 1 of 1999.

[19] S 193(2-3) Constitution; s 1A (3) Public Protector Act 23 of 1994.
[20] Sonke Judgment (note 1) at para 257.
[21] Article 18(1), (2), OPCAT.

27. However, we are concerned this amendment does not sufficiently address the concerns regarding the current financial independence (or lack thereof) of JICS from the DCS.

28. In the Sonke Judgment, the Constitutional Court held that:

> "[90] [T]he budget of the Judicial Inspectorate is not exclusively appropriated by Parliament. The effect of sections 88A(1)(b) and 91 is that the Judicial Inspectorate's budget is both determined and controlled by the very Department over which it is meant to exercise oversight. It is the Department which has the final say on the Judicial Inspectorate's funding. The Department, in fact, has an "unfettered discretion" over the Judicial Inspectorate's level of funding.
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> [91] The Department is responsible for the expenses of the Judicial Inspectorate. While the Department may not utilise funds earmarked for the Judicial Inspectorate for its own purposes, it does determine how much money the Judicial Inspectorate receives. Moreover, although it cannot spend the Judicial Inspectorate's money on its own projects, it is in a position to control how the Judicial Inspectorate spends that money. The accounting officer of the Department – the National Commissioner – is the accounting officer for the Judicial Inspectorate[208] and the CEO must account to the National Commissioner for the monies received by the Judicial Inspectorate. The Department has the power to approve or disapprove the expenditure of the Judicial Inspectorate.
> ....
>
> [94] The Department's control over the funding of the Judicial Inspectorate has the potential to impact negatively on the ability of the Judicial Inspectorate to function effectively. This possibility alone makes the impugned provisions inimical to the Judicial Inspectorate's independence."

29. The Constitutional Court relied on various judgments' pronouncements regarding the financial independence of oversight bodies in reaching its conclusion that JICS does not have sufficient money and budget to take the steps it deems reasonably necessary to effectively oversee the actions of the Department and to perform its monitoring and reporting functions, including *Glenister v President of the Republic of South Africa and Others*[22] ("Glenister II") and *Helen Suzman Foundation v President of the Republic of South Africa.*[23]

30. In *Helen Suzman Foundation* which dealt with a challenge to amendments to the South African Police Services Act 68 of 1995 establishing the Directorate for Priority Crime Investigation

[22] (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC), accessed here: http://www.saflii.org/za/cases/ZACC/2011/6.html
[23] [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC).

("DPCI"), the Court held that sections 17(H), dealing with the financial independence of the DPCI was constitutionally compliant in that it section 17(H) provided that-

> "[t]he DPCI's budget is 'specifically and exclusively' appropriated by Parliament for the entity's expenses to be incurred in the performance of its mandate. Neither the executive nor the national commissioner has the final say on the level of the DPCI's funding. Parliament does. The preparation of the budget of the directorate by its national head, the consultation she is entitled to have with the national commissioner on the budget and the possible mediation by the minister in the event of disagreement between the two demonstrate the adequacy of the DPCI's independence in relation to the budget. More importantly, the national head has control over the moneys appropriated by Parliament for the DPCI. Added to this is s 17K(2B) which provides that the national head 'shall make a presentation to Parliament on the budget of the Directorate'. Although this presentation relates to the money that would have been spent already, it presents an annual platform to the national head to raise whatever concerns she might have about the inadequacy of the previous budget and the need for a future increase."[24]

31. The Sonke Judgment also referenced the financial independence of other institutions, including the Commission for Gender Equality ("CGE"), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Electoral Commission.[25] Most noteworthy in this regard is section 9(1) of the Commission for Gender Equality Act 39 of 1996 ("CGE Act") which provides that:

> "Expenditure incidental to the performance of the functions of the Commission in terms of this Act or any other law shall be defrayed from money appropriated by Parliament in the same manner, with the necessary changes, and subject to the same laws, as in the case of the expenditure of a department of the National Government".

32. Accordingly, and in light of the above, we recommend the inclusion of safeguards in the amended section 91 of the Act as follows:

    a) That the amended clause 91(1) be amended further to remove reference "to the departmental vote" to ensure that there is no financial tie between the DCS and JICS. In fact, given the concerns expressed in the Sonke Judgment about JICS' lack of financial independence we recommend the inclusion of a clause similar to that of section 9(1) in the CGE Act where expenditure related to JICS is dealt with in the same manner as those of departments of National Government; and

[24] Ibid at paragraphs 40-42.
[25] See fn 215 in the Sonke Judgment (note 1).

b) That clauses similar to that set out in sections 17H (5) and (6) of the SAPS Act are included, providing that:

- Monies appropriated by Parliament for JICS are used specifically and exclusively appropriated for that purpose; and

- The CEO will have control over the monies appropriated by Parliament for JICS.

Clause 6 - Mandatory reporting obligations of Department to Inspecting Judge

33. Clause 6(1) of the Bill provides for a list of incidents which warrants mandatory reporting to the Inspecting Judge to investigate or instruct the National Commissioner or any other appropriate authority to investigate. We welcome the inclusion of the instances listed in section 95D (1). Additionally, we recommend the following:

    a) That sexual violations in section 95D(1)(h) be replaced by "sexual offence(s)" as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Act No. 32 of 2007). Sexual offence(s) encompasses the different sexual offences or violations set out in the aforementioned Act.

    b) That section 95D (1) be amended to include as a notifiable instance any harm of an inmate by either a fellow inmate or an official, as a result of xenophobic violence and abuse;

    c) Any unlawful detention of a person, including any detention under the Immigration Act 13 of 2002 beyond the designated periods stipulated therein.

34. We also recommend that section 95D (1) not be drafted as a closed list of notifiable instances to provide for the reporting of any human rights violations perpetrated against inmates to JICS.

35. We are concerned that the Act does not provide whistle-blower protection clauses. This will be necessary to ensure protection to officials that report human rights violations and corruption in DCS facilities.

36. In terms of clause 6 (3) of the Bill, the 'Inspecting Judge may investigate or instruct the national commissioner or request any appropriate authority to investigate any matter contemplated in subsection 1.' We view this as problematic, and this is explored further in the below.

Investigations conducted by the Inspecting Judge

37. Firstly, the Act contains insufficient powers for the Inspecting Judge (bar reference to 90(5) of the Act) and the JICS to investigate effectively. As a human rights institution, its overall powers and functions appear weak in comparison to other statutory oversight bodies such as the Human Rights Commission and the IPID.

38. Furthermore, this provision does not make it mandatory for the Inspecting Judge to investigate (the Inspecting Judge 'may investigate') the listed mandatory reporting obligations of the DCS, which contain serious human rights violations. By way of comparison, the IPID Act 1 of 2011 makes it mandatory to investigate amongst others: deaths in police custody, deaths because of police actions, rape by a police officer, any complaint of torture or assault against a police officer in the execution of his or her duties and so forth.[26] It is clear in respect of what IPID must do, as opposed to leaving it open to the institution to interpret what it wants to do.[27] Also, for the purposes of investigating, an IPID investigator has the same powers bestowed upon a peace officer/police official.[28]

39. A competent and effective prison oversight structure enhances the transparency and accountability of the prison's authority. We recommend that JICS be given sufficient legislative authority to investigate complaints independently; sufficient legislative authority to make binding recommendations and decisions, as well as monitor the progress in the carrying out of such recommendations and decisions by the department.

40. Such powers or authority shall be applicable for both public correctional centres and privately-run centres. We recommend that the Act make explicit provision for the mandate of JICS and the Inspecting Judge to hold sufficient authority to investigate complaints from privately-run correctional centres. The legislation shall override provisions of a contract or agreement entered into by any party. It should in clear terms note that the terms of an agreement between DCS and any party, shall not take precedence over the legislation.

Referral for investigations to the National Commissioner

41. It is highly problematic for the Department to conduct investigations, which essentially involves investigations of its own staff. Our past submissions on this issue bear reference to the problem.[29] The involvement of the DCS in these criminal investigations (where it would interview witnesses, alleged perpetrators and assess physical evidence) goes against the internationally accepted requirement that such investigations must be conducted by impartial and independent

[26] Section 28, IPID Act 1 of 2011.

[27] CSPRI 'Submission: Strengthening the Investigating, Monitoring and Oversight Over the Treatment of Inmates and Conditions of Incarceration and Remand Detention, ' Bellville, South Africa, page 23

[28] Section 24, IPID Act 1 of 2011.

[29] CSPRI 'Submission: Strengthening the Investigating, Monitoring and Oversight Over the Treatment of Inmates and Conditions of Incarceration and Remand Detention,' Bellville, South Africa, pages 22-27; African Policing Civilian Oversight Forum, Comment on the Judicial Inspectorate for Correctional Services Proposed Draft Bill, 22 October 2020, page 4. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://apcof.org/wp-content/uploads/jics-bill-apcof-submission.pdf; Just Detention International – South Africa (JDI-SA), Submission to The Portfolio Committee For Justice And Correctional Services "The Purpose and Impact of the Judicial Inspectorate for Correctional Services," September 2016. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static.pmg.org.za/160921JDI.pdf.

authorities.[30] We therefore recommend that the DCS should be excluded from conducting investigations into human rights violations on behalf of JICS. All efforts must be made to ensure that investigations are conducted by impartial and independent authorities, as required by UNCAT.

42. The Inspecting Judge should have the powers to conduct investigations, independently of the DCS, make recommendations or take decisions regarding complaints that are of a binding nature. It is recommended that the Inspecting Judge's recommendations and/directive be binding and enforceable, but for in the instance where the decision/recommendation/directive is taken to court for judicial review.

43. Where decisions or recommendations made by the Inspecting Judge require the DCS's compliance, such recommendation shall come into force immediately and require the DCS to comply with the directive /order as soon as reasonably possible or within 14 days after the filing of the papers.

Matters referred to the National Prosecuting Authority (NPA)

44. In the past, we have raised concerns regarding the lack of prosecutions involving DCS officials implicated in gross violations against inmates (esp. deaths). It is important for JICS to track the progress of criminal cases referred to the NPA by the South African Police Service (SAPS) for a decision to prosecute or not to prosecute. We note with concern the lack of provisions explicitly formalizing a relationship between the NPA and JICS. There should be provisions in the Correctional Services Act placing an obligation on the NPA to report back to JICS on a regular basis (e.g. six-monthly) on matters referred to it by SAPS and the outcome of the decision to prosecute or not and the reasons thereto. Feedback may indeed improve the quality of investigations and thus improve outcomes for the NPA.

Complaints by the public

45. The Act currently does not make explicit reference to the public being able to lodge complaints directly with JICS. Currently, JICS is receiving and accepting complaints from the public and family members of inmates as a result of their powers in terms of section 90 (2) of the Correctional Services Act which state that 'The Inspecting Judge may …….of his or her own volition deal with any complaint.' The public plays a pivotal oversight role, and we thus recommend that the Act be amended to include explicit reference to the public being able to lodge complaints directly with JICS.

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

DETENTION
JUSTICE FORUM

Conclusion

46. We thank you for your consideration of our comments.

47. Should the Committee have any questions, the authors of the submission will avail themselves at the Committee's convenience.

Yours sincerely,

On behalf of the Detention Justice Forum

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