

POLICY ON THE PREVENTION OF TORTURE AND THE TREATMENT OF PERSONS IN CUSTODY OF THE SOUTH AFRICAN POLICE SERVICE

INTRODUCTION

The right not to be tortured is entrenched as a fundamental right in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) which is the highest law of the land. The fundamental right of an individual to be protected against torture is widely accepted as a customary rule of international law. With the signing of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) on 29 January 1993, South Africa explicitly acknowledged the prevention of and protection against torture as part of international law. By signing the Convention government also undertook to work towards ratification and thereby binding the State to adhere to the Convention. This requires government to work actively towards the prevention of torture and to protect people against any act of torture.

In terms of the Convention, each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Most importantly, the above-mentioned scenario necessitated a re-evaluation of the treatment of persons in custody of the South African Police Service, and the approach of the South African Police Service towards interrogation methods, detention, etc. The office of the National Commissioner requested that a policy document be drawn up to ensure that torture and other cruel, inhuman or degrading treatment of persons in custody of the South African Police Service are prevented.

It should be noted that this document does not deal with pain or suffering arising from, inherent in or incidental to, lawful sanctions. The "use of force" which is inherent in or incidental to lawful sanctions is not seen as torture, and will therefor not be dealt with.

The instructions, set out below, will eventually be incorporated into National Orders. Until this is done, it is the responsibility of every station commissioner and other commander to ensure that members under their command at all times adhere thereto.

It should be noted that the commentary after a paragraph does not form part of the instructions, but are intended to give guidance to members about its application and interpretation.

INSTRUCTIONS

1 Definitions

(1) In this document, unless the context otherwise indicates, -

(a) ***appropriate adult*** means:

(i) in the case of a juvenile:

his or her parent or guardian or person in whose care the parent or guardian has placed such juvenile, a probation officer or other social worker in whose area of jurisdiction the juvenile is being detained, an official from correctional services in the area concerned or any other responsible member of the public who is 18 years or older. If none of the afore-mentioned are available, the *station commissioner* or any other *member* (excluding the *charge office commander*) to whom he or she has delegated his or her authority in writing; and

(ii) in the case of a person who is mentally handicapped:

a relative, guardian or other person responsible for his or her care or custody, or someone who has experience in dealing with mentally handicapped persons or another responsible member of the public who is 18 years or older. If none of the afore-mentioned are available, the *station commissioner* or any other *member* (excluding the *charge*

office commander) to whom he or she has delegated his or her authority in writing.

- (b) ***approved restraining measures*** means handcuffs and/or leg irons.
- (c) ***charge office commander*** means the *member* in charge of the charge office and/or the *member* in charge of the detention facilities at an office under the control of *the Service* and includes a *member* who is performing the functions of a *charge office commander*;
- (d) ***intimate search*** means a search which consists of the physical examination of a person's body orifices, including such person's mouth, nose, ears, anus and vagina;
- (e) ***member*** means any member of *the Service* as defined in section 1(x) of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- (f) ***person in custody*** means a person deprived of his or her freedom of movement by a *member* or any other person, who is detained in the custody of *the Service* and who has not yet been lawfully released or handed over or handed back to the Department of Correctional Services or any other institution for detention;
- (g) ***questioning*** means the questioning by a *member* of a person, who is an accused or suspect, regarding his or her alleged involvement in the commission of an offence or alleged offence,

but excludes the questioning of a person who is not suspected of having been so involved at the time of the questioning;

- (h) **station commissioner** means the station commissioner of the station area in which a person is or has been detained in custody or any other *member* to whom he or she has delegated his or her authority in writing;
 - (i) **the Act** means the South African Police Service Act, 1995 (Act No. 68 of 1995) and regulations promulgated in terms thereof;
 - (j) **the Service** means the South African Police Service; and
 - (k) **torture** may include, but is not limited to, any cruel, inhuman or degrading treatment or punishment, as referred to in section 12(1)(e) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) 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 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 instigation of or with the consent or acquiescence of a *member* or any other person acting under the authority or protection of *the Service*.
- (2) The **interests of justice** will be established, if there are reasonable grounds to believe that the exercise of any right:

- (a) will lead to interference with or harm to evidence connected with a serious offence or interference with or physical injury to other persons; or
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested; or
- (c) will hamper the recovery of property obtained as a result of such an offence.

Comment:

- (1) With reference to the definition of *torture* mentioned in paragraph 1(1)(k), the following can be seen as practical examples of *torture*: Solitary confinement as a form of punishment; isolation in a police cell without food, water or access to toilets; mock executions; attempts or mock attempts to suffocate a person; threats to throw a person out of a window; the use of insulting and abusive language; compelling persons to be present at the *torture* of relatives or friends; forcing a person to stand against a wall for a prolonged period of time; subjecting a person to noise; deprivation of sleep; and any unnecessary application of physical force in escorting or dealing with a *person in custody*.

The above-mentioned examples should not be regarded as exhaustive. Any conduct complying with the definition, whether mentioned in the examples or not, shall be regarded as *torture*. It is to be expected that the definition will be interpreted widely.

- (2) It is important to note that there may be no coercion whatsoever to compel a *person in custody* to answer any questions. It is therefore

recommended that reference should not, under any circumstances, be made to "interrogation", but rather to *questioning*.

2 Prohibition against *torture*

No *member* may *torture* any person, permit anyone else to do so, or tolerate the *torture* of another by anyone. The same shall apply to an attempt to commit *torture* and to an act by any person which constitutes complicity or participation in *torture*. No exception, such as a state of war or a threat of war, state of emergency, internal political instability or any other public emergency will serve as justification for *torture* - there can simply be no justification, ever, for *torture*.

Comment:

As mentioned in the Introduction, every person has, in terms of the Constitution, a fundamental right not to be *tortured*. Internationally, no limitation of the prohibition against *torture* is recognised.

3 Acting upon an order, reporting and complaints regarding acts of *torture*

- (1) An order by a superior or any other authority that a person be *tortured*, is unlawful and shall not be obeyed. The fact that such an order has been given shall immediately be reported to the *station commissioner* or, in the event that the *station commissioner* issues the order, to the area commissioner concerned.
- (2) A *member* who has reason to believe that a person is *tortured*, or that an attempt is being made to do so, shall immediately take all reasonable steps to put an end thereto.

- (3) A *member* who has reason to believe that a person has been *tortured* shall immediately report this to the *station commissioner*, or where the *station commissioner* is involved in the incident, to the relevant area commissioner, who shall immediately take steps to ensure that any allegation or complaint regarding a person who has allegedly been *tortured*, is investigated.
- (4) The *station commissioner*, or, where the *station commissioner* is involved in the incident, the area commissioner, shall immediately take steps to protect the *member* or other person who has reported the alleged *torture*, against any form of victimization.
- (5) If a *person in custody* raises a complaint regarding *torture*, the complaint must immediately be conveyed to the *station commissioner* or where appropriate, the area commissioner, who shall act in terms of paragraph 3(3) above: Provided that this does not exclude a *person in custody* to submit a complaint regarding *torture* directly to the Independent Complaints Directorate. The *person in custody* must be informed of his or her right to do so, and if he or she prefers that the matter be reported to the Independent Complaints Directorate, form ICD-1 must be completed and be forwarded to the nearest provincial office of the Independent Complaints Directorate. A suitable entry in the Occurrence Book must be made in this regard.
- (6) If an investigation indicates that a *member* committed, attempted to commit or acted as an accomplice in the commission of *torture*, it should be deemed to be serious misconduct and disciplinary proceedings should immediately be instituted against such a *member* in terms of regulation 8(2)(a) of the South African Police Service Discipline Regulations.

- (7) If, during disciplinary proceedings, it is found that a *member* has committed *torture*, this will be viewed in a serious light. If the *member* concerned is the *station commissioner* or *charge office commander* where the prohibited act is found to have taken place, it will serve as an aggravating factor.

Comment:

The fact that a *member* acted upon an order by a superior will not be a ground of justification for *torture*. It is the duty of senior *members* to convey to their subordinates the clear message that any *torture* of a *person in custody* of the *Service* is not acceptable and will be dealt with severely.

When the effects of an act of *torture* on the person subjected thereto, the legal and other consequences thereof in relation to *the Service* and the community and the importance attached to protection against *torture* in the international community, are considered, it becomes clear that any conduct by a *member* which constitutes *torture* will be regarded in a very serious light.

4 Respect for dignity

Every *person in custody* shall at all times be treated with respect for his or her human dignity.

Comment:

In terms of section 10 of the Constitution, every person has the right to respect for and protection of his or her dignity.

5 *Person in custody* to be informed of his or her rights

- (1) Every person taken into custody shall be promptly informed, by the *member* who takes him or her into custody, in a language which he or she understands, of:
 - (a) the reason for his or her arrest;
 - (b) the right to remain silent and that anything he or she says, may be used as evidence in a court of law;
 - (c) his or her right to consult with a legal practitioner of his or her choice, or if he or she should prefer, to apply to the Legal Aid Board to be provided by the State with the services of a legal practitioner; and
 - (d) his or her right to apply to be released on bail.

If the *person in custody* does not appear to understand any of the languages in which the *member* addresses him or her, such person should in any event be advised of his or her rights in the English language and in any other language in which such *member* is able to communicate and which such *member* suspects that the *person in custody* may understand. Steps must promptly be taken to ascertain a language which the *person in custody* understands, and to have the rights explained to such person in that language by an interpreter. The *member* shall record the warning, and all steps taken with regard thereto, in his or her pocketbook.

- (2) In order to ensure that the *person in custody* is duly informed of his or her rights in terms of the Constitution, the *charge office commander* must give the person a written notice setting out his or her rights upon his or her arrival at the police station. The contents of the rights shall be

explained to such person in a language which he or she understands and it shall be explained to such person that these are continuing rights which may be exercised at any stage during the period in which he or she is detained in custody.

If the *person in custody* does not appear to understand any of the languages in which the *member* addresses him or her, such person should in any event be advised of his or her rights in the English language and in any other language in which such *member* is able to communicate and which such *member* suspects that the *person in custody* may understand. Steps must promptly be taken to ascertain a language which the *person in custody* understands, and to have the rights explained to such person in that language.

- (3) The *charge office commander* shall ask the *person in custody* to sign the statement provided for in the notice, and which states that he or she has been informed of his or her rights in terms of the Constitution and that he or she understands the contents thereof. Where the *person in custody* refuses to sign such a statement, a third person must sign the statement to certify that he or she witnessed the *person in custody* being informed of his or her rights and that the *person in custody* refused to sign the said statement.

Comment:

In terms of the Constitution a *person in custody* must be informed of the rights he or she has as an arrested and detained person. Non-compliance with this paragraph may lead to the detention being unlawful or relevant evidence being excluded in court.

6 Measures to prevent torture

- (1) A *station commissioner*, as well as every other commander at any level, shall take effective measures to prevent *torture* by a *member* under his or her command and shall ensure that the following rights of a *person in custody of the Service* are respected:
 - (a) A *person in custody* shall be detained under conditions consonant with human dignity. In order to give effect to this right the following conditions of detention must be complied with:
 - (i) The *station commissioner* shall ensure that the number of persons who are accommodated in a police cell shall be reasonable in relation to the size thereof. If this is not possible, the *station commissioner* shall accommodate all additional persons in suitable alternative accommodation, such as in an office or in the police cells of a neighbouring station. A *person in custody* shall not be detained in a police vehicle as an alternative for accommodation in police cells.
 - (ii) A *station commissioner* shall ensure that all police cells have adequate light and ventilation.
 - (iii) Police cells shall be equipped with reasonable means of rest such as a chair or bench, and a *person in custody*, who is kept in custody overnight, shall be provided with a mattress and blankets of a reasonable standard.
 - (iv) A *person in custody* shall be allowed to use toilet facilities and be offered adequate washing facilities.

- (v) No *person in custody* shall be subjected to restraining measures unless absolutely necessary, in which case only *approved restraining measures* shall be utilized.
- (vi) Open air exercise must be offered daily whenever possible.
- (vii) If it is necessary to remove the clothes of a *person in custody* for the purposes of safety, investigation, hygiene, health or cleaning, replacement clothing of a reasonable standard of comfort and cleanliness must be provided. A *person in custody* may not be questioned unless adequate clothing has been offered to him or her.
- (viii) A *person in custody* shall have ready access to drinking water and be provided with nutritious food three times per day. The meal times are as follows:

Breakfast	:	Between 06:00 and 08:00
Lunch	:	Between 12:00 and 14:00
Dinner	:	Between 17:00 and 19:00

- (b) If the conditions set out in paragraph 6(1)(a)(i) - (vi) cannot be met, the *station commissioner* must, as a matter of urgency, follow the procedures regarding the upgrading of the police cells at his or her station, as set out in the Amalgamation Policy on Facility Management. The *station commissioner* must keep a written progress report setting out the progress made and the reasons for any delay.

- (2) A *person in custody* shall have the right to consult with a legal practitioner of his or her choice subject to paragraph 6(2)(c), or to apply to be provided with the services of a legal practitioner by the state.
- (a) The *charge office commander* shall ensure that every *person in custody* is aware of his or her right to consult with a legal practitioner. Where a legal practitioner is requested, the *charge office commander* shall act without delay to enable the *person in custody* to communicate with his or her legal practitioner or where he or she so requests, with the Legal Aid Board to apply to have a legal practitioner provided by the State to him or her. *Questioning* may not commence before this paragraph has been complied with.
- (b) Where a *person in custody* has not yet had the opportunity to contact a legal practitioner, he or she must immediately after his or her arrival at the police station, be allowed to make a telephone call to his or her legal practitioner.
- (c) The exercise of the above right may be delayed only if the person has not yet been charged with an offence and the *station commissioner* is of opinion that reasonable grounds exist for believing that the exercise of the above-mentioned right, in respect of the legal representative nominated by the *person in custody*, will not be in the *interest of justice*. The *station commissioner* must authorize the delay in writing, and specify the reasons for the delay and the time period, which may not exceed 12 hours, during which the *person in custody* may not communicate with or be visited by the legal practitioner: Provided that this does not

mean that the *person in custody's* right of access to a legal practitioner may be totally denied during the period in question. Such person shall still be entitled to have access to another, independent legal practitioner, in respect of whom there is no reasonable ground to believe that access to him or her will jeopardise the *interest of justice*.

(d) *Persons in custody*: Special groups:

- (i) If a *person in custody* appears to be deaf or there is doubt about his or her hearing or speaking ability or ability to understand the language in which the *charge office commander* is communicating, and the *charge office commander* cannot establish effective communication with him or her, the *charge office commander* must as soon as practicable, take steps to ascertain how to communicate with the person in custody, and call an appropriate interpreter to communicate with such person.
- (ii) If the *person in custody* is a juvenile (below the age of 18 years), the *charge office commander* must ensure that the *member* who has made the arrest, or other responsible *member*, ascertain the identity of an *appropriate adult*. The *appropriate adult* must, as soon as practicable, be informed that the juvenile has been arrested, the reasons therefor and the place where he or she is being detained. In the case of a juvenile who is known to be subject to a supervision order, reasonable steps must be taken to notify the person supervising him or her.

- (iii) If a *person in custody* is mentally handicapped or is suffering from a mental disorder, the *charge office commander* shall, as soon as is practicable, inform an *appropriate adult* of the grounds for his or her custody and the place where he or she is being detained and ask the *appropriate adult* to visit the *person in custody* at the police station. (Read together with Standing Order (G) 291).

 - (iv) If the *appropriate adult* is already at the police station when information is given to the person as required in paragraph 6(2), the information must be given to the *person in custody* in the presence of the *appropriate adult*. If the *appropriate adult* is not at the police station when the information is given, the information must be repeated to the *person in custody* in the presence of the *appropriate adult*, once that person arrives.

 - (v) If a *person in custody* is blind or seriously visually handicapped or is unable to read, the *charge office commander* shall ensure that his or her legal practitioner, relative, an *appropriate adult* or some other person likely to take an interest in him or her (and not involved in the investigation) is available to help in checking any documentation. Where this policy requires written consent or signification, the person assisting the *person in custody*, may, at the request of the *person in custody*, sign the required documentation.
- (3) A person shall have the right to communicate with and be visited by his or her partner, spouse, next-of-kin and religious counsellor.

- (a) The right of a *person in custody* to communicate and be visited by his or her partner, spouse, next-of-kin and religious counsellor implies that a *person in custody* may on request have certain persons known to him or her, or who is likely to take an interest in his or her welfare, informed at public expense and as soon as is practicable, of his or her whereabouts. If the nominated person cannot be contacted, the *person in custody* may choose up to two alternatives. If they too cannot be contacted the *charge office commander* has the discretion to allow further attempts until the information has been conveyed. The right of a *person in custody* to be visited by his or her partner, spouse, next-of-kin and religious counsellor, is subject to such reasonable restrictions and supervision, as may be determined by the *station commissioner*, to regulate the security and orderly detention of *persons in custody*.

- (b) The exercise of the above right in respect of each of the persons nominated, may be delayed only if the person has not yet been charged with an offence and the *station commissioner* is of opinion that reasonable grounds exist for believing that the exercise of the above-mentioned rights, in respect of the person nominated by the *person in custody*, will not be in the *interest of justice*. The *station commissioner* must authorize the delay in writing, and specify the reasons for the delay and the time period, which may not exceed 12 hours, during which the *person in custody* may not communicate with or be visited by the nominated person.

- (c) If the *person in custody* is a national of another State or Country, he or she shall immediately be assisted to communicate with the

nearest appropriate representative of that State or Country. If the *person in custody* is a stateless person but usually resides in a country other than the Republic of South Africa, he or she shall be assisted to communicate with the representative of such State.

- (d) Where an enquiry as to the whereabouts of a *person in custody* is made by a friend, relative or person with an interest in his or her welfare, this information shall be supplied, if the *person in custody* agrees, and if paragraph (b) does not apply.
 - (e) Before any telephone call is made, the *person in custody* shall be informed that what he or she says during such call (other than in the case of a communication to a legal practitioner) may be listened to, and may be terminated if it is in the *interest of justice*.
- (4) A *person in custody* shall have the right to communicate with and to be visited by a medical practitioner of his or her choice.
- (a) If a *person in custody* appears to be suffering from physical or mental illness, is injured, does not react to sensory stimulation, displays a lack of awareness of his or her surroundings or otherwise appears to need medical attention, the *charge office commander* or any *member* in control of a *person in custody* shall immediately call the district surgeon or, in urgent cases, send the person to the nearest provincial hospital available or call the nearest available medical practitioner.
 - (b) Where a *person in custody* requests to be examined or treated by a medical practitioner of his or her choice, in addition to any medical examination or treatment by a medical practitioner called

by the police, his or her request must be acceded to, but he or she must be informed that he or she will have to bear the costs of such examination or treatment. The medical practitioner must also be informed that the *person in custody* will be responsible for payment of the costs of such examination or treatment.

- (c) All medical consultations should be conducted out of the sight and hearing of a *member*, unless the medical practitioner concerned, requests otherwise.
- (d) If a medical practitioner prescribes that medication be administered to a *person in custody*, the *charge office commander* is responsible for the safekeeping thereof and to ensure that he or she is given the opportunity to administer it at the appropriate time.
- (e) Whenever a *person in custody* is examined by a medical practitioner provided by the state, the medical practitioner shall be requested to supply the *station commissioner* with a written report, which shall include the following:
 - (i) any statements made by the person concerned which are relevant to the medical examination (including the description by the person concerned of his or her state of health and any allegations of *torture*);
 - (ii) a description of the objective medical findings based on a thorough medical examination; and

- (iii) the conclusions of the medical practitioner in the light of subsections (i) and (ii).

The written report shall be filed with the remand warrant, SAP 70 and body receipts.

- (f) Whenever a complaint regarding *torture* is made by a *person in custody* to a medical practitioner and the medical practitioner is of the opinion that the examination revealed indications which tended to confirm such allegations, the medical practitioner shall be requested to send a copy of the report referred to in paragraph (e) above, to the nearest office of the Independent Complaints Directorate.

Comment:

- (1) **detained under conditions consonant with human dignity:** In terms of section 35(2)(e) of the Constitution, every *person in custody* has the right to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate accommodation, nutrition, reading material and medical treatment at state expense;
- (2) **consult with a legal practitioner:** In terms of section 35(2)(b) and (c) of the Constitution, every detainee shall have the right to choose and to consult with a legal practitioner, to be informed of this right promptly and to have a legal practitioner assigned to him or her by the state at state expense, if substantial injustice would otherwise result.
- (3) **communication and visitation by a partner, spouse, next-of-kin and religious counsellor:** In terms of section 35(2)(f) of the Constitution a

person in custody shall have the right to communicate and be visited by his or her partner or spouse, next-of-kin, chosen religious counsellor.

- (4) **medical examination of *person in custody*:** In terms of section 35(2)(e) and (f) of the Constitution every *person in custody* shall be given the opportunity to communicate with and to be visited by a medical practitioner of his or her choice.

7 Exceptions

- (1) All rights referred to in paragraph 6 are subject to the limitation that a *person in custody* must submit to the disciplinary regulations applicable to awaiting trial prisoners.
- (2) Any disciplinary action taken in terms of paragraph 7(1) shall be recorded in the Occurrence Book by the *charge office commander*.

8 Recording of information

A custody register shall be kept at each police station. Every action taken by a *member* regarding the *person in custody* shall be recorded by the *charge office commander* in the Custody Register or where appropriate in the Occurrence Book. It is the responsibility of the *station commissioner* to ensure that the *charge office commander* records every action with regard to a *person in custody*, as set out below:

- (1) the date, time and reason of the arrest shall be recorded in the Custody Register;

- (2) any injury suffered before, during or after arrest, and the circumstances thereof shall be recorded in the Occurrence Book. Any other medical information such as when the *person in custody* underwent a medical examination, shall be recorded in the Occurrence Book and the entry number in the Occurrence Book, shall be recorded in the Custody Register. Subsequent occurrences in terms of this paragraph shall be cross-referenced in the Occurrence Book;
- (3) the serial number of the Notice of Rights in terms of the Constitution shall be recorded in the Custody Register;
- (4) the date and time of detention shall be recorded in the Custody Register;
- (5) if the *person in custody* requests to communicate with and be visited by his or her partner, spouse, next-of-kin, religious counsellor and his or her legal practitioner, this information together with any other information regarding visitation shall be recorded in the Occurrence Book. The entry number in the Occurrence Book shall be recorded in the appropriate columns of the Custody Register. Subsequent occurrences in terms of this paragraph shall be cross-referenced in the Occurrence Book;
- (6) if a *person in custody* has been removed for *questioning*, the date and time of removal and return, as well as the particulars of *the member* removing and returning such a person shall be recorded in the Occurrence Book and the entry number in the Occurrence Book shall be recorded in the Custody Register. Subsequent occurrences in terms of this paragraph shall be cross-referenced in the Occurrence Book; and
- (7) the date, time and reason of the release of the *person in custody* shall be recorded in the Custody Register.

9 Searches of persons in custody and seizure of objects in their possession

- (1) The *charge office commander* is responsible to:
 - (a) ascertain what property a *person in custody* has with him or her when he or she arrives at the police station;
 - (b) ascertain what property a *person in custody* might have acquired for an unlawful or harmful purpose while in custody; and
 - (c) the safekeeping of any property which is taken from a *person in custody* and while such person remains at the police station.
- (2) In order to accomplish the above, the *charge office commander* must search the *person in custody* or authorise that the *person in custody* be searched to the extent that the *charge office commander* considers necessary, provided that an *intimate search* shall only be conducted subject to the conditions set out in paragraphs 9(7) and (8) below.
- (3) A search of a *person in custody* shall be conducted with strict regard to decency. A person shall be searched by a person of the same gender only. If no *member* of the same gender is available, the search shall be conducted by any person of the same gender designated for that purpose by a *member*.
- (4) All valuable possessions or dangerous objects found in the possession of a *person in custody*, shall be seized for safe keeping.

- (5) Articles of clothing may only be seized if there are reasonable grounds to believe:
- (a) that the *person in custody* may use such articles to cause physical injury to himself or herself or any other person, damage property or assist him or her to escape; or
 - (b) that they may afford evidence of the commission of an offence.
- (6) The *person in custody* shall be informed of the reason why anything is taken for safekeeping.
- (7) An *intimate search* may only be authorised by a *station commissioner* if he or she has reasonable grounds to believe:
- (a) that a *person in custody* has concealed a dangerous weapon on his or her person; or
 - (b) that such a person has concealed on his or her person an article which may afford evidence of the commission of an offence.
- (8) An *intimate search* shall be conducted by a registered medical practitioner or a registered nurse.

10 Questioning of persons in custody

Every *member* shall follow the instructions set out below when *questioning* a *person in custody*.

- (1) Before the commencement of the *questioning* of a *person in custody* who has been arrested for the alleged commission of an offence, he or she shall, in a language which he or she understands,
 - (a) be informed of the offence in respect of which he or she will be questioned;
 - (b) be informed of his or her right to consult with a legal practitioner of his or her choice or, should he or she prefer, to apply to be provided with the services of a legal practitioner by the State;
 - (c) be informed that he or she has the right to remain silent and that anything he or she says may be used as evidence in a court of law; and
 - (d) be informed of his or her right to apply to be released on bail.

This shall be recorded in the Statement regarding Interview with Suspect.

- (2) Should the *questioning* of a *person in custody* be interrupted, the *member* conducting the *questioning* shall, on the resumption of the *questioning*, once again inform such person as set out in paragraph 10(1). This step shall also be duly recorded.
- (3) A juvenile in custody or a person who is mentally handicapped may only be questioned in the presence of an *appropriate adult* or where applicable, a legal practitioner. If an *appropriate adult* or legal practitioner is not present when the juvenile or mentally handicapped person is informed as set out in paragraph 10(1), the information must be repeated in the presence of the *appropriate adult* or legal practitioner.

- (4) If a *person in custody* indicates his or her willingness to make a confession or to point out anything, he or she shall,
 - (a) once again be informed as set out in paragraph 10 (1); and
 - (b) he or she should preferably be medically examined before and after making the confession or performing the pointing out.
- (5) No *member* may supply a *person in custody* with intoxicating liquor, drugs or medicine, except as provided for in paragraph 6(4)(d).
- (6) A *person in custody* who is under the influence of intoxicating liquor, drugs, medicine, or who is in a state of shock shall, unless the *interests of justice* require otherwise, not be questioned.
- (7) The following rules shall apply with respect to the duration of *questioning*:
 - (a) A *person in custody* shall, in every period of 24 hours be allowed an uninterrupted period of at least 8 hours to rest, free from *questioning*, travelling or any interruption arising out of the investigation concerned. This should usually be at night and this period may only be interrupted or delayed, if the *interests of justice* require otherwise.
 - (b) If it is necessary to continue with *questioning* for more than two hours, the person being questioned must be allowed a rest period of at least ten minutes after the completion of every two hour period of *questioning*.

- (8) A *person in custody* shall be afforded a reasonable opportunity to enjoy his or her meal during meal times and may not be questioned while doing so.
- (9) Not more than two *members* may be present during the *questioning* of a *person in custody*, and not more than three teams of two *members* each may conduct the *questioning* of a *person in custody*.
- (10) A person of the same gender as the *person in custody*, shall, whenever reasonably possible, be present during the *questioning* of a *person in custody*.
- (11) As far as practicable, *questioning* shall take place in a *questioning* room which must be adequately heated, lit and ventilated.
- (12) *Members* conducting a *questioning* shall identify themselves to a *person in custody* before the *questioning* commences.
- (13) Commanders at all levels shall keep proper supervision of all *questioning* conducted by a *member* under his or her command.

Comment:

The fact that a person made a statement as a result of *torture* will render such evidence inadmissible in terms of section 35(5) of the Constitution.

11 Electronic Recording

The introduction of a system of electronic recording of *questioning* by *members* is envisaged. Whenever a system of electronic recording of *questioning* is used the following instructions shall be adhered to:

- (1) The electronic recording of a *questioning* shall only be done after the *person in custody* has been informed that the *questioning* will be electronically recorded.
- (2) If a *questioning* is recorded electronically, the entire *questioning* must be recorded and not just a part thereof. The *questioning* must be electronically recorded on two tapes or disks.
- (3) When a *person in custody* is brought into the *questioning* room, the *member* shall, without delay, but in sight of the *person in custody*, load the equipment with previously unused tapes or disks and set it to record. The tapes or disks must be opened in the presence of the *person in custody*.
- (4) The *member* shall start the recording of the *questioning*, with the following information:
 - (a) that the *questioning* is being recorded electronically;
 - (b) the name and rank of the *member*, the name of the interpreter and the name and rank of any other *member* present;
 - (c) the name of the *person in custody* and any other party present (eg. his or her legal practitioner);
 - (d) the date, time of commencement and place of *questioning*; and
 - (e) that the *person in custody* will be given a notice about what will happen to the tapes or disks.

- (5) If a *person in custody* refuses to answer questions while the answers are being recorded electronically, but indicates his or her willingness to answer when the answers are not electronically recorded, this refusal and indication of his or willingness must be recorded and the tape recorder may then be switched off before the *questioning* continues.
- (6) The *member* shall hereafter again inform the *person in custody* as contemplated in paragraph 10(1).
- (7) If the *person in custody* raises objections to the *questioning* being recorded electronically, either at the outset or during the *questioning* or during a break in the *questioning*, his or her objections shall be recorded on the tapes or disks. After the objections have been recorded on the tapes or disks, or after the *person in custody* has refused to have his or her objections recorded, the *member* shall turn off the equipment. In such event, he or she must record that the equipment shall be turned off, give the reasons therefor, and turn it off.
- (8) If the *person in custody* lodges a complaint concerning his or her detention or if he or she gives information concerning a matter not related to his or her *questioning*, such complaint or information shall be recorded unless the *person in custody* objects to it being recorded. The decision to continue with the *questioning* is at the discretion of the *member*. If it is continued, the *member* must inform the *person in custody* that the complaint will be dealt with after the *questioning*. The *member* must then deal with it as soon as the *questioning* has been concluded or as soon as practicable thereafter.

- (9) Where a tape or disk is reaching its end, the *member* must inform the *person in custody* and round off that part of the *questioning*, remove the tapes or disks and insert new tapes or disks, which must be opened in the presence of the *person in custody*. One of the old tapes or disks must be sealed with a master label and both must be marked with an identification number immediately after they have been removed from the equipment.
- (10) An interruption of the *questioning* involving the *person in custody* leaving the *questioning* room, must be recorded, together with the reason for it and the duration thereof. The tapes or disks must then be removed from the equipment and be dealt with in the same manner as if the *questioning* had been concluded.
- (11) A short break, in which both the *person in custody* and the *member* remain in the room, must be recorded. The equipment may be switched off, but it is not necessary to remove the tapes or disks. Resumption of the *questioning* must be recorded.
- (12) Whenever there has been a break in the *questioning*, the *member* conducting the *questioning* must ensure that the *person in custody* is still aware of his or her constitutional rights. If there is doubt, the *person in custody* must once again be informed of his or her constitutional rights.
- (13) In the event of a failure of equipment which can be rectified quickly, this must be done and the reason for any break must be recorded and the time when the *questioning* resumes. Where the further use of the equipment is impossible and no alternative is readily available, the *questioning* may continue without being electronically recorded.

- (14) If one of the tapes or disks are damaged during *questioning*, it should be sealed as a master tape or disk and marked with an identification number in the presence of the *person in custody*, and the *questioning* should be resumed where it stopped. The undamaged tape or disk should be copied and the original sealed in the usual way. If equipment for copying the undamaged tape or disk is not readily available, both tapes or disks must be sealed in the prescribed manner, and the *questioning* resumed.
- (15) At the conclusion of a *questioning*, including the taking and reading back of any written statement, the *person in custody* must be offered the opportunity to clarify anything he or she has said and to add anything he or she wishes to add. The time must then be recorded and the equipment switched off.
- (16) One tape or disk must be used as a master tape or disk, which must be sealed with a master label and marked with an identification number and treated as an exhibit. The *member* must sign the label and ask the *person in custody* and any third party to sign it as well. If either, or both, refuse to sign the label, a *member* shall be called into the *questioning* room and be asked to sign it.
- (17) The *member* must then give the *person in custody* a written notice explaining the use which will be made of the recording, and the arrangements for access to it.
- (18) The other tape or disk may be used as a working copy and for transcription purposes. A transcribed copy of the *questioning* may, at his or her request, be made available to the *person in custody*.

- (19) A note must be made in the Investigation Diary of the fact that the *questioning* has taken place and that it has been recorded electronically, the time, duration and the date and the identification number of the master tape or disk.
- (20) The *station commissioner* of each police station is responsible for the safekeeping of the master tapes or disks. Seals must not be broken until it has been handed in as evidence at criminal proceedings.

Comment:

Before this paragraph can be incorporated into National Orders, the availability and type of equipment to be used, should be investigated, together with the financial implications thereof. The electronic recording of *questioning* represents an important safeguard for *persons in custody* while offering protection to *members* conducting the *questioning*. In particular, it provides a complete and authentic record of the *questioning*, thereby greatly facilitating the investigation of allegations of *torture*.

12 Training

Any person who may be responsible for the training or education of *members* shall ensure that each and every *member* is fully aware of the prohibition against *torture*. Each *member* shall be trained to properly deal with persons in his or her custody and how to conduct *questioning* in a proper manner.

Comment:

It follows from this paragraph that suitable training on human rights issues and the effective conduct of *questioning* should form an essential part of the training of all *members*.