
# 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 OF PUNISHMENT"

**Prepared**

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## Executive summary

This submission is made by the Civil Society Prison Reform Initiative (CSPRI), a non-governmental structure, in response to the first Country Report submitted by the Republic of South Africa in terms of the UN Convention against Torture. The Country Report submitted is dated and reflect in many regards not accurately on the current situation, and both positive developments and areas of concern do not receive adequate attention. This submission focuses on two themes. Firstly, attention is given to the criminalisation of torture as is required by Articles 2 and 4 of the Convention. South Africa has as yet not met this requirement of the Convention and there is as yet no crime such as torture in South Africa. Two pieces of draft legislation has been selectively circulated by the Department of Justice and Constitutional Development (the responsibly department) but both pieces of draft legislation exhibit serious shortcomings. The failure of South Africa to criminalise torture nine years after it ratified the Convention continues to place its citizens at risk and prevent the effective investigation of allegations.

The second theme addressed in the submission is the situation in South Africa's prisons. A general overview of South Africa's prisons is presented followed by more specific discussions on particular issues. The country's prison system is midst a large scale transformation process which is to say the least, very challenging to both government and civil society. In 2004 the Correctional Services Act was promulgated creating a new legislative framework for prisons and corrections. The failure to criminalise torture has perpetuated the generally weak investigative regime in place. The investigation of assault and attempted murder charges laid by prisoners against officials are investigated by the police. There is consistent evidence that this is ineffective. The submission also reflects on the role of the Judicial Inspectorate of Prisons and the role of the Independent Prisons Visitors as well as the oversight function of the Parliamentary Portfolio Committee on Corrections. The persistent claims of human rights violations (assaults and torture) in South Africa's prisons should be seen within the larger context of developing systems of effective governance, which is at this stage a serious challenge for the Department of Correctional Services.

## Introduction

1. The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 and is a project of the Community Law Centre at the University of the Western Cape in Cape Town, South Africa. CSPRI was established in response to the limited civil society participation in the discourse on prison and penal reform in South Africa. To address this, four broad focus areas were developed:
    - Developing and strengthening civil society involvement and oversight over corrections
    - Promotion of non-custodial sentencing and penal reform
    - Improving prison governance
    - Improving offender reintegration services
2. In broad terms, a similar implementation strategy is followed for the four focus areas:
    - Information collection, research and analysis of the field
    - Dissemination and sharing of findings with stakeholders to stimulate and inform dialogue
    - Engaging key players and decision-makers to influence decisions that will improve corrections
    - Embedding the achievements of the programme in government and civil society.
3. It is the approach of CSPRI to engage constructively, yet independently, with government and utilise democratically accepted means to advocate for the rights of prisoners and reforms in this regard. To this end CSPRI has done the following:
    - Engaged the Parliamentary Portfolio Committee on Correctional Services on numerous occasions through written and oral submissions on various matters
    - Met with the Ministry of Correctional Services as well as senior departmental officials
    - Supported litigation and launched litigation (*Minister of Home Affairs v NICRO* that ensured the right of prisoner to vote)
    - Engaged the judiciary on sentencing and prison reform
    - Disseminated information emanating from numerous research projects conducted
4. It is CSPRI's position that to advance the rights of prisoners in South Africa, it is essential to engage government in a constructive yet critical and independent manner. This is a fine line, especially in the prison reform field. Access to prisons and prisoners can easily be denied. We have been fortunate to date to have received good cooperation from the Department of Correctional Services in order to conduct research in prisons. We regard this as indicative of a maturing relationship between civil society and government in a deepening constitutional democracy.
5. It is noted with concern by CSPRI that the Country Report is several years late and that the information supplied in the report is dated, with the result that both positive developments and areas of concern are not adequately or at all reflected on. Where possible within the ambit of this submission, more up to date information will be supplied. It is further noted that the Country Report was not made available in South Africa, and that the government did not inform

stakeholders of its existence. Consequently a copy of the report was obtained only in late April 2006 through other channels.

6. Should the committee wish to obtain additional information or require clarification, on any of the points raised, CSPRI will assist in this as far as is possible.

## Structure of the submission

7. This submission will respond to the report "*Republic Of South Africa – First Country Report On The Implementation Of The Convention Against Torture, And Other Cruel, Inhuman and Degrading Treatment Of Punishment*" (the Country Report) focusing on two themes, namely:
   - the criminalisation of torture as required by Article 4 of the UN Convention against Torture (UNCAT)
   - the situation in South Africa's prisons as reported on in the Country Report.
8. The submission will respond to the Country Report using the paragraph numbers of said report as headings. In order to be brief, this report will rather refer to existing documented sources and highlight salient features instead of citing extensively from these sources.

## Criminalisation of torture[1]

### Paragraph 68 – Article 2: Measures to prevent torture

9. The Country Report, written in 2002, has since been overtaken by two significant events on the issue of torture. First, South Africa has now incorporated the Rome Statute into national law. Second, the Department of Justice circulated the *Draft Criminalisation of Torture Bill* in 2003[2] selectively for comment. It was revised an issued as the *Combating of Torture Bill* in 2005.[3] The following comments are in respect of the latter, a copy of which is attached as Appendix 1.
10. Whereas the first draft kept to the wording of the definition of torture in the Convention, the second draft omits the aspect of torture where it is committed "with the consent and acquiescence" as spelled out in the Convention. Instead, the draft uses the words "procures any person to commit torture." This is an unfortunate wording. First, the notion of "procuring" is redundant as it is in any case subsumed under either the meaning of "instigation or with the consent or acquiescence of a public official" as set out in the Convention definition. It is the omission of the words "with the consent and acquiescence" in the draft Bill which is perturbing. This gap creates a loophole for superiors who might be aware of the torture occurring under their chain of command, but who fail to take action against it or who purposefully allow it continue.

[1] A comprehensive research report on the criminalisation of torture in South Africa was commissioned by CSPRI and will be available shortly, see Fernandez L and Muntingh L (forthcoming) The Criminalisation of Torture in South Africa, CSPRI Research Report.
[2] Minister for Justice and Constitutional Development [B-03] 2003.
[3] Minister for Justice and Constitutional Development [B-05] 2005.

11. This is a sore omission, given the notorious history of the South African police authorities to consciously ignore information about acts of torture being perpetrated by subordinates. The fact that the draft Bill limits liability to inciting, instigating and commanding constitutes a substantial narrowing down of the type of specific conduct for which superiors may be held culpable. The notion of consent and acquiescence has been included in the Convention definition to cover cases where superiors know about abuses and fail to act, or consciously ignored information which should place them on notice of torture committed by subordinates, yet do nothing about it. The draft Bill definition therefore erodes a core element of the Convention definition, which aims to eliminate impunity for public officials who themselves do not administer the torture physically, but who bear knowledge of it taking place.
12. The most fundamental objection against the omission of the words "consent and acquiescence" is that it might lead to the conviction of the perpetrator, the so-called "small fries", without doing anything to disturb the possibility of torture being resorted to as a tool of policy within the system. For as long as the conduct of superiors does not come comprehensively within the purview of the definition, systemic torture cannot be fought successfully. To avert this happening, the Committee against Torture has in the past correctly advised States that are party to the Convention to "[*a]dopt a definition of torture that covers all the elements contained in article 1 of the Convention and incorporate into the Penal Code a definition of a crime of torture that clearly responds to this definition*."[4] It is therefore essential that South Africa, too adhere, to the Convention definition.
13. All that the Draft Bill says about punishment is that whoever is found guilty of torture "is liable to conviction and imprisonment." So, too, one may add, is someone convicted under South African law for theft, fraud or assault or any other ordinary common law or statutory crime. In other words, according to the Draft definition the torturer may even come away with a suspended sentence or a sentence as light as four months imprisonment. Nothing in this provision suggests, even remotely, that one is dealing here with an exceptionally grave crime, one rightly deserving to be regarded with utter revulsion and severely punished. The torturer, it was held in *Filartiga v Pena-Irala*, is "like the pirate and slave trader before him – *hostis humani generis* – an enemy of all mankind." To make such a person only blandly liable to imprisonment, without the penalty reflecting the absolute abomination that attaches to the crime, constitutes no departure from seeing torture in no different light to the common law crime of assault.
14. The wording in the First Draft was less bland; at least, it went as far as equating the punishment for torture to that imposable for the crime of attempted murder. The Revised Draft Bill retreats from the original, more punitive clause. The reason for this is unknown. One may well surmise that this has been prompted by the public demands on Government to clamp down hard on spiralling crime, and that the Constitution places unnecessary limitations on the police to deal effectively with criminals. We know that the government is sensitive to such

[4] CAT/C/SR.584 and 587 Para 110 (a). See also, more recently, for example CAT/C/SR.612 and 614 Para 33 (a); CAT/C/SR.602 and 605 (a).

criticism and has, in response to past similar calls after the demise of the death penalty, enacted mandatory minimum sentence legislation compelling the courts to impose life imprisonment for certain crimes. But however vociferous the demands for more policing muscle might be, torture is a different matter altogether. The South African Constitution states clearly that the person's inherent right to dignity is non-derogable. In addition, the Convention, including the Draft Bill itself, affirms that no public emergency of whatever kind may be invoked as a justification for torture. The very extent to which this right is protected needs therefore to be reflected by the degree of punishment which attaches to it. The need for stringent punishment also arises from the following:

- The international literature and leading commentaries on CAT emphasise that the crime of torture should carry severe custodial penalties.[5] Article 4(2) of CAT spells out that the punishment must take into account the "grave nature" of torture.
- The continued lack in South Africa, despite its having ratified CAT, of a credible penal framework for punishing acts of torture and conduct amounting to cruel, inhuman or degrading treatment or punishment, explains why such acts continue unabated. The findings of an empirical study conducted by the Centre for Justice and Crime Prevention, which released in May 2006, shows that in South Africa, 51,4 % of schoolchildren are being subjected to corporal punishment.[6] – this despite a judgment by the Constitutional Court in 1995 which found corporal punishment to be unconstitutional.[7] An earlier study, conducted in 2005 by the University of the Witwatersrand's Education Policy Unit, found that every year in South African schools some children "are left permanently disfigured, disabled or even dead."[8] The practice of allowing impunity for human rights violations has rightly been pointed to as an important reason for their persistent recurrence.[9]
- Most of the victims of torture and other cruel forms of treatment in South Africa are impoverished, marginalised persons who lack the knowledge and the means to vindicate their constitutional rights. The absence of a strongly deterrent punitive regime for abuses against such persons, as well as other minority groups such as asylum seekers, children in homes, inmates of psychiatric institutions, facilitates grave malpractices at the hands of some state officials or those functioning at their behest and with their knowledge.

[5] See, for example, C Ingelse *The UN Committee against Torture: An Assessment* (2001) 340; L Wendland *A Handbook on State Obligations under the CONVENTION against Torture* (2002) 37-37.
[6] See A Shelensky "Corporal punishment still rife in classrooms despite being banned" in *Cape Times* 11 May 2006 at 4. See also Leoschut L and Burton P (2006) How Rich the Rewards – Results of the 2005 National Youth Victimisation Study, Centre for Justice and Crime Prevention, Cape Town.
[7] See *S v Williams* 1995 (3) SA 632 (CC).
[8] S Vally "What is Corporal Punishment?" (2005) 1 *Article 19* at 7.
[9] See, for example, M C Bassiouni, in L C Vohrah *et al* (eds) *Man's Inhumanity to Man*, (2003) 119 ff.

- The United Nations ad hoc tribunals have confirmed the relevance of positing retribution and deterrence as the main purposes to be considered when imposing sentences for crimes that violate the international legal order.[10]

15. South Africa's First Country Report lauds the existence of a complaints procedure which ensures "the prompt and thorough investigation into any complaint of torture."[11] This statement does not reflect reality. At best, it refers to a small number of matters involving allegations of torture and other forms of cruel and inhuman treatment by the police. The fact of the matter is that whatever complaints procedure as it exists, is widely unknown.
16. The report flagships the Independent Complaints Commission (ICD) as an effective oversight mechanism for investigating complaints of abuse brought against the police "in an impartial, effective and efficient manner."[12] In practice, the ICD is little known, for one; for another, it does not command wide public confidence in the way it works. First, the ICD makes it hard for the public to believe that it is an independent body. The foreword to its Annual Report to Parliament –it is a creature of statute- is written by the political head of the South African Police Services, namely the Minister of Safety and Security. This undermines its public credibility as an independent civilian oversight body. Second, in its work, it depends heavily on the police policing themselves. A very recent study carried out by the Open Society Foundation (South Africa) and the Open Society Justice found the following:

    > *Many of the cases regarding alleged police misconduct that are received by the ICD, with the exception of deaths in custody, are referred back to the police themselves for investigation. There is also a limited capacity to monitor the outcome of the investigations. In addition the police are not compelled to report back to oversight bodies on their compliance with the agency's recommendations. The result is that there is little scope to evaluate the impact of the work of many of these bodies and little opportunity to build confidence in the communities*.[13]

    Second, the ICD lacks adequate information and data on what happens to the cases that it refers to the police for investigations. Furthermore its work is impeded by limited personnel, resources, duplication of functions, inadequate follow-up of cases, and the inability to extract answers from the National Prosecuting Authority regarding progress in tracking matters bearing on police abuse.[14] The unfinished way in which the ICD operates is reflected, too, in the Report's wording, with phrases as "the ICD has therefore started to investigate" (Page 68); "[f]urther attempts are being made"(Page 69); "the matter is still pending before court"(Page 70); [t]o date there has been no formal inquiry or charges made."
17. To inspire public confidence in the Government's determination to criminalise torture, an enactment that outlaws torture must provide a credible means for the victims of torture to bring

[10] See *Prosecutor v Kuprezeski et al* ICTY (Trial Chamber) Judgment of 14 January Paras 848 ff; *Prosecutor v Jokic* ICTY (Trial Chamber) judgment of 18 March 2004 Para 30 ff.
[11] At 67.
[12] *Ibid.*
[13] *Strengthening Police Oversight in South Africa* (published by the Open Society Foundation for South Africa) (2005) available at www.osf.org.za
[14] *Ibid* 251.

the matter to the courts. The present Bill is conspicuously silent on this matter. The Country Report, on the other hand, refers to a host of enactments, constitutional bodies, judicial decisions, government initiatives and plans aimed at promoting human rights. No doubt, these are important and welcome advances in a country blighted by the inhumanity of Apartheid, and need to be supported. But we need to realise, too, that successes on this front are limited to the goals they set out to achieve, and even then, their usefulness is limited to those who know about their existence and how to go about obtaining relief. None of the institutions referred to in the Report can be said to be specifically geared to cases of torture, for this is an area that demands a great deal of investigative expertise, from the investigative stage, through the medical examination stage, right up to the prosecution of the crime.

18. One does not expect the Bill to deal comprehensively with all these matters in one piece of legislation. What the envisaged anti-torture law would need to contain is this regard are some provisions that enable the enactment or promulgation of rules, codes of professional conduct, and procedural beacons that need to be observed in implementing of the main law criminalising acts of torture (Article 11 CAT). Above all, the investigations need to be prompt and fully impartial (Article 12 CAT), unencumbered by built-in bureaucratic hurdles, and be transparent –the lack of which is what presently characterizes complaints against the South African Police Services at present. It is equally important that provision be made for protecting complainants and witnesses against official reprisals (Article 13), and that the legislation give effect Article 14 of CAT that victims are accorded the right to redress and enforceable right to fair and adequate compensation and rehabilitation.

## Prisons in South Africa

19. A number of major developments occurred in the field of prisons between 1998 and 2005 that are not reflected in the Country Report, namely:
    - In March 2005 the Department of Correctional Services released its long term vision and policy document, the White Paper on Corrections in South Africa.
    - The full promulgation of the Correctional Services Act (Act 111 of 1998) in October 2004. This brought the legislative framework for prisons into line with the Constitution of South Africa six years after Parliament accepted the legislation.
    - In May 1998 the Criminal Law Amendment Act (Act 105 of 1997) came into force. This legislation prescribed mandatory minimum sentences for certain offences. This had a profound influence on the nature of sentencing in South Africa.[15] The Act prescribed minimum mandatory sentences ranging from five years to life imprisonment for specified offences.

[15] See Sloth-Nielsen J and Ehlers L (2005) Assessing the Impact – mandatory minimum sentences in South Africa, SA Crime Quarterly, No. 14, pp. 15 – 22 and Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 22-26.

- In 1998 the Magistrates Amendment Act (Act 66 of 1998) came into force. This Act increased the sentencing jurisdiction of district and regional courts significantly. In the case of district courts, the maximum prison term that may be imposed was increased from 12 months to 36 months, and in the case of regional courts, the maximum sentence was increase from 10 years to 15 years.
- In 2001 the President appointed a Judicial Commission of Inquiry, the Jali Commission, lead by the Honourable Justice Mr T Jali, to investigate corruption in the Department of Correctional Services.[16] This step was taken after it became evident that government had effectively lost control of sections in the Department of Correctional Services due to widespread corruption. In December 2005 Judge Jali handed over the final report to President Mbeki. At the time of writing, the report had still not been made public yet.

20. The Department of Correctional Services, as the department responsible for prisons, has an excellent electronic management information system and is able to produce extensive numerical and statistical data on the prison population. The emphasis will be placed here only on the most pertinent facts for contextual purposes.
21. South Africa has approximately 240 prisons[17] at present and has official capacity for approximately 114 796 prisoners. On 31 December 2005 there were 157 402 prisoners in custody, resulting in an overall overcrowding level of 137%. [18] Historical data shows that from 1965 to 1997 the total prison population remained below the 120 000 level but thereafter rapidly increased to a level above 180 000 by mid-2005.[19]
22. The following table presents an overview of the South African prison system, comparing figures for February 2005 and December 2005.[20]

**Table 1**

| Category | Feb 2005 | Dec 2005 | % Increase/ Decrease |
|---|---|---|---|
| Functioning prisons | 233 | 237 | 1.7 |
| Total prisoners | 186 823 | 157 402 | -15.7 |
| Sentenced prisoners | 135 743 | 111 075 | -18.2 |
| Unsentenced prisoners | 51 080 | 46 327 | -9.3 |
| Male prisoners | 182 652 | 154 183 | -15.6 |
| Female prisoners | 4 173 | 3 219 | -22.9 |

[16] The Commission was duly constituted by the order of the President in terms of Proclamation No. 135/2001 dated 27th September 2002, which proclamation sets out the regulations governing the Commission as well as the Commission's Terms of Reference.
[17] This figure varies from month to month as prisons are closed and reopened as a result of renovations.
[18] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 12.
[19] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 24.
[20] CSPRI Newsletter no. 16, "SA prisons at a glance" , http://www.easimail.co.za/BackIssues/CSPRI/2403_Issue769.html#57

| Category | Feb 2005 | Dec 2005 | % Increase/ Decrease |
|---|---|---|---|
| Children in prison | 3 035 | 2 354 | -22.4 |
| Sentenced children | 1 423 | 1 137 | -20.1 |
| Unsentenced children | 1 612 | 1 217 | -24.5 |
| Total capacity of prisons | 113 825 | 114 796 | 0.9 |
| Overcrowding % | 164 | 137 | -16.5 |
| *Most overcrowded* | | | |
| Feb '05: Durban Medium C | 388% | | |
| Dec '05: Middledrift | | 387% | |
| *Least overcrowded* | | | |
| Feb '05: Emthonjeni | 28% | | |
| Dec '05: Emthonjeni | | 18% | |
| Prisoners awaiting trial for longer than 3 months | 23 132 | 19 277 | -16.7 |
| Infants in prison with mothers | 228 | 68 | -70.2 |

23. Due to a remission of sentence programme implemented by the Department of Correctional Services, the sentenced population was reduced substantially, with the result that the overall prison population was reduced. This step was taken in the light of unbearable overcrowding levels reached by the middle of 2005.
24. Due to sustained efforts by various role players in government, civil society and oversight structures, the total number of awaiting trial prisoners has shown a steady albeit slow decline over the past 36 months.
25. The size of the South African prison population and the imprisonment rate should be seen within the African context. The South African imprisonment rate and size of the prison population is significantly higher than any other African country.[21] In February 2005 the imprisonment rate was 416 per 100 000 of the population. This came down to 351 prisoners per 100 000 of the population following the remissions programme.

**Paragraph 87 – Article 2: Measures to prevent torture**

26. The Country Report reflects on the adoption of the principles of unit management in the design of all prisons constructed post 1994. It further claims that unit management would help attain a wide range of other positive outcomes. The link between the prevention of torture and unit management is not explained in the Country Report, but it may be assumed that improved management should result in the improved safety and security of prisoners in line with human rights standards.

[21] Muntingh L (2005) Surveying the Prisons Landscape – what the numbers tell us, *Law Democracy and Development*, Volume 9 No. 1, p. 22-23.

27. Whilst the Department of Correctional Services may have adopted the principles of unit management, implementation in this regard has been limited. Sloth-Nielsen notes that the concept first entered the departmental lexicon in 1999/2000 but that progress has been very limited.[22] She further notes that the architecture housing the overwhelming majority of South Africa's prisoners creates an "antithetical environment" for the objectives of unit management. The overwhelming majority of South Africa's prison population is housed in buildings characterised by long corridors with large communal cells.
28. The Department of Correctional Services Annual Report of 2004/5 reports that a training manual on unit management had been developed during that year and that an audit of "unit management practices" were completed at 36 selected prisons.[23] The departmental strategic plan for 2006 to 2011 reflects further that unit management will in fact only be fully implemented by 2011.[24] Compounded by the lack of staff skills and overcrowded conditions in many prisons, the notion of unit management should be regarded as a vision for the future rather than an achieved result, and its contribution to combating torture and ill treatment of prisoners should be seen in this light.
29. The Country Report, as noted above, fails to report on the full promulgation of the Correctional Services Act (Act 111 of 1998) in October 2004, as well as the release of accompanying Regulations in support of the implementation of the Act.[25] The Act is fundamental to the prevention of torture as it affords every prisoner the rights and protection derived from the Constitution. These are primarily dealt with in Chapter 3 of the Correctional Services Act and it is not necessary to describe these here. Suffice to say, that the drafters of the legislation consulted the international instruments extensively to ensure that the Act is indeed in line with the these instruments.
30. The Act created a new legislative environment but due to the fact that torture has as yet not been criminalised in South Africa, the notion of torture remains conceptually peripheral. Torture as a human rights violation has not entered the human rights discourse in the Department of Correctional Services. For example, unlike the South African Police Service, the Department of Correctional Services does not have a policy on the prevention and combating of torture. Whilst serious human rights abuses are frequently alleged by prisoners, these are not necessarily regarded a violations covered by the Convention Against Torture and as such the Convention is a relatively unknown document in this context. South Africa's particular history has, at least for some, placed torture as a human rights violation that occurred under the

[22] Sloth-Nielsen J (2005) Policy and practice in South African Prison – a update, *Law Democracy and Development*, Volume 9 No. 1, p. 9-10.
[23] These prisons are the so-called centres of excellence. According to the government communication service: "*The establishment of centres of excellence in various regions as sustainable service-delivery points will enable the Department to phase in interventions and services to promote excellence, taking advantage of the best practices within and outside the system. The White Paper Implementation Plan details the activities to be realised*." http://www.info.gov.za/aboutgovt/justice/corrections.htm
[24] Department of Correctional Services Strategic Plan for 2006/7 to 2010/11, p. 56.
[25] Correctional Services Act (1998) Promulgation of Regulations, No. R 914, Regulation Gazette No. 8023, Vol 469. Available at http://www.dcs.gov.za/Policies/Correctional%20Services%20Act%20111/Correctional%20Services%20Act%20111.pdf

Apartheid regime, and then with a very specific political purpose in mind. There is therefore a need to expand the discourse on torture to ensure that the Convention provides effective protection to prisoners and other persons deprived of their liberty.

31. One of the avenues through which prisoners can lay complaints (relating to any condition of incarceration) is the Independent Prison Visitors[26], which are appointed by the Inspecting Judge of Prisons. During 2005/6 the Independent Prison Visitors recorded a total of 429 700 complaints.[27] Of these a significant number related to complaints associated with assault and ill treatment of prisoners, as shown in Table 2.[28] On such a scale, allegations of assault should not be regarded as individual and isolated incidents, but rather as an indicator of the systematic abuse of prisoners' rights and efforts by unscrupulous officials to establish a culture of fear in specific prisons.

**Table 2**

| **Category** | **Number of complaints recorded** |
|---|---|
| Assault (prisoner on prisoner) | 4 755 |
| Assault (official on prisoner) | 2 494 |
| Conditions of incarceration | 18 799 |
| Inhumane treatment | 5 291 |

32. Whilst such complaints are recorded by the Independent Prison Visitors, a prisoner has to lay a criminal charge with the South African Police Service to have it criminally investigated. The police officials tasked with this are not specially trained and will investigate such a charge like any other. Their impartiality and independence in these investigations are also questioned as they may be the same police officials who investigate further charges against prisoners. Testimony heard in 2004 at the Jali Commission hearings in Pretoria give insight into this problem: [29]

> *The Head of Pretoria Prison (Mr Boloyi) was testifying before the Jali Commission when Judge Jali enquired why warders with a sum total of 251 criminal charges (involving assaults on prisoners) against them were still being employed and why he (Boloyi) had not done anything to address these criminal matters. Judge Jali stated that this inaction encouraged a culture of assault of prisoners because they (warders) knew nothing will happen. Boloyi admitted that he did not follow the procedure relating to criminal matters.*

33. The current system affords little protection to prisoners who have laid complaints of assault, torture and ill-treatment. As the above example (paragraph 32) illustrates, little may happen to

[26] S 93 of the Correctional Services Act (111 of 1998)
[27] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 11.
[28] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 11.
[29] Pretoria News 21/4/2004

officials in response to such serious allegations. It is also often alleged by prisoners that after they have laid a charge, they never hear from the investigating officer again. Even when prisoners have laid a complaint with the Independent Prison Visitors, the Independent Prison Visitors hold no authority over police officials investigating charges laid by prisoners and there is therefore no mechanism to ensure that cases are investigated effectively.

34. Inquiry with the Judicial Inspectorate[30] confirmed that Independent Prison Visitors have recorded numerous complaints from prisoners stating that after they had made statements to the South African Police Service alleging assault by prison officials, they never heard about the case again. The Judicial Inspectorate further confirmed that such cases are in general not thoroughly investigated and that prisoners believe that there is collusion between prison officials and police investigators. Excessive delays in cases have also been reported and also that cases are adjudicated without informing the complainant. When cases do progress to prosecution and trial stage, they are frequently thrown out for lack of evidence or because the National Prosecuting Authority declines to prosecute. The Independent Prison Visitors have also recorded complaints from prisoners alleging that they have been transferred to another prison far away soon after criminal charges have been laid against a prison official. The result is that the victim is not available to provide evidence during the investigation or to give testify during the trial. These cases are consequently withdrawn fro lack of evidence.
35. It is imperative that legislation and appropriate measures be implemented to ensure that prisoners' complaints are effectively investigated and that they receive adequate protection.

**Paragraphs 88, 89 90 and 91 (Overcrowding in prisons)**

36. As noted above in paragraph 21, the rapid growth in the South African prison population occurred post 1997. This growth was initially fuelled by a burgeoning unsentenced prison population but this section of the prison population stabilised and started declining by 2000; from a high of more than 60 000 unsentenced prisoners in 2000 to the December 2005 level of 46 000. However, despite the decline in the unsentenced prison population, the total population continued to grow as a result of the growth in the sentenced population. This happened despite the fact that significantly fewer prisoners were admitted to serve prison sentences.[31]
37. The effect of the mandatory minimum sentences has been severe. For example, the number of prisoners serving life sentences increased from 433 in 1995 to 6214 by 2005.[32] Similarly, the number of prisoners serving sentences of longer than 10 years, increased from approximately 11 000 in 1995 to more than 46 000 by 2005.[33]

[30] Interviews conducted at the Offices of the Inspecting Judge on 12 May 2006.
[31] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 2.
[32] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 24.
[33] Muntingh L (2005) Surveying the Prisons Landscape – what the numbers tell us, *Law Democracy and Development*, Volume 9 No. 1, p. 36.

38. Several commentators have reported on the impact of the mandatory minimum sentences legislation and it is not necessary to repeat here.[34] It is, however, important to acknowledge that the current overcrowding problem in South Africa's prisons was created as a result of a change in sentencing practices following the enactment of mandatory minimum sentences legislation. Longer prison sentences rather than more prisoners, is the main driver of the growth in the prison population. The overcrowding of South Africa's prisons and the impact this has on prisoners' rights cannot be seen as separate from the urgent need for sentencing reform.
39. Overcrowded conditions create a host of ills that are well reported on the Annual Report of the Judicial Inspectorate of Prisons. Reports by the Law Society of South Africa[35] as well as Johannesburg Attorneys Association[36] also reflect in detail on the conditions in overcrowded prisons. These conditions are in violation of the South African Constitution and the Correctional Services Act. Prisoners are expected to live, eat and sleep in conditions that are not acceptable in a constitutional democracy. The following is an extract from the Annual Report of the Judicial Inspectorate of Prisons:[37]

> *While some IPVs* [Independent Prison Visitors] *remark on improved conditions following on the reduction in prisoner numbers, many IPVs still report on problems caused by overcrowding in their prisons. Examples in recent reports are: inmates sleeping on the floor; medium and maximum prisoners being mixed; 44 beds for about 100 inmates; about 74 inmates in cells for 16; a single toilet and shower being used by 59 inmates; foul smells; no exercise; broken light fittings; shortage of clothes and shoes; insufficient nurses; no washing of blankets; locking up at 3 pm; sleeping in toilets and showers; two last meals at 12 noon and 2 pm; sharing of beds; "idling" i.e. "eat and sleep"; late unlocking and early lock up; visiting room too small and lacking privacy.*
>
> *In February 2006 the Johannesburg Attorneys Association presented a comprehensive report on inspections done at the four Johannesburg Prisons, Medium A which houses awaiting-trial males, Medium B which houses sentenced males, Medium C which houses sentenced juveniles and the Female prison. All four were found to be overcrowded, the worst being Medium A with 5 389 prisoners with space for 2 630 and Medium B with 4 729 prisoners with space for 1 300. While praising the efforts of the officials to cope, the report gives an indication of the awful consequences of too many prisoners. It details degrading*

[34] See Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, and Muntingh L (2005) Surveying the Prisons Landscape – what the numbers tell us, *Law Democracy and Development*, Volume 9 No. 1, and See Sloth-Nielsen J and Ehlers L (2005) Assessing the Impact – mandatory minimum sentences in South Africa, SA Crime Quarterly, No. 14, pp. 15 – 22 and Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town.
[35] Law Society of South Africa (2004) The 2003 Prison Report, Pretoria.
[36] Report by the Johannesburg Attorneys Association on a visit to the Johannesburg Prison, Dated 19 December 2005.
[37] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 18.

*and inhumane treatment suffered and the miserable conditions resulting from the large numbers sent to prison while there is inadequate space and facilities for them. Examples are being forced to share beds with others suffering from tuberculosis and HIV/AIDS, having to crawl over others to get to their beds, sleeping 2 to 4 to a bed, taking turns sleeping, 103 prisoners in a cell with 1 toilet and 1 urinal.*

40. Not all South Africa's prisons are equally overcrowded and Table 3 presents the distribution of the prison population per level of overcrowding and the number of prisons per level of overcrowding as at December 2005.

**Table 3**[38]

| Level of occupation | Nr of prisons | No. of prisoners | % of total population |
|---|---|---|---|
| Equal to or less than 100% full | 75 | 22199 | 14.1 |
| 101 to 125% full | 41 | 21129 | 13.4 |
| 126 to 150% full | 47 | 22183 | 14.1 |
| 151 - 175% full | 35 | 33885 | 21.5 |
| 175% or more full | 39 | 58006 | 36.9 |
| **Total** | **237** | **157402** | **100.0** |

41. In the latter half of 2005, the Department of Correctional Services implemented a remission of sentence programme for selected categories of prisoners, as noted above in paragraph 23. The overall result was a reduction of approximately 25 000 in the sentenced population.[39] This made a significant contribution to the overall overcrowding situation but it should also be acknowledged that similar initiatives in the past, such as amnesties, only provided temporary relief and the prisons population was often back to its previous level within six months.
42. Paragraph 90 of the Country Report notes that four new prisons will be built providing additional capacity for 12 000 prisoners. It is further reported that these prisons will be operational by 2005/6.
43. At the time of writing, none of these prisons have been built and the Parliamentary Portfolio Committee on Correctional Service has had to call the Department of Correctional Services to explain the situation.[40] [41] This the Department of Correctional Services did to the apparent satisfaction of the Committee on Correctional Services. It is at this stage more likely that the four planned prisons will become operational at the soonest in 2009/10.
44. It was also reported by the Department of Correctional Services to the Portfolio Committee on Correctional Services that a further four prisons are being planned that will be of the same

[38] Information supplied by the Judicial Inspectorate of Prisons upon request.
[39] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 31.
[40] Parliamentary Monitoring Group Minutes of the Portfolio Committee on Correctional Services meeting on 2 May 2006, http://www.pmg.org.za/viewminute.php?id=7714
[41] It should be noted that minutes of parliamentary meetings taken by the Parliamentary Monitoring Group are not official minutes as the Parliamentary Monitoring Group is a non-governmental organisation providing this service for the benefit of civil society.

specifications. Together, the planned eight prisons would give additional capacity of 24 000 beds. At the current cost estimates, the prisons will cost in the region of US$ 32 000 per bed to construct, or US$ 767 213 114 in total.

45. The efforts by government to address the cooperation between different departments involved in the criminal justice system are acknowledged. The results are visible in the reduced number of unsentenced prisoners, the reduction in the number of sentenced prisoners, and the reduction in the number of children (sentenced and unsentenced) in prison. As with regard to children, there were 3931 children in South African prisons in December 2003 and by December 2005 this figure had been reduced to 2354.
46. Despite these achievements, there remains a significant number of prisoners awaiting trial for extensive periods of time. Table 4 reports on the number of prisoners in custody for longer than 3 months in 2004 and 2005. The number of prisoners awaiting trial should be seen within the context of the conditions in awaiting trial prisons, which are often substantially worse than in prisons for sentenced offenders. Unsentenced prisoners are also not entitled to the same services as sentenced offenders. The Department of Correctional Services has made the proposal that either the South African Police Services or the Department of Justice take on the responsibility for unsentenced prisoners.[42] There has as yet not been any decision in this regard.

**Table 4**

| Unsentenced Offenders In Custody Longer Than 3 Months Per Month | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Months | 3 - 6 Months | >6 - 9 Months | >9 - 12 Months | >12 - 15 Months | >15 - 18 Months | >18 - 24 Months | > 24 Months | All Duration |
| 2004/12 | 9343 | 4581 | 2879 | 1892 | 1229 | 1426 | 1384 | 22734 |
| 2005/01 | 9438 | 4729 | 2761 | 1920 | 1231 | 1431 | 1424 | 22934 |
| 2005/02 | 9364 | 4500 | 3013 | 1925 | 1287 | 1414 | 1460 | 22963 |
| 2005/03 | 9689 | 4936 | 2931 | 1885 | 1322 | 1480 | 1520 | 23763 |
| 2005/04 | 9300 | 4845 | 2883 | 1846 | 1286 | 1459 | 1509 | 23128 |
| 2005/05 | 8838 | 4803 | 2727 | 1916 | 1308 | 1475 | 1462 | 22529 |
| 2005/06 | 8353 | 4755 | 2856 | 1814 | 1278 | 1568 | 1517 | 22141 |
| 2005/07 | 8350 | 4559 | 2905 | 1940 | 1241 | 1471 | 1549 | 22015 |
| 2005/08 | 7955 | 4212 | 2636 | 1684 | 1291 | 1512 | 1528 | 20818 |
| 2005/09 | 7772 | 4066 | 2634 | 1754 | 1190 | 1484 | 1537 | 20437 |
| 2005/10 | 7181 | 4021 | 2488 | 1754 | 1208 | 1390 | 1475 | 19517 |
| 2005/11 | 7285 | 3707 | 2253 | 1613 | 1131 | 1440 | 1480 | 18909 |
| 2005/12 | 7813 | 3863 | 2208 | 1551 | 1101 | 1308 | 1433 | 19277 |

47. The fact that more than 40% of the unsentenced prison population had been awaiting trial for longer than three months in often hideously overcrowded conditions, indicates that there are fundamental problems in the administration of cases in the justice system. The result is that these prisoners are subjected to inhumane conditions of detention for long periods.

[42] Department of Correctional Services (2005) White Paper on Corrections in South Africa, Pretoria, p. 93-94

**Paragraph 92 - Relationship between members and prisoners**

48. Paragraph 92 of the Country Report entitled "Relationship between members and prisoners" makes reference to the Code of Conduct developed by the Department of Correctional Services but does not proceed to elaborate on any facts with regard to this relationship. The relationship between prisoners and warders requires a far more critical perspective than merely stating there is a Code of Conducts in existence.
49. In the above (at paragraph 31) reference was made to the nearly 2500 complaints recorded by the Judicial Inspectorate of Prisons alleging assault by officials on prisoners. This should be seen as an indicator of the quality of this relationship.
50. The Annual Report of the Department of Correctional Services reflects that in 2004/5 a total of 75 prisoners died due to unnatural causes.[43] [44] The "target" that the Department of Correctional Services set for itself was a maximum of 48 unnatural deaths in 2004/5. The high number of alleged assaults as well as the number of unnatural deaths give reason for concern and indicate that the relationship between prisoners and warders is not of the desired nature. To date there has been no public explanation for the high number of unnatural deaths and what measures will be undertaken by the Department of Correctional Services to ensure the safety of prisoners. To set a minimum numerical target for unnatural deaths in a prison system seem to be a callous expression of underlying good intentions. A numerical target of this nature unavoidably creates a threshold of acceptability and this cannot be tolerated from a human rights perspective. There should be zero unnatural deaths in prisons.
51. The relationship between prisoners and warders is also tainted by corruption. The Jali Commission investigated corruption extensively and numerous incidents of collusion between warders and prisoners were reported. Corruption in the prison system and especially collusion between prisoners and warders places certain categories of prisoners at great risk. Allegations of trafficking in people in prisons have surfaced from time to time in the past. A video, secretly filmed by prisoners at the Grootvlei Prison, demonstrated with horrific clarity the nature of the practice.[45] The video showed how a young prisoner from the juvenile section was brought to an older prisoner by a warder for payment, who then proceeded to have sex with the young prisoner.[46] This was not an isolated incident as the Jali Commission found evidence at Grootvlei prison that the sale of young prisoners for sex with older prisoners was commonplace, and that a sex ring involving juvenile prisoners existed amongst warders.[47] Evidence for this was provided by a 20-year old Grootvlei prisoner who testified before the Jali Commission, stating that he was repeatedly raped by warders and other prisoners. According

[43] Annual Report of the Department of Correctional Services 2004/5, p.38.
[44] "Unnatural deaths" refer to deaths as a result of non-natural causes such as murder, accidents, and suicides.
[45] The video was shown on national television in May 2002.
[46] IOL 19/6/2002
[47] Jali Commission briefing to the Parliamentary Portfolio Committee on Correctional Servcies on 20 August 2002

to him, warders would pretend to take him out of his cell on the pretext that he had to help with throwing out the garbage but would instead take him to other prisoners for sex.[48] In a remarkable study on sex in South Africa's male prisons, Gear and Ngubeni also found consistent evidence that some warders were part of an organised trade in sex in prisons.[49] The study alleges that there are warders who run their own gangs inside prisons. The study found that the most prevalent form of this trade was "selling" prisoners to other inmates:

> *You give [the warder] money and tell him that you want a certain boy in your cell . . . He will agree and he will tell the other warders some story.*[50]
>
> And
>
> *There are some [prisoners who] . . . live a nice life, they have the money . . . They tell the warders to do them favours, saying, . . .'I like that boy' and they give the warders a bribe, maybe R10.00 to buy Coke. The warders will make sure that they lead you to that prisoner's hands so that he can use you for sex.*[51]

52. The weak investigative regime in place at the moment makes it difficult to hold prison officials accountable. From the information supplied by the Department of Correctional Services in it's 2004/5 Annual Report it is not clear if disciplinary actions were taken against any officials for the assault of prisoners or what the result of this disciplinary action was.[52]

**Paragraph 136– Article 11**

53. As noted above, the Country Report does not reflect on the promulgation of the Correctional Services Act in 2004 and therefore does not deal with the requirements pertaining to prisoners set out in Article 11 of the Convention. These minimum standards are laid down primarily in Chapter 3 of the Act and further description is provided in Chapter 2 of the Regulations to the Act.
54. It is submitted that the minimum standards of detention for prisoners, as described in the legislation and the Regulations, are of an adequate nature and achievable in the South African context.
55. There is however concern about meeting these standards. Unlike many of its neighbours on the continent, South Africa cannot claim that resources are in short supply. In fact, South Africa finds itself in the enviable position that the State is collecting substantially more revenue than what is being budgeted for.[53] Further testimony to the resources issue, is the fact that the Department of Correctional Services is embarking on a very expensive capital works

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[48] News24.com 23/7/2002
[49] Gear S and Ngubeni K (2002) Daai Ding – Sex, Sexual Violence and Coercion in Men's Prisons, Centre for the Study of Violence and Reconciliation, Johannesburg, p.67
[50] Gear S and Ngubeni K (2002) Daai Ding – Sex, Sexual Violence and Coercion in Men's Prisons, Centre for the Study of Violence and Reconciliation, Johannesburg, p.67
[51] Gear S and Ngubeni K (2002) Daai Ding – Sex, Sexual Violence and Coercion in Men's Prisons, Centre for the Study of Violence and Reconciliation, Johannesburg, p.67
[52] Annual Report of the Department of Correctional Services 2004/5, p.146.
[53] Budget Speech 2006 by Minister of Finance, Trevor A Manuel, 15 February 2006 http://www.info.gov.za/speeches/2006/06021515501001.htm

programme and will also employ an additional 8311 entry level staff over the next three years.[54]

56. Overcrowded conditions will place any prison system under strain and are likely to elicit a more sympathetic response from human rights organisations. However, the apparent blatant disregard for the correct procedure is another matter, as is alleged regarding a recent death at Pollsmoor Prison in Cape Town:[55]

    [A female prisoner] *Marleyn Syfers, 19, allegedly set alight the mattress she was on in protest after she was shackled and handcuffed to the door of her cell, an internal investigation found. She had been put in the single cell after she threatened to stab fellow inmates and officers that evening.*

    *Syfers, from Swellendam* [a town some 300 kms from Cape Town], *was serving 22 months and 80 days for two counts of theft, one of contempt of court and one count of housebreaking. She was due to come before a parole board soon.*
    *The investigation found that only three warders were on duty at the time instead of five, as stipulated by prison policy.*
    *The incident, as well as the way Syfers died, has shocked inmates of the womens' section and several have undergone counseling. The probe found that Syfers had set the blaze with a box of matches passed to her by a prisoner in the next cell.*
    *The investigation also found that funds set aside earlier this year by the Department of Correctional Services to upgrade the female section of the prison had, instead, been used in other parts of Pollsmoor.*
    *The female section had earlier been earmarked to become a "centre of excellence", and prisoners were barred from smoking or having cigarettes in their possession.*
    *In August 2004, three inmates at the prison, Trevor Petersen, 23, Christopher Sibidla, 32, and Bayanda Nethi, died in similar circumstances, after a fire broke out in their cell.*
    *A Department of Correctional Services inquiry into that incident absolved the department of responsibility, but the Judicial Inspectorate of Prisons disagreed with the findings because the probe was not conducted by an independent body.*

57. From St Alban's Prison in Port Elizabeth it was also recently reported that a group of prisoners who were allegedly assaulted by warders in retaliation after the killing of warder in July 2005, won a court order on 23 April 2006 in the High Court allowing them to consult their lawyer without prison officials listening in:[56]

    *St Albans prisoners who were allegedly assaulted by warders in retaliation after the killing of a warder in July last year won a High Court application yesterday that allows them to consult their lawyer without prison officials listening in.*
    *The application by Patrick Bruintjies and 66 others against the correctional services minister followed an earlier application when they were prevented from seeing their lawyer during preparations to sue the department of correctional services.*
    *The group were granted an order by the Port Elizabeth High Court last year which allowed them to see their lawyer, but yesterday claimed they could only see the lawyer while correctional services senior legal representatives were sitting in on the consultations and listening to the conversations.*
    *In papers before court, advocate Bruce Dyke, on behalf of the prisoners, said the action of the department was a violation of the prisoners' attorney-client privilege. A letter in this regard had been written to the head of the prison, the state attorney and the correctional services provincial head, but to no avail.*

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[54] Department of Correctional Services Strategic Plan for 2006/7 to 2010/11, p. 38.
[55] The following are extracts from the full article "*Warders face action over teen's death blaze*" that appeared in The Cape Argus on April 13, 2006. A Parliamentary Portfolio Committee on Correctional Services meeting on the death of Ms Syfers was scheduled for 15 May 2006 but has been postponed.
[56] The Herald "*Court victory for St Alban's prisoners*", 24 April 2006.

*Dyke said the action amounted to intimidation.*
*Judge Johan Froneman ordered that prisoners be given the opportunity to consult their lawyers in private and that the department pay the legal fees of the prisoners' application.*
*The prisoners plan to lodge a civil claim for assault against the department. They say they were beaten in a "campaign of terror" in July last year in the St Albans maximum security prison after a warder was stabbed to death by an inmate.*
*Babini Nqakula, 52, the unit manager of the maximum security section, was stabbed in the dining room, allegedly by an inmate, on July 15.*
*Nqakula, a cousin of Safety and Security Minister Charles Nqakula, was apparently killed for foiling an escape which was supposed to have taken place weeks before.*
*After the murder, according to prisoners, warders began a systematic process of torture and intimidation to keep prisoners in check.*
*The warders feared for their lives because they were outnumbered by the inmates.*
*One inmate complained of being sexually assaulted with a pool cue as "prisoners were watching and warders were laughing".*

58. The cases cited in paragraphs 56 and 57 above are indicative of the implementation problems experienced at ground level. The lack of effective and transparent investigative measures continues to place prisoners at risk despite a Bill of Rights, well-crafted legislation and clear regulations. The Judicial Inspectorate of Prisons has a mandate to investigate any matter brought to its attention and may hold hearings in this regard. Investigations in response to allegations of assault have been done and recommendations for action and addressing systemic problems are submitted to the Minster of Correctional Services. As such the Judicial Inspectorate can recommend that a particular case be reported to the South African Police Services and the Inspectorate has confirmed that it will monitor progress on a particular case until a charge has been laid and case number assigned.[57] Thereafter it does not monitor progress on the case.
59. The Judicial Inspectorate has also not used its mandate to investigate trends relating to the high number of unnatural deaths in prisons.
60. Meeting the minimum requirements of humane detention in all prisons should be an absolute priority for the Department of Correctional Services. To achieve this, it is essential that officials are adequately trained to manage prisoners in a manner that is in line with the minimum requirements of the Correctional Services Act.

**Paragraphs 138 to 141 – Article 11**

61. The Country Report reflects in paragraphs 138 to 140 on the establishment of the Judicial Inspectorate of Prisons and the establishment of the Independent Prison Visitor System. The annual reports of the Judicial Inspectorate provide sufficient and up to date information on its operations and it is not necessary to repeat this.[58] It should be noted that the Judicial Inspectorate has made an extremely positive impact on the country's prisons and has focused primarily on the prison overcrowding problem over the last six years.[59]

[57] Interview conducted with Inspectors at the Office of the Inspecting Judge, 12/5/2006
[58] The annual reports of the Judicial Inspectorate are available at http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp
[59] CSPRI commissioned two research projects on the Judicial Inspectorate in 2004, namely:

62. The Judicial Inspectorate of Prisons has given sustained media exposure to overcrowding of South Africa's prisons and this has undoubtedly contributed to a more sympathetic public attitude towards prisoners.
63. As noted in the Country Report in paragraph 141, judges and magistrates are free to visit any prison in South Africa at any time. The importance of visits by external agencies, especially from civil society and oversight structures, plays a critical role in the prevention of torture and ill treatment. In this regard the Parliamentary Portfolio Committee on Correctional Services has led by example and has visited numerous prisons in the last few years. It is especially the last two visits to the Durban Westville Correctional Centre (17-19 October 2005) and four prisons[60] in the Northern Cape Province (10-15 October 2005) that are noteworthy. Following these visits the Committee on Correctional Services made detailed reports available to the public, giving insight into the challenges and achievements of the Department of Correctional Services. The Portfolio Committee is commended for these contributions.
64. Every second year since 2001, the Law Society of South Africa has conducted annual prison visits to a substantial number of prisons in the country.[61] These visits usually take place in December and a report on the findings of the visits is handed over to the Minister of Correctional Services a few months later and made public. These reports continue to make information available to the public about conditions in prisons and thus contribute to greater transparency in the prison system.

**Paragraphs 159 to 162 – Article 12: Complaints**

65. The Country Report deals with complaints under Article 12 although, strictly speaking, Article 13 of the Convention focuses on complaints and complaints mechanisms. This submission will follow the Country Report.
66. The Correctional Services Act[62] requires that prisoners have, on a daily basis, the opportunity to lodge complaints and make requests to the Head of the Prison. Such complaints are recorded in writing in a register, known as the G365 register. All complaints must be duly recorded, steps taken to deal with the complaints must be recorded, and the prisoner must be promptly informed of the outcome.
67. If the complaint concerns an alleged assault, the prisoner must immediately undergo a medical examination and receive the appropriate treatment. According to the Judicial Inspectorate of Prisons, Independent Prison Visitors receive frequent complaints from prisoners stating that there is not compliance with this requirement and that medical officers may even collude with

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Gallinetti, J (2004) Report of the Evaluation of the Independent Prison Visitors (IPV) System, CSPRI paper no. 5. and Jagwanth, S (2004) A Review of the Judicial Inspectorate of Prisons of South Africa, CSPRI paper no. 4. Both reports available at http://www.communitylawcentre.org.za/cspri/cspri-publications1.php

[60] The four prisons are Kimberley Male, Kimberley Female, Barkley West and Douglas.

[61] The 2001 and 2003 reports are available and the 2005 report will become available in the course of 2006.

[62] S 21 of the Correctional Services Act (111 of 1998)

the offending officials to cover up assaults.[63] The following are extracts from Independent Prison Visitor reports dated March 2006 and provide some insight into problems experienced at prison level with regard to the management of complaints:

***Kimberley Prison:*** *Conditions in the centre are satisfactory, the major problem that we experience is the way in which some complaints are been handled. There are delays or even no resolution on some of complaints, which needs the attention of external stakeholders, complaints such as Appeals and Legal Representation. Sometimes inmates have to wait for a very long period to get response on their application for appeals and their legal representatives provided by the state after appearing before court, seemingly there is a communication problem between DCS (Department of Correctional Services) and the Legal Aid Board because some DCS members claims that Legal Aid Board delays or sometimes do not respond at all to applications and enquiries forwarded to them. Complaints lodged with SAPS are also a major problem because the police visits the Kimberley Correctional Centre seldom and does not give feedback on charges laid by inmates. It was established that in most instances when charges were laid by inmates, especially assault charges, the state prosecutor refuses to prosecute. However other complaints are been resolved effectively and efficiently.*

***Oudtshoorn Medium A Prison:*** *The following worrying factors within the institution are noted: . . . . People are transferred from Knysna prison[64] where they allege that they had been assaulted by the Area Commissioner and other officials, put in solitary confinement and not being allowed to have access to the police to press criminal charges. It is of the utmost importance that this situation be immediately addressed by our office by way of either sending Mr. [ ----- ] of the Special Investigations Unit to have an in-depth investigation into this and other outstanding matters.*

***Goedemoed Medium B Prison****: On 22 March 2006 the inmates were fighting each other. According to the prisoners, this is when the members assaulted the inmates, including the Head of Prison, and he also gave the members the power to continue to assault inmates.*

68. Paragraph 159 of the Country Report notes that prisoners can lay criminal charges against officials of the Department of Correctional Services, as noted in paragraph 32 above. The South African Police Service investigators are not trained to investigate claims of torture and these charges will be investigated as normal criminal complaints. The independence and impartiality of the South African Police Service is also called into question in these cases. It has been alleged by prisoners that such cases have a tendency to “disappear” and take very long to complete, if at all. The case cited above at paragraph 32 from Pretoria Prison bears testimony to this. The problems noted above in paragraph 34 also bear reference here.
69. When such cases are investigated by the South African Police Service, their investigation is not monitored by an oversight structure such as the Office of the Inspecting Judge. This is regarded as a further shortcoming in the investigation architecture. The results of such investigations are also not made public.

[63] Interview conducted with Inspectors at the Office of the Inspecting Judge, 12/5/2006
[64] Knysna is a town approximately 200 km south east of Oudsthoorn.

70. The G365 register referred to above in paragraph 66 may provide an avenue for prisoners with regard to lesser complaints and requests. It is however doubtful that complaints alleging torture and ill treatment will be dealt with effectively through an internal complaints procedure.
71. The 2003 Law Society of South Africa Prison Report makes a number of comments regarding the internal complaints mechanism. The overall impression created is that it is ineffective, discourages prisoners to make complaints, and there is seldom feed back on complaints lodged. It is also noted that when prisoners make complaints, they are in real fear of reprisals from warders or colluding prisoners and warders.[65]
72. Paragraphs 161 to 162 of the Country Report describe an incident at Helderstroom Maximum Prison in 1997 and proceed to explain the findings and recommendations of the SA Human Rights Commission. The Country Report, however, fails to report on whether or not criminal charges were laid against any of the officials and the result of these. It is also not clear if the recommendations made by the Human Rights Commission were implemented. It is noted that this incident occurred prior to South Africa ratifying the Convention.

**Paragraphs 167 to 168 - Article 13 Investigation by impartial authorities**

73. The current situation with regard to the investigation of complaints of torture and assault is that it is the responsibility of the South African Police Service to investigate such cases after the victim has laid a criminal charge. As noted above, the Judicial Inspectorate has limited authority and can make recommendations to the Minister of Correctional Services in this regard. It was also noted in the above that there are serious doubts as to the impartiality, ability, commitment and competence of the South African Police Service to investigate such cases.
74. The Judicial Inspectorate of Prisons is ideally placed to lead or at least oversee such investigations. The Correctional Services Act makes provision for the appointment of Special Assistance should the Judicial Inspectorate requires specialist skills or additional capacity to conduct such investigations.[66]
75. The South African Law Society Report further reflects that, in very few instances, disciplinary and criminal actions were taken against officials accused of assaulting prisoners. It is with some measure of disappointed that the following comment is made by the Law Society of South Africa in its 2003 report:

    *Despite highlighting sexual and physical abuse cases in the past two inspection visits, it would seem that some prison heads have not seriously dealt with these matters immediately. For example, female inmates complained of continued sexual harassment and autocratic behaviour by warders. In certain male sections of the prisons warders meted out inhuman punishment to prisoners such as standing upside down on one's*

[65] Law Society of South Africa (2004) Prison Report 2003, p. 6.
[66] S 87 of the Correctional Services Act (111 of 1998)

*palms - and if they fail to satisfactorily complete the degrading manoeuvres the prisoners are beaten using batons.*

76. Whilst prisoners can, as noted in paragraph 169 of the Country Report, lodge complaints with the Public Protector and the SA Human Rights Commission, there is a working agreement between these bodies and the Judicial Inspectorate of Prisons that such complaints will be referred to the latter.
77. The investigation of torture should also be seen within the broader context of governance and corruption in the Department of Correctional Services. Collusion between prisoners and warders, or the police and prison warders will continue to undermine investigations. Recent history in the Department of Correctional Services indicates that particular factions in the Department have been effective in undermining and subverting investigations.[67] The methods use were:
    - official investigators being refused entry into prisons and access to information
    - intimidation of witnesses
    - undermining investigations through the fabrication or disappearance of evidence
    - delay tactics frustrating investigations
    - selective investigations

**Paragraphs 177, 179 and 180 – Article 14 Compensation and rehabilitation**

78. Paragraph 177 of the Country Report notes that the Department of Correctional Services has adopted the "restorative justice approach". Paragraph 178 of the Country Report explains further the aims and objectives of this approach, i.e. problem solving, dialogue and negotiation involving the parties concerned. It is apparently in this context that paragraph 180 of the Country Report notes that victims of crime and presumably victims of torture would be invited to attend parole board hearings in order to make representation to the Parole Board regarding the contemplated release on parole of the offender concerned.
79. The Judicial Matters Second Amendment Act (55 of 2003), effecting an amendment to S 299A of the Criminal Procedure Act, provides for the right of a complainant to make representation in certain matters relating to the placement on parole, on day parole, or under correctional supervision of an imprisoned offender. A complainant is understood to be the victim of the crime, or the immediate family, in the case of a murder. Not all crimes are covered by this provision and the emphasis is clearly placed on serious crimes such as murder, rape, robbery, sexual assault and kidnapping. On 31 March 2005 the Judicial Matters Second Amendment Act (55 of 2003) came into effect. Directives to facilitate the participation of victims in parole board hearings were issued by the Commissioner of Correctional Services in April 2006.[68]

[67] Muntingh L (Forthcoming) Corruption in the Prison Context, CSPRI Research Report, p. 41-42.
[68] Directives regarding complainant participation in correctional supervision and parole boards, Government Gazette No. 28646, 7 April 2006.

The procedure is at face value fairly uncomplicated. Firstly, the sentencing officer is required, at sentencing, to inform the complainant, if present at the court, that he or she has the right to make representation when the offender is considered for parole, day parole, or correctional supervision, and also to attend any relevant meeting of the parole board. Should the complainant wish to make representation, he or she has the duty to inform the Commissioner of Correctional Services thereof in writing, and to provide the commissioner with his or her contact details (to be updated as necessary). In turn, the Commissioner is required to inform the relevant parole board of the declared intention. The duty then rests on the parole board to inform the complainant when a meeting will take place with regard to the particular offender.

For this procedure to work, two immediate requirements need to be met. Firstly, the sentencing officer must inform the complainant of his or her right to make representation. Secondly, the complainant must be in court to receive this information. The legislation does not deal with the very likely scenario where the complainant is not at court but may wish to make representation if he or she was aware of this right.

There appear to be a number of points of incongruence between the provisions of S 299A of the Criminal Procedures Act and the *Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards* (the Directives). The most glaring of these is the shift in responsibility with regard to notification. Whereas in proceedings relating to parole, the Act is clear that the complainant must inform the Commissioner of his/her intention to make representation, as well to provide up to date contact details, with the latter then informing the relevant parole board, the Directives sets out a different procedure. Paragraph 3 of the Directives state that the complainant must ensure that the relevant parole board in whose area the offender is being detained, is informed of both the desire to make representation and to be informed of relevant parole board meetings. In addition to this, the complainant must inform the Chairperson of the Parole Board of the following:

- name of the offender
- offence committed
- case number, the date and name of the court where the offender was convicted
- physical and postal address of the complainant.

It is not clear how a complainant will know where any prisoner is being detained and there is no procedure set out that compels the Commissioner to keep the complainant informed of where an offender is being detained. There is no requirement in S 299A of the Criminal Procedure Act where the sentencing officer is instructed to give any information regarding the offender to the complainant.

The Directives also require a level of knowledge from the complainant about the offender's case that is perhaps at the level of engagement that most victims of murder, torture, rape, robbery, sexual assault and kidnapping would prefer to avoid. By implication it means that if

the complainant is not able to furnish all this information and/or directs his or her notification to the wrong parole board, the right to make representation is effectively lost due to administrative concerns. Lack of information in this case can then result in secondary victimisation by a procedure that was presumably developed with the opposite intention.

80. Paragraph 179 reports on the Victim Empowerment Programme of government. Subsequent to the submission of the Country Report, the fourth draft of the Integrated Victim Empowerment Programme was released by the Department of Social Development. The duties of the Department of Correctional Services with regard to this programme are set out in Section 17.1.6 of the programme document, and are:
    - Ensuring victim's participation in parole board hearings
    - Notifying victims of release of offenders
    - Effective rehabilitation of offenders
    - Reduction in victimisation prisoners in the prison and support systems to reduce impact when it happens
    - Effective reintegration into society
    - Diversion of youth offenders and less serious offenders in partnership with the relevant non-governmental institutions.
81. The strategic plan to the Victim Empowerment Programme identifies priorities for the Department of Correctional Services for the period 2006 to 2008.[69] The Department of Correctional Services contribution to the Victim Empowerment Programme should therefore be seen as a process that has commenced in 2006.
82. Paragraph 183 of the Country Report refers to the "Victims' Charter". It should be noted that the "*Service Charter for Victims of Crime in South Africa*" and the accompanying "*Minimum Standards on services for victims of crime*" were released by the Department of Justice in 2005 after it was approved by cabinet in late 2004. Since torture has not been criminalised in South Africa, it is not surprising that the *Service Charter for Victims of Crime in South Africa* does not make any reference to victims of torture or state violence. Article 6 of the Charter deals with Compensation as redress in the loss or damage of property. Article 7 deals with the right to restitution.
83. In the case of South Africa and other common law countries, victims are not allowed to join the criminal proceedings as a civil claimant for damages.[70] Should a victim of torture wish to claim for mental pain and suffering, this will have to be instituted through a separate civil action. In such civil cases, it is unlikely that the victim will receive state sponsored legal representation and the Legal Aid Board itself admits in its 2003-2004 *Annual Report* that "[t]here also remains a dire need for civil legal aid in this country".[71] Due to resource and capacity constraints, the Legal Aid Board tends to focus on representing the accused in criminal matters and with

[69] National Intersectoral Victim Empowerment Programme – Strategy Plan 2006 – 2008, p. 8
[70] Section 300 of the Criminal Procedure Act, 51 of 1977.
[71] Report of the Chairperson, Judge D Mlambo in Annual Report of the Legal Aid Board 2003/4 RP: 129/2004 at 6.

regard to civil matters it has prioritised women, children and the landless.[72] The net result is that there are significant barriers in the way of victims of torture to seek compensation even when the offender has been criminally convicted. In the absence of legal representation it is virtually impossible for a lay person to implement civil proceedings against another party.

84. The use of civil litigation to advance the rights of prisoners have met with varying success and De Vos concluded:[73]

*It would also be important not to see litigation as a magic formula that on its own will change the way the prison services operate. Such a strategy must therefore take cognisance of the following:*

- *There is a lack of respect for the Rule of Law within prison services, which means existing rules are disobeyed, court orders ignored and corruption and misconduct condoned or covered up;*
- *Representatives of prison services often fear taking responsibility and therefore often fail to act, passing on cases to court to pass the buck;*
- *The leadership in the Department* [of Correctional Services] *often does not know what is going on in individual prisons;*
- *The public and the newspapers have little sympathy for prisoners and there is little publicity for the plight of prisoners and consequently representatives in the prison service feel that they can get away with actions that would otherwise not be tolerated; and*
- *Conditions of overcrowding in the prisons are often caused by problems in the criminal justice system and must be addressed if one wants to improve the conditions under which prisoners are kept.*

85. The weak legislative framework around torture places a further obstacle in the path of victims of torture to seek redress, especially redress in line with the Van Boven-Bassiouni Principles.[74]

**Article 16 – Other acts of cruel, inhuman and degrading treatment of punishment**

86. A submission of this nature needs to reflect on the situation of HIV/Aids in the country's prisons. The Country Report does not reflect on the situation of HIV/Aids in general or on the situation specific to the country's prisons.
87. Section 12 of the Correctional Services Act stipulates the nature and level of health care to which prisoners are entitled to. The Regulations to the Correctional Services Act state further in Regulation 7(1)(a) that "*Primary health care must be available in a prison at least on the same level as that rendered by the State to members of the community*".

[72] See Legal Aid Board of South Africa webpage "Do I qualify?" http://www.legal-aid.co.za/services/qualifications.htm

[73] De Vos P (2004) Prisoner's rights litigation in South Africa since 1994: A critical evaluation, CSPRI Research Paper No. 3, p. 45-46. http://www.communitylawcentre.org.za/cspri/publications/Prisonersrightslitigation.pdf

[74] Foley C (2003) Combating Torture – A Manual for Judges and Prosecutors (Human Rights Centre, University of Essex, London) p.84

88. The 2005/6 Annual Report of the judicial Inspectorate reflects that the number of prisoners dying annually from natural causes, such as Aids, increased from 211 in 1996 to a peak of 1689 in 2004.[75] From 2004 to 2005 this figure declined slightly from 1689 to 1507. This reflects a mortality rate of 9.2 deaths per 1000 prisoners.
89. In 2003 the South African government agreed to an anti-retroviral therapy roll-out plan.[76] The treatment of Aids patients are further regulated by the *National Antiretroviral Treatment Guidelines*. [77] With good reason anti-retroviral therapy can only be administered by appropriately trained staff at accredited centres.[78]
90. On 6 September 2005 the Department of Correctional Services reported to the Parliamentary Portfolio Committee on Correctional Services on its "HIV/Aids Policy for Offenders".[79] With regard to access to anti-retroviral treatment the Department of Correctional Services reported that it was not accredited to provide anti-retroviral therapy to prisoners. Two further challenges were noted, namely that the anti-retroviral therapy roll-out centres were located off-site at Department of Health facilities, and further that this created security concerns as a result of staff shortages and the logistical obstacles it created (for example transport). In essence, the Department of Correctional Services explained that whilst it would like to provide access to anti-retroviral therapy, it lacked the resources (staff and infrastructure) to do so. The problem is thus primarily a practical one, since the Department of Correctional Services is not accredited to provide anti-retroviral therapy in prisons.[80] Subsequent to the September 2005 submission to the Portfolio Committee on Correctional Services, the first accredited centre in a prison was opened in March 2006 at the Grootvlei Prison.
91. Despite the progress made, it remains cause for deep concern that thousands of qualifying prisoners suffering from Aids are effectively excluded from life saving therapy as result of practical and logistical problems between the Departments of Health and Correctional Services. The highly politicised nature of the HIV/Aids debate and more specifically access to anti-retroviral therapy, further contributes to strained relationships between prisoners and human rights groups on the one hand, and the Department of Correctional Services on the other hand. This exclusion of prisoners from treatment to which the general population has access to should be regarded as cruel and inhuman treatment.
92. Prisoners' access to anti-retroviral therapy has already resulted in case law in *Magida v S* and it was evident from the Supreme Court of Appeal judgment that the court held the right to

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[75] Judicial Inspectorate of Prisons (2006) Annual Report of the Office of the Inspecting Judge, Cape Town, p. 34-35.
[76] National Department of Health (2003) Operational Plan for Comprehensive HIV And Aids Care, Management and Treatment For South Africa, http://www.info.gov.za/otherdocs/2003/aidsplan.pdf
[77] National Department of Health (2004) National Antiretroviral Treatment Guidelines, First Edition, http://www.doh.gov.za/docs/factsheets/guidelines/artguidelines04/index.html
[78] National Department of Health (2003) Operational Plan for Comprehensive HIV And Aids Care, Management and Treatment For South Africa, p. 95, http://www.info.gov.za/otherdocs/2003/aidsplan.pdf
[79] PMG Minutes of the Portfolio Committee on Correctional Services, 6 September 2005. The minutes included a copy of a presentation on the topic distributed by the DCS representatives.
[80] Muntingh L (2006) *Medical parole – Prisoners' means to access anti-retroviral treatment?*, ALQ Newsletter, March Issue, Aids Legal Network.

adequate medical care (access to anti-retroviral therapy) as more important than society's need to punish offenders with a custodial sentence that would effectively amount to a death sentence.[81] Sloth-Nielsen notes further that the case is important for a number of reasons:

*First, despite the earlier decision of the Cape High Court in Van Biljon[82] granting prisoners access to antiretroviral treatment in prisons, the de facto situation remains that this treatment is not available to prisoners, a fact accepted by the Supreme Court of Appeal. Second, as regards HIV positive prisoners, the judgment details graphically the results of exposure to prison conditions, including referring to the inadequate diet and lack of necessary vitamins that exacerbates opportunistic infections and the onset of full-blown Aids.*

*Most significant, though, is the fact that the reality of prison conditions in South Africa must be factored into the sentencing process. After all, it is not solely the HIV/Aids status of the appellant that impelled the Supreme Court of Appeal to its decision - it is this fact viewed in tandem with the actual conditions in prisons, such as prison overcrowding, exposure to infection, poor diet, and lack or proper medical treatment. This decision should therefore be a beacon to all sentencing officers contemplating imposing a sentence of imprisonment.*

93. At the time of writing the Aids Law Project at the Centre for Applied Legal Studies at the University of the Witwatersrand (Johannesburg) is representing a group of fifteen prisoners suffering from Aids who are denied access to anti-retroviral therapy.[83] Papers were filed in the Durban High Court. Despite numerous attempts by the Aids Law Project to settle the matter without litigation the Departments of Health and Correctional Services had remained uncooperative and non-responsive to requests for the prisoners to start with their anti-retroviral therapy. Numerous practical problems were cited such as transport, security, and ultimately that prisoners did not have identity documents.
94. If the above application is successful or the matter can be settled between parties without it going to trial, the challenge that remains is to ensure that prisoners in others parts of the country also have access to anti-retroviral therapy and that it is not only the prisoners at Durban Westville prison who benefit.

End

[81] Sloth-Nielsen (2005) A new sentencing principle in the context of HIV/AIDS? [*Magida v S* (SCA Case No. 515/04)] CSPRI Newsletter No. 13, September http://www.easimail.co.za/BackIssues/CSPRI/0911_Issue585.html
[82] *Van Biljon and others v Minister of Correctional Services* 1997 (4) S 441 (C).
[83] Mail and Guardian, 5-11 May 2006, "*Prisoners take fight for ARVs to court*", p. 8.

**Appendix 1**

REPUBLIC OF SOUTH AFRICA

COMBATING OF TORTURE BILL, 2005

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(DRAFT)

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 05]

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# BILL

To provide for a framework to ensure the effective implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**,** to ensure that South Africa conforms with its obligations set out in the Convention; to provide for the crime of torture, and to provide for matters connected therewith.

## PREAMBLE

**MINDFUL** that the Republic of South Africa –

* has a shameful history of gross human rights abuses, including the torture of many of its citizens/inhabitants;
* has, since 1994, become an integral and accepted member of the community of nations;
* is committed to bringing persons who carry out acts of torture in any form to justice;
* is committed to carrying out its obligations in terms of international instruments, including the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

**AND WHEREAS** each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**Definitions**

**1**. In this Act, unless the context indicates otherwise—

"accused person" means any person who has committed or allegedly committed an act of torture;

"complainant' means any person, who is or has been subjected or allegedly subjected to an act of torture;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"Convention" means the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by the Republic on 10 December 1998, a copy of the English text of which is attached in the Annexure for information;

"court" means any court referred to in section 166 (c) of the Constitution;

"Director of Public Prosecutions" means a Director of Public Prosecutions appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

"Minister" means the Cabinet member responsible for the administration of justice;

"National Director" means the National Director of Public Prosecutions appointed in terms of section 179(1)*(a)* of the Constitution;

"public official" means—

*(a)* any person holding public office and exercises or purports to exercise a public power or a public function in terms of any law;

*(b)* any person acting in a public capacity;

*(c)* any person acting in terms of the Private Security Regulation Act, 2001 (Act 56 of 2001); or

*(d)* any person acting with the consent or acquiescence of a person contemplated in paragraphs (a), (b) or (c); and

"torture" means any act of torture contemplated in section 3.

**Objects and interpretation of Act**

**2**. (1) The objects of this Act are—

*(a)* to create a framework to ensure that the Convention is effectively implemented in the Republic;

*(b)* to ensure that anything done in terms of this Act conforms with the obligations of the Republic in terms of the Convention;

*(c)* to give effect to the letter and the spirit of the Convention, in particular—

(i) the recognition of the equal and inalienable rights of all persons regarding freedom, dignity, justice and peace;

(ii) the promotion of universal respect for human rights and the protection of human dignity as contemplated in the Convention;

(iii) that no one shall be subjected to acts of torture;

*(d)* to provide for measures aimed at the combating of torture; and

*(e)* to provide for measures to educate law enforcement personnel, civil or military personnel, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment.

(2) When interpreting this Act, a court must promote the values of—

*(a)* Chapter 2 of the Constitution;

*(b)* the Convention; and

*(c)* the Preamble, the objects and guiding principles of this Act.

**Acts constituting torture**

**3.** For purposes of this Act, 'torture' means any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

*(a)* in order to—

(i) obtain information or a confession from him or her or a third person; or

(ii) punish him or her for an act he or she or a third person has committed, or is suspected of having committed or of planning to commit; or

(iii) intimidate or coerce him or her or a third person to do, or to refrain from doing, anything; or

*(b)* for any reason based on discrimination of any kind,

but torture does not include pain or suffering arising from, inherent in or incidental to lawful actions.

**Prohibition of torture**

**4.** (1) Any public official who—

*(a)* commits torture;

*(b)* attempts to commit torture; or

*(c)* incites, instigates, commands or procures any person to commit torture,

is guilty of an offence and is liable on conviction to a sentence of imprisonment.

(2) Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture is guilty of an offence and is liable on conviction to imprisonment.

(3) Despite any other law to the contrary, including customary international law, the fact that an accused person –

*(a)* is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

*(b)* being a member of a private security service, was under a legal obligation to obey a manifestly unlawful order of a government or superior,

is neither a defense to a charge of committing an offence referred to in subsection (1) or (2), nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.

(4) A state of war, threat of war, internal political instability or any other public emergency may not be invoked as a justification for torture.

**Aggravating circumstances**

**5.** If it is proven by the prosecution that one or more of the under mentioned circumstances occurred during or formed part of torture, it must be regarded as aggravating circumstances for the purpose of sentencing:

*(a)* Racial discrimination against the complainant.

*(b)* The complainant was a disabled person.

*(c)* The complainant was under the age of 18 years.

*(d)* The complainant was raped or indecently assaulted.

*(e)* The use of any kind of weapon.

*(f)* The infliction of life threatening physical injuries.

**Extra-territorial jurisdiction**

**6.** (1) In order to secure the jurisdiction of a South African court for purposes of this Act, any person who commits an offence contemplated in section 4(1) or (2) outside the territory of the Republic, is deemed to have committed that offence in the territory of the Republic if—

*(a)* that person is a South African citizen;

*(b)* that person is not a South African citizen but is ordinarily resident in the Republic;

*(c)* that person is, after the commission of the act of torture, present in the territory of the Republic; or

*(d)* that person has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.

(2) If a person is alleged to have committed an offence contemplated in section 4(1) or (2)—

*(a)* within the territory of the Republic, no prosecution may be instituted against that person without the consent of the Director of Public Prosecutions concerned; or

*(b)* outside the territory of the Republic as contemplated in subsection (1), no prosecution may be instituted against such person without the consent of the National Director, who must, if he or she decides to prosecute, designate the court in which the prosecution must be conducted.

**Prohibition on extradition**

**7**. (1) No accused person may be extradited from the Republic to another state if the Minister is of the opinion that there is a real likelihood for believing that the accused person would be in danger of being subjected to torture.

(2) For the purposes of determining whether there is a real likelihood for believing that an accused person would be in danger of being subjected to torture, the Minister must take into account all relevant factors, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state in question.

**General responsibility to promote awareness**

**8**. (1) The State has a duty to promote awareness of the gravity of torture.

(2) Without derogating from the general nature of the duty referred to subsection (1), one or more cabinet ministers, designated by the President must cause programs to be developed in order to —

*(a)* conduct information campaigns regarding the gravity of torture;

*(b)* ensure that all public officials are aware of the gravity of torture;

*(c)* provide assistance and advice to victims of torture; and

*(d)* train public officials on the combating of torture.

**Amendment of Schedule 1 and Schedule 2 Parts II and III and schedule 5 of Act 51 of 1977**

**9.** Schedule 1 and Parts II and III to Schedule 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) are hereby amended by the inclusion of the offences referred to in section 4(1) and (2).

**Amendment of Schedule 1 of Act 121 of 1998**

**10.** Schedule 1 of the Prevention of Organised Crime Act, 1997 (Act No. 121 of 1998) is hereby amended by the inclusion of the offences referred to in section 4(1) and (2).

**Short title**

**11.** This Act is called the Combating of Torture Act, 2005.