

BEST PRACTICES RESEARCH REPORT

A comparative analysis of prison
oversight bodies

2019



**DETENTION
JUSTICE FORUM**



OPEN SOCIETY FOUNDATION
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The Detention Justice Forum (DJF) is a coalition of civil-society organisations seeking to ensure that the rights and well-being of those who are detained are respected and upheld, as enshrined under the South African Constitution, laws, and international human rights norms and standards. Its members include: Just Detention International-South Africa; National Institute for Crime Prevention and the Reintegration of Offenders (NICRO); Sonke Gender Justice; Africa Criminal Justice Reform (ACJR); Wits Justice Project; Section27; Lawyers for Human Rights; Centre for Applied Legal Studies, University of Witwatersrand; African Policing Civilian Oversight Forum (APCOF); Childline South Africa; Egon Oswald Attorneys At Law; Footballers for Life; Gender, Health & Justice Research Unit, University of Cape Town; Treatment Action Campaign; Young in Prison South Africa; and Zonkizizwe Odds Development.



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Acronyms

CEO	Chief Executive Officer
CCRA	Corrections and Conditional Release Act (1992)
CDCR	California Department of Corrections and Rehabilitation
CSA	Correctional Services Act (111 of 1998)
DCS	Department of Correctional Services (South Africa)
DJF	Detention Justice Forum
HCC	Head of the Correctional Centre
ICCV	Independent Correctional Centre Visitor
IPIID	Independent Police Investigative Directorate
JICS	Judicial Inspectorate for Correctional Services
NPA	National Prosecuting Authority
NYCA	Correctional Association of New York
OCI	Office of the Correctional Investigator
OIG	Office of the Inspector General
OPCAT	Optional Protocol to the Convention Against Torture
SAPS	South African Police Service
UN	United Nations
ZHRC	Zambian Human Rights Commission

Glossary of terms

<p>California Department of Corrections and Rehabilitation (USA)</p>	<p>The department over which the Office of the Inspector General has oversight. The internal affairs, hiring and disciplining of CDCR employees and their adherence to operating rules are all within the purview of the Office of the Inspector General.</p>
<p>Correctional Services Act 111 of 1998 (SA)</p>	<p>Legislative source for South Africa’s prison oversight body, the Judicial Inspectorate for Correctional Services.</p>
<p>Correctional Association of New York (USA)</p>	<p>An independent non-profit organisation which advocates for a more humane and effective criminal justice system. They have unlimited access to inspect prisons so as to monitor the facilities. They also collect data, prepare reports, correspond with inmates, study specific prison issues and lobby lawmakers for changes based on their research and inspections.</p>
<p>Corrections and Conditional Release Act (Canada)</p>	<p>Legislative source for Canada’s prison oversight body, the Office of the Correctional Investigator.</p>
<p>Her Majesty’s Inspectorate of Prisons (UK)</p>	<p>A statutory body established to inspect prisons in England and Wales and to report to the Secretary of State for Justice, focusing specifically on the treatment of prisoners and the conditions of incarceration. They only monitor and do not conduct investigations.</p>
<p>Independent Correctional Centre Visitor (SA)</p>	<p>Individuals who regularly visit prisons, interview inmates, record and deal with inmates’ complaints and submit monthly reports of their activities. They receive their mandate from sections 92 and 93 of the Correctional Services Act.</p>
<p>Independent Police Investigative Directorate (SA)</p>	<p>A statutorily established oversight mechanism which investigates alleged misconduct or offences committed by a member of the South African Police Service and Municipal Police Services.</p>
<p>Independent Police Investigative Directorate Act 1 of 2011 (SA)</p>	<p>Legislative source for South Africa’s police oversight body, the Independent Police Investigative Directorate.</p>
<p>Individual Monitoring Boards (UK)</p>	<p>They receive their mandate from UK legislation. They are comprised of independent unpaid members of the public, whose duties are to frequently visit prisons so as to monitor the premises, the administration of prisons, and the treatment of prisoners. They have unlimited access and can hear prisoner complaints and requests. They bring matters to the attention of the head of the prison and report annually to the Justice Secretary. They cannot enforce actions or recommendations, but serve an important role as witnesses.</p>

<p>Inspecting Judge (SA)</p>	<p>A judge appointed under section 86 of the Correctional Services Act as head of the Judicial Inspectorate for Correctional Services, who must inspect or arrange for the inspection of correctional centres in order to report on the treatment of inmates and conditions of detention. Section 90 of the Correctional Services Act provides for the powers and functions of the Inspecting Judge.</p>
<p>Judicial Inspectorate for Correctional Services (SA)</p>	<p>A statutory body established under section 85 of the Correctional Services Act, which serves as South Africa’s dedicated prisons oversight mechanism. The Inspectorate’s mandate includes inspecting, monitoring and reporting on the treatment of inmates and the conditions of detention. Its purpose is to protect and promote the rights of prisoners, as well as to hold the Department of Correctional Services to account.</p>
<p>Office of the Correctional Investigator (Canada)</p>	<p>A Canadian statutorily established body responsible for conducting investigations into the problems of offenders as related to decisions, recommendations, acts or omissions of the Commissioner of Corrections.</p>
<p>Office of the Inspector General (USA)</p>	<p>An independent government entity established for the oversight of internal affairs investigations and the disciplinary process of the California Department of Corrections and Rehabilitation. Their powers include: review, inspection, monitoring, reporting, and to a limited extent, investigations and auditing.</p>
<p>Optional Protocol to the Convention Against Torture</p>	<p>The Protocol is dedicated to establishing a system of regular prison oversight as a means to prevent torture and cruel, inhuman and degrading treatment. It further obligates every State Party to maintain a designated body or bodies, a ‘National Preventative Mechanism’, to visit prisons and places of detention. The Protocol has been signed but not ratified by the South African government.</p>
<p>Prison Inspectorate (Malawi)</p>	<p>A body established by the Malawian Constitution to visit, monitor and investigate prison facilities.</p>
<p>Prisons and Probations Ombudsman (UK)</p>	<p>An agency established to investigate complaints made by incarcerated persons, detainees and offenders under probation supervision. It also investigates all deaths of incarcerated persons due to any cause. It has no statutory basis and is independent of the prison services.</p>
<p>Visitors Committees (SA)</p>	<p>Groups made up of Independent Correctional Centre Visitors and community stakeholders who meet regularly to consider unresolved prisoner complaints, coordinate visits to prisons, and include the community in decisions and proposals. They report to the Inspecting Judge. They are given legislative recognition in section 94 of the Correctional Services Act.</p>
<p>Zambian Human Rights Commission</p>	<p>Established under the Zambian Constitution and Human Rights Commission Act to ensure the enjoyment of human rights and fundamental freedoms for all persons in Zambia. They have a statutory mandate to visit prisons and places of detention and a broad mandate to investigate any human rights violations.</p>

Executive Summary

The Judicial Inspectorate for Correctional Services (“JICS”) is a statutory body established under the Correctional Services Act (“CSA”) as a mechanism for the protection of prisoners’ rights. The CSA gives JICS its mandate, instituting JICS as primarily an inspecting body, rather than an investigative or disciplinary body. Currently, JICS faces a number of challenges, notably the inadequate legal definition of its functions and powers, its lack of autonomy, and its insufficient accessibility to prisoners.

JICS’ powers and functions are not clearly defined in the empowering legislation, and the body lacks operational, financial, and institutional independence. This has serious consequences for its efficacy as an oversight body. Without clarity on its functions and powers, and greater independence, either through statutory amendment or the promulgation of regulations, JICS is effectively hamstrung and cannot meaningfully fulfil its mandate.

Provision must be made to ensure the independence of JICS. Presently it reports to the National Commissioner for Correctional Services and the Minister for Justice and Correctional Services – entities that JICS is supposed to hold accountable. Furthermore, the appointment of the Inspecting Judge and Chief Executive Officer, as well as their dismissal, is open to political influence, thus weakening the independence of both positions. JICS employees do not enjoy a high level of job security, are not required to have any qualification other than a Matric certificate, and receive little training. JICS also lacks financial independence and is allocated funds from the Department of Correctional Services’ budget rather than by direct vote by Parliament. The reliance on the Department for budget, access, and cooperation could easily have a negative impact on how JICS is viewed by prisoners and the general public.

Prison oversight should be multi-faceted, incorporating a number of functions, not all of which need to be carried out by the same body. These functions include: regulation, auditing, inspection and monitoring, investigation, reporting, legal processes for redress and restitution, and accreditation.

A survey of oversight models within South Africa and in foreign jurisdictions reveals a number of principles of best practice that ought to be considered in the reformation of JICS. These principles support a number of recommendations as to how the CSA should be amended to improve JICS’ efficacy.



regulation



auditing



inspection & monitoring



investigation



reporting



legal processes



accreditation

Introduction

Consistent and effective prison oversight is a crucial means to ensure the protection and promotion of prisoners' human rights. Not only does regular monitoring, inspecting and reporting serve to prevent human rights abuses of prisoners, it also ensures transparency and increases the accountability of the government department responsible for overseeing the prisons system.

This report provides an analysis of the literature on the criteria for effective prison oversight, with the objective of establishing how the ideal prison oversight model (or models) would look. It then examines the prison oversight systems in foreign jurisdictions, and evaluates their efficacy against these criteria. The jurisdictions examined include: Zambia, Malawi, Ghana, India, Canada, California, New York, England and Wales. The recommendations of this report will serve to inform the advocacy of the Detention Justice Forum ("DJF") in pursuing amendments to the empowering legislation of the Judicial Inspectorate for Correctional Services ("JICS") – South Africa's primary prisons oversight body.

The report will first provide an explanation of why amendments to JICS' empowering legislation are necessary. It will then outline the law and literature on what is required in order to have an effective oversight mechanism, and develop a set of criteria against which to assess prison oversight mechanisms. The report concludes with recommendations, based on best practice principles, on what amendments need to be made to the Correctional Services Act ("CSA")¹ to ensure an independent and effective South African prison oversight body.

THE JURISDICTIONS EXAMINED INCLUDE:

Zambia, Malawi, Ghana, India, Canada, California, New York, England and Wales.



Background: South Africa's Judicial Inspectorate for Correctional Services

In 1997 the Correctional Services Act (1959) was amended to provide for the establishment of the Judicial Inspectorate. This legislation was further amended in 1999 by proclamation of sections 85 to 94 of the current CSA. JICS officially became operational in 2000.

It is notable that JICS is a statutory body established for the purpose of prison oversight, yet it is not constitutionally mandated; whereas police oversight is provided for by sections 205 to 208 of the Constitution.²

Since 2012, the DJF as well as other civil society organisations have been advocating for improvements to the South African prison oversight model, specifically JICS, to make it a more effective mechanism for the protection of prisoners' rights.

Presently, JICS faces various challenges, in particular: the inadequate legal definition of its functions and powers; its lack of legal, operational and financial autonomy; and its limited accessibility to prisoners. These flaws hinder JICS from fulfilling its primary function of protecting the human rights of incarcerated persons in South Africa, and must be addressed if JICS is to be an effective prison oversight body.



Functions and Powers

JICS receives its mandate from the CSA to report accurately on the conditions of incarceration in South African prisons and to ensure the protection of prisoners' rights and human dignity. Although neither the CSA nor its Regulations clearly sets out JICS' powers and functions, it appears primarily to be an inspecting body, with weaker investigative and disciplinary powers.

JICS is led by the Inspecting Judge, who coordinates the substantive work of the inspectorate – inspections, investigations and reporting – and the Chief Executive Officer (“CEO”), who is responsible for the financial and administrative operations of the Inspectorate. According to the CSA, the Inspecting Judge's powers and functions are:

- To inspect or arrange for the inspection of correctional centres and remand detention facilities in order to report on the treatment of inmates and remand detainees, and on conditions of confinement;³
- To receive and *deal* with complaints submitted by the National Council, the Minister, the National Commissioner, a Visitors' Committee, and Independent Correctional Centre Visitors, and of their own volition to *deal* with any complaint [our emphasis];⁴
- To report on each inspection to the Minister and the relevant Parliamentary Committees for Correctional Services;⁵
- To submit an annual report to the President and Minister for Justice and Correctional Services, to be tabled in Parliament by the Minister;⁶
- For the purpose of conducting an investigation, to make any enquiry and to hold hearings;⁷ and
- In the event of a death in a correctional centre, to carry out or instruct the National Commissioner to conduct an enquiry.⁸

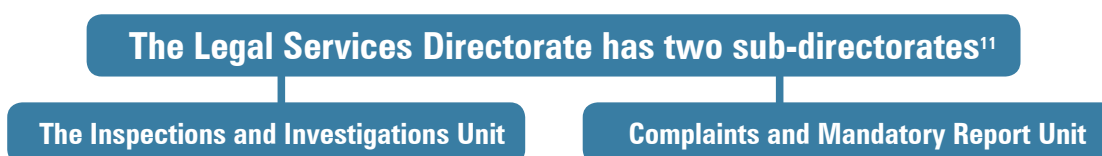


The Management Regions Directorate includes Independent Correctional Centre Visitors (“ICCVs”) who regularly visit prisons, interview prisoners, record and deal with prisoners’ complaints, monitor and participate in the resolution of complaints, escalate unresolved complaints and submit monthly reports on their activities. In the language of the CSA:

‘An Independent Correctional Centre Visitor shall deal with the complaints of inmates by–

- ***regular visits;***
- ***interviewing prisoners in private;***
- ***recording complaints in an official diary and monitoring the manner in which they have been dealt; and***
- ***discussing complaints with the Head of the Correctional Centre, or the relevant subordinate correctional official with a view to resolving the issues internally.”¹⁰***

The CSA provides that ICCVs must be given access to any part of a prison and any document or record necessary for them to perform their functions, and the Head of the Correctional Centre (“HCC”) is legally obligated to assist the ICCVs in the performance of their functions. Should the HCC refuse to do so, the matter must be referred to the Inspecting Judge for resolution. ICCVs must report any complaints that they are unable to resolve internally to the relevant Visitors’ Committee, and in urgent circumstances, may elevate the complaint by referring it to the Inspecting Judge. Visitors’ Committees, made up of ICCVs and community stakeholders, meet at least quarterly to consider unresolved complaints, coordinate visits to prisons, and include the community in decisions and proposals. Visitors’ Committees report to the Inspecting Judge.



The Inspections and Investigations Unit conducts inspections and investigations. Inspections are conducted regularly as well as when there is evidence of a trend that needs further examination, and investigations are usually conducted when there is insufficient information to deal with a complaint satisfactorily.¹² However, there is no guidance in the legislation regarding the extent of JICS’ powers to investigate or to make decisions on the basis of their investigations.

The lack of clarity on the ambit of JICS’ powers and functions limits its effectiveness as an oversight body. The CSA states that the Inspecting Judge has the power to ‘deal’ with complaints, without further explanation of what this might entail (for example, investigation, arbitration, or disciplinary action). While the Inspecting Judge may investigate complaints, the extent of this investigatory power is not stipulated by the CSA. In the same vein, ICCVs are only expressly given the power to ‘discuss’ complaints with the HCC ‘with a view to resolving the issue internally’, without explication of what further powers that might entail. Moreover, JICS has no power to enforce its findings and recommendations, nor does the Department of Correctional Services (“DCS”) bear an obligation to account for any of JICS’ findings.

In contrast, the Independent Police Investigative Directorate Act (“IPID Act”),¹³ which provides the Independent Police Investigative Directorate (“IPID”) with its mandate, explicitly sets out the following: the circumstances in which IPID must investigate; the powers that IPID may exercise in such investigations and specifically how they must be exercised; and the manner in which IPID must report on investigations. Further, it provides for disciplinary action for misconduct by the IPID staff, something that is notably absent from the CSA in relation to JICS staff.

It should also be noted that the work of JICS is complemented by visiting judicial officers and public officials (such as Members of Parliament and members of the South African Human Rights Commission), who are all empowered to visit prisons at any time.¹⁴ Judicial officers are also permitted to interview any prisoner and to report their findings to the National Commissioner of Correctional Services, the Minister and the Portfolio Committee for Justice and Correctional Services.



Independence

As mentioned above, JICS’ mandate is statutory in nature, which is important for its independence as a body. However, JICS reports to the National Commissioner for Correctional Services (“National Commissioner”), the Minister for Justice and Correctional Services, and the Portfolio Committee for Justice and Correctional Services. It is therefore effectively reporting to the department it is supposed to hold accountable, which undermines JICS’ independence, legitimacy and effectiveness.

It is therefore effectively reporting to the department it is supposed to hold accountable, which undermines JICS’ independence, legitimacy and effectiveness.

The Inspecting Judge is nominated by the Minister of Justice and Correctional Services and appointed by the President. They may be a judge active on the South African bench or a retired judge. They continue to receive the salary and benefits attached to their judicial office. This is intended to ensure their independence. The CSA is *prima facie* unclear as to whether or not their term of office is renewable, yet on review of past Inspecting Judges it appears as though it is.

The CEO must be appointed by the National Commissioner, who also participates in the shortlisting and interviewing of candidates. This is problematic as the CEO, who is responsible for the administrative and financial functions of JICS, is appointed by the entity that JICS is supposed to oversee. In the event of any misconduct or incapacity, the CEO must be referred to the National Commissioner for disciplinary action. This is especially problematic as not only does it compromise the CEO’s security of tenure, but it essentially discourages the CEO from criticising the very entity that it is entrusted to oversee. This leaves the CEO, and consequently the operational autonomy of JICS, open to political influence.

Inspectors and staff must be appointed by the CEO. JICS employees are considered to be correctional officials seconded to JICS, but under the control of the Inspecting Judge. This has the effect of creating a conflict of interest for JICS employees, as they are technically still employed by the DCS. The terms of their employment are governed by the Public Services Act (1994).

ICCVs are appointed by the CEO (in consultation with the Inspecting Judge), who calls for nominations and consults with community organisations. Their term of office is determined by the CEO (in consultation with the Inspecting Judge) upon their appointment, and they may be suspended or terminated at any time on valid grounds as determined by the CEO. They do not, therefore, enjoy a high degree of employment security. Furthermore, they are only required

to have a matric qualification, and receive limited training for their positions, as well as limited counselling. This means that they are not well equipped or supported to perform what is a demanding and difficult function.

With regards to associational independence, ICCVs have been found to be at risk of institutional capture; that is, they are likely to sympathise with the institution that they are supposed to oversee.¹⁵ Often ICCVs pursue employment opportunities with DCS once their contracts expire. Moreover, ICCVs are widely reliant on DCS officials for access to basic and necessary apparatus, such as computers, office space, telephones and internet, and they depend on DCS officials for security. They are therefore unlikely to want to antagonise the DCS and its employees when necessary for the performance of their functions.

Finally, JICS lacks financial autonomy. Under the CSA, the DCS is responsible for JICS' expenses. JICS does not have an independent budget vote before Parliament and is therefore financially reliant on the department that it is intended to oversee. This allows for the DCS to effectively hamstring JICS by denying it the resources it needs to hold the Department accountable. For example, in the 2014/2015 financial year, JICS was allocated only 0.23% of the DCS' budget.¹⁶ Furthermore, the CEO is accountable to the National Commissioner for the Inspectorate's finances; this further compromises JICS' financial and operational autonomy and consequently its ability to hold the DCS to account.¹⁷

JICS' compromised independence has a negative impact on prisoners' trust and the public's confidence in its capacity to function effectively, and in reality does limit JICS' ability to fully protect prisoners' human rights and hold DCS to account.

Overall Assessment

In spite of JICS' compromised independence and effectiveness, the DJF recognises that JICS' contribution to the protection of prisoners' rights is critical. The model does have strengths, and aspects of it should be retained, namely:

- Its power to inspect and monitor prisons acts as a preventive measure against human rights abuses.
- Its power to make recommendations has the potential to assist the DCS in the better performance of its functions, and also in its ability to motivate for more funding.
- The ICCVs and Visitors' Committees perform an invaluable function. They allow for community engagement with the business of correctional services, and for more efficient handling of prisoners' complaints, leading to greater transparency.
- JICS publishes data in its Annual Report that would otherwise be inaccessible to the public (such as the prevalence of sexual violence perpetrated against prisoners), further contributing to much-needed transparency in the correctional system.

However, while JICS certainly has strengths, the present model has several notable problems: it compromises JICS' financial, operational, and associational autonomy, leaving it vulnerable to political influence; JICS' powers and functions are unclear, particularly its power to conduct investigations; and it can only make unenforceable recommendations to the department that it oversees and the Portfolio Committee.¹⁸

Thus, while South Africa's prison oversight model is a positive step in the right direction, it is fundamentally flawed in such a way that it is currently close to being toothless. For this reason, legislative amendments are required in order to make JICS more effective in fulfilling its mandate.

What makes a prison oversight body effective?

In order for a prison oversight body to be effective, it must be able to hold the ministry and department overseeing prisons accountable to the Constitution, other relevant legislation, and to the public. Accountability has been defined by Corder et al. as the requirement that ‘a person explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.’¹⁹ They go on to say that the principles of constitutional democracy require that the administration and executive be held accountable to an organ of government *distinct from it*.

Accountability is a value enshrined in the South African Constitution as a cornerstone of our constitutional democracy. Indeed, the preamble to the Constitution articulates our constitutional commitment to ‘a democratic and *open* society ... in which ... every citizen is equally protected by law’. Section 55(2) mandates the national legislature to provide mechanisms to ensure the accountability of all executive organs of state, and to maintain oversight over the exercise of national executive authority, and any organ of state. Sections 92(2) and 92(3) of the Constitution similarly provide for the accountability of members of the executive to the national legislature for the exercise of their powers and the performance of their functions. Finally, section 195(1) of the Constitution requires that the public administration is governed by the ‘democratic values and principles’ enshrined in the Constitution, including, *inter alia*, accountability and transparency.

Crucial to accountability is the provision of oversight mechanisms, which allow the national legislature (and the public) to monitor the activities of the executive and the public administration. Oversight, according to Corder et al., covers a far broader range of activities than the idea of accountability.²⁰

Oversight and accountability are necessary for all government departments, but as Parkes and Pate have pointed out, this need is of particular importance in relation to prisons, ‘which, by their very nature and function, are closed institutions far removed from the public eye’.²¹ The primary function of prisons’ existence is the deprivation of people’s liberty, which provides a near limitless potential for abuse of power and failure to perform functions.²² Deitch, a scholar focusing on the effective oversight of prisons in the United States, wisely points out that oversight is not the end goal, but is ‘a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons and jails.’²³

International human rights law emphasises the necessity of prison oversight bodies. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”)²⁴ states at Principle 29 that,

‘In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.’

The Optional Protocol to the Convention Against Torture (“OPCAT”),²⁵ which South Africa has signed but not yet ratified, is dedicated to establishing a system of regular prison oversight as a means to prevent torture and cruel, inhuman or degrading treatment. Per the OPCAT, every State Party is obligated to maintain a designated independent body or bodies, dubbed a ‘National Preventive Mechanism’, to visit prisons and places of detention.²⁶

It is clear that the need for an oversight body is internationally acknowledged to be of great importance, especially in regards to the prison system. Yet an oversight body needs to be able to function effectively in order to have a positive impact. Arguably in order to be effective, an oversight mechanism must at the very minimum satisfy the following criteria: established functions and powers, independence, and accessibility.²⁷



Functions and Powers

According to Deitch, prison oversight should be multi-faceted, incorporating a number of functions, not all of which need to be carried out by the same body. These functions are:²⁸



Regulation, which involves the setting of standards and formulation of policies, with the authority to enforce them.



Auditing, to establish whether or not a government department is meeting the standards and policies formulated by the regulating body.



Accreditation, which requires a government department to meet performance standards in order to receive a stamp of approval by a professional organisation in the field.



Investigations of prisoners' complaints or systemic issues, carried out by ombudsmen or similar entities.



Legal processes for redress and restitution where it is found that rights have been violated.



Reporting by the media, human rights organisations and commissions of inquiry, for the purpose of exposing prison conditions and investigating particular incidents.



Inspection and monitoring by an entity outside of the relevant government department with the mandate to routinely inspect all correctional facilities within a jurisdiction, and to report publicly on how people within each facility are treated.



Independence

In the Constitutional Court decision of *Glenister v President of the Republic of South Africa and others*,²⁹ when asked to assess the independence of the then newly established Directorate of Priority Crime Investigation, the Court looked to the requirements for independence of the courts, South African Chapter 9 Institutions, and the National Director of Public Prosecutions as exemplars of the South African conception of independence. The Court found that some of the key criteria for independence are security of tenure and freedom from direct political oversight of the entity's functioning,³⁰ or as Parkes and Pates dub it, legal and operational autonomy.³¹ To these criteria, Parkes and Pate add financial autonomy, as well as associational and ideological autonomy.

Legal and operational autonomy means that an oversight body is given a statutory mandate to oversee prisons, and the authority to develop its own processes for fulfilling that mandate. If the body is to provide reports on its findings, reporting should not be to the department that the body is overseeing. For example, in South Africa, given that JICS is overseeing correctional services, it should not be reporting to the DCS, as this compromises its legal and operational autonomy. Parkes and Pate suggest that the best way to ensure legal and operational autonomy is for the oversight body to report directly to the legislature.³²

Security of tenure requires that members of the oversight body have entrenched job security so that they may carry out their duties vigorously and fearlessly.³³ This is not to say that investigators or inspectors can never be dismissed, but rather that the grounds for doing so must meet a higher threshold than is required for ordinary government employees. Furthermore, the director should have a non-renewable term of office to minimise his/her vulnerability to political pressure.³⁴ Another aspect of security of tenure is the autonomy of the oversight body to appoint and, where necessary, to dismiss its own staff, so as to ensure that those charged with oversight have the requisite qualifications and experience in order to confidently exercise informed and independent judgement.³⁵

Financial autonomy requires that the oversight body does not depend financially on the department that it is tasked to oversee³⁶ and that it has adequate resources and sufficient staff, office space and equipment.³⁷ This is to prevent undue political influence through financial inducements or punishments, and to prevent the department in question from hindering the oversight body from effectively carrying out its mandate by limiting its budget.

Associational and ideological independence refers to the potential for the members of oversight bodies to become too sympathetic to the department that they are inspecting, investigating and reporting on.³⁸ In a similar vein, if investigators and inspectors rely too much on the assistance of the department to carry out their functions, this will have an impact on their ability to challenge decisions and to issue reports without fear of damaging a close working relationship.³⁹



Accessibility

Prison oversight is directed at protecting the rights of prisoners, who are among the most vulnerable and disadvantaged members of society. Moreover, they are deprived of their liberty well outside of the public gaze, which makes it difficult for them to make their grievances known, and allows for retaliation if they do lay complaints. For this reason, it is important that a prison oversight body is accessible to prisoners. This means that it must have the trust and confidence of the prisoners, which in turn requires that it both facilitates disclosure by prisoners of any mistreatment, and also provides safeguards to protect prisoners who do raise grievances.⁴⁰ In conducting its inspections, oversight bodies should be certain not to simply check items on a list, but should take a holistic approach to evaluating the treatment of prisoners and the effect of incarceration on them.⁴¹ As the Constitutional Court underscored in *S v Makwanyane*,⁴²

“Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under chap 3 [sic], subject only to limitations imposed by the prison regime that are justifiable under s 33 [sic].”

This residuum principle, which is well-established in South African jurisprudence,⁴³ makes it the responsibility of a prison oversight body to ensure that the rights of prisoners to life and dignity, amongst others, are not being unnecessarily infringed.

Drawing on the above, the table below is a list of criteria for assessing the effectiveness of prison oversight bodies.

TABLE 1: CRITERIA FOR AN EFFECTIVE PRISON OVERSIGHT BODY

 Functions and Powers	What functions and powers does the body have?	<ul style="list-style-type: none"> • Inspection • Investigation • Monitoring and reporting • Enforcement • Regulation • Accreditation • Legal • Disciplinary
	How extensive are its powers?	<ul style="list-style-type: none"> • To what extent can it access facilities at will? • To what extent can the body enforce its recommendations? • What impact does the body have?
 Independence	Legal and operational autonomy	<ul style="list-style-type: none"> • Does the body have a clear statutory mandate? • What organ of government or what legislation gives the body its mandate? • Does the body have the authority to develop and implement its own processes in order to fulfil its mandate? • Who does the body report to?
	Security of tenure	<ul style="list-style-type: none"> • What degree of employment security is enjoyed by the body’s directors, inspectors and investigators? • Who appoints inspectors and how? • Is the director’s term of office renewable? • What are the grounds for removal of the director and other members of staff? • What are the qualifications of the people employed?
	Financial autonomy	<ul style="list-style-type: none"> • Who has budgetary control over the body? • Does the body have sufficient staffing, offices and equipment?
	Associational and ideological independence	<ul style="list-style-type: none"> • How much does the body depend on the department responsible for correctional services in carrying out its functions? • Does the body risk damaging working relationships with the department if it carries out its functions?
 Accessibility	Confidence and trust of prisoners and the public	<ul style="list-style-type: none"> • Does the body receive complaints? If so, what kinds of complaints? E.g. are they of varying severity? • To what extent and how does the body address these complaints? • Does the body have a good working relationship with civil society?
	Safeguards for prisoners	<ul style="list-style-type: none"> • Does the body have safeguards in place for prisoners who come forward? • Is there a way for prisoners to raise grievances with the body external to the prisons’ internal systems? • Are prisoners afraid to raise complaints?
	Methods	<ul style="list-style-type: none"> • How does the body assess the prison environment and is its approach holistic?

Application of criteria to prison oversight bodies

Below is an examination of prison oversight bodies in foreign jurisdictions, using an application of the above criteria, in order to evaluate the bodies' effectiveness, and in so doing, to establish a model for best practice.

LESSONS FROM THE GLOBAL SOUTH

In keeping with South Africa's global position, this report first looks to the practices and models in a number of countries in the Global South. While South Africa is often considered to be leading in the promotion and protection of human rights, particularly amongst the BRICS countries, it should not become complacent and should strive to improve where it can. Countries in the region and/or similar income bracket have practices that should be considered.

1. ZAMBIA: HUMAN RIGHTS COMMISSION

Zambia does not have a body dedicated exclusively to prison oversight. However, the Zambian Human Rights Commission ("ZHRC"), in accordance with the Paris Principles,⁴⁴ is responsible for visiting prisons.



Functions and Powers

The ZHRC, established under the Zambian Constitution and the Human Rights Commission Act ("HRC Act"),⁴⁵ exists to ensure the enjoyment of human rights and fundamental freedoms for all persons in Zambia.⁴⁶ Section 9 of the HRC Act gives the ZHRC a statutory mandate to visit prisons and places of detention or related facilities 'with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems,' and a broad mandate to investigate any human rights violation.

Although the HRC Act does not expand upon the ZHRC's prison oversight function in particular, it does provide for the general powers of the ZHRC. The ZHRC has the power to investigate any human rights abuses on its own initiative, on receipt of a complaint by an aggrieved person or their representative, or a person acting on behalf of and in the interest of a class of persons. However, it also has the discretion to refuse to investigate a complaint, and it may not investigate complaints received more than two years after the alleged violation occurred. It may issue summons requiring the attendance of any authority or the presentation of any document or record relevant to its investigation. It may also question any person on any subject relevant to its investigations and recommend the punishment of any officer who has been found to have perpetrated a human rights violation. Finally, it is permitted access to any place of detention.⁴⁷

Following an investigation, the ZHRC may make recommendations, including: the release of a detainee, payment of compensation, or that the aggrieved person seek redress in a court of law.⁴⁸ Following its investigations and inspections, the ZHRC must send a written report to the

It may also question any person on any subject relevant to its investigations and recommend the punishment of any officer who has been found to have perpetrated a human rights violation

appropriate authority and include recommendations. The authority must respond within 30 days with a report to the Commission on any actions taken for the redress of human rights violations. The failure to report back after 30 days amounts to an offence subject to a fine or imprisonment.⁴⁹



Independence

The HRC Act expressly provides for the autonomy of the ZHRC, stating in section 3 that, *'The Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.'*⁵⁰ This is an important statutory provision for its independence.

The ZHRC comprises a Chairperson, Vice-Chairperson, and five other commissioners. All of the commissioners are appointed for a renewable term of three years by the President and confirmed by the national Parliament. To qualify for the position, a commissioner must have held, or be qualified to hold, high judicial office. A commissioner may be removed from office for inability to perform their functions arising from infirmity, incompetence, or for misbehaviour. These grounds are not particularly stringent, and as such have a negative impact on commissioners' security of tenure.

The ZHRC is responsible for the appointment and discipline of its employees, and their removal from office. The ZHRC may make its own regulations for the appointment of its staff and the exercise of its powers and functions and so has a relatively large degree of operational autonomy.⁵¹

The ZHRC's funds are appropriated by Parliament, granting it financial autonomy. It is audited annually by an independent auditor appointed by the ZHRC, and it submits an annual financial report to the President, who must table it before the national parliament.



Accessibility

Although the ZHRC can receive verbal or written complaints from anyone, few complaints are actually made.⁵² This may reflect a lack of confidence in the ZHRC, or a lack of accessibility. The legal framework does not prescribe the number or frequency of prison visits that the ZHRC must carry out. Moreover, the ZHRC has published only a handful of reports on its prison visits: the 'Lusaka Prisons Report' in 2004, the 'Central Province Prison Report' in 2005, the 'Northern Province Prisons Report' in 2009, and the 'Eastern, Western, Northern and Muchinga Provinces Prison Report' in 2013. These reports do not detail how the ZHRC plans or conducts its visits. In light of the size of the country, the high number of prisons (87 in total) and that the ZHRC has a broad mandate and is not a body dedicated only to the oversight of prisons, it is unlikely to visit facilities regularly.⁵³ This has a negative impact on its accessibility, and on its effectiveness.

Overall assessment

The ZHRC enjoys a strong degree of independence, and is empowered to hold prison authorities accountable. However, it seemingly lacks accessibility. Moreover, because it is not dedicated solely to the oversight of prisons, it is not as effective an oversight body as some of the other entities described below, as it is not able to monitor prisons regularly – an important function of an effective prison oversight body. It also appears that in spite of its recommendations in its reports, conditions have not improved in most Zambian prisons.⁵⁴ In many instances, recommendations have been ignored.⁵⁵ This casts doubt on the institution's efficacy. It is recommended that an independent, dedicated prisons oversight body be established in Zambia.

2. MALAWI: INSPECTORATE OF PRISONS

Malawi's Prison Inspectorate was established by section 169 of the Malawian Constitution.⁵⁶ The Inspectorate of Prisons must include a Justice of Appeal or Judge, the Chief Commissioner for Prisons or a person nominated by the Chief Commissioner for Prisons, members of the Prison Service Commission, Magistrates, and an Ombudsman.⁵⁷



Functions and Powers

The mandate of the Inspectorate of Prisons, as provided in section 169 of the Malawian Constitution, is to:

- Monitor the conditions, administration and general functioning of penal institutions, taking due account of the applicable international standards;
- Conduct investigations (including the power to require any person to answer questions relating to those investigations);
- Visit all prison facilities, without notice or hindrance; and
- Exercise any other powers prescribed by an Act of Parliament.

These functions apply to prisons as well as police holding cells.

The Inspectorate of Prisons reports to the Minister responsible for Prisons, who must submit their reports to the National Assembly in the form of 'a motion for acceptance of the reports' recommendations. Where the reports recommend an amendment to the law, the Minister must put before Parliament a Bill for the amendment of the relevant law.



Independence

According to section 169(2) of the Malawian Constitution, the Inspectorate of Prisons "shall exercise its powers, functions and duties independent of any direction or interference by any other person or authority."



Accessibility

Unfortunately there is limited literature on the Prisons Inspectorate, making it difficult to determine the accessibility of the body.

Overall assessment

It seems as though the efficacy of the Inspectorate of Prisons may be called into question, considering that it has "persistently raised concerns about the conditions of detention in Malawi, to which the government has always responded with silence or indifference."⁵⁸ That is, the recommendations being submitted to Parliament are not being implemented.

Furthermore, the UN Human Rights Committee has expressed concern that the Inspectorate of Prisons does not have sufficient capacity to effectively carry out its mandate. It has called on the government to "strengthen the capacity and independence of the Inspectorate of Prisons and establish mechanisms to consistently consider its recommendations and make them public."⁵⁹

3. GHANA: JUDICIAL VISITS

In Ghana, judges and magistrates are empowered by section 48 of the Prisons Service Act⁶⁰ to inspect any prison and to make remarks to the Director of Prisons on the state of the prison in question. The Act is unclear as to whether or not the Director of Prisons is obligated to address these remarks. In pursuance of this, the Ghanaian Chief Justice has recently instituted monthly prison visits by judges and magistrates.⁶¹

The Ministry of Justice and the Attorney General's Department have also introduced the Justice for All Programme to improve access to justice for detainees awaiting trial and to reduce the overcrowding in Ghana's prisons. This would fulfil the 'legal' function of prison oversight identified by Deitch.⁶² Courts now sit in the prisons to hear the cases of detainees awaiting trial who have been in prison for more than five years.

Unfortunately there is limited literature on judicial inspections of Ghanaian prisons making a full assessment difficult. Further information is needed.

4. INDIA: PRISON VISITORS

India's prison oversight mechanism draws its mandate from the Indian Prisons Act.⁶³ State governments are empowered to make their own rules for the appointment and guidance of prison visitors. Consequently, every state in India has developed its own prison manual, which provide for 'official' and 'unofficial' visitors, who together make up a Boards of Visitors. Every prison is required to have a Board of Visitors.

Official visitors are district officials, judicial members, members of legislative assemblies and often State Human Rights Commissioners.⁶⁴ Essentially they occupy a position on the Board of Visitors by virtue of the government offices they hold.

Non-official visitors are reputed local people. A report of the Indian Jails Committee ("IJC") states that non-official visitors should be appointed on the basis of 'definite qualifications, such as an interest in prison matters or other social work, or ability and willingness to assist in finding work for prisoners on release.... Selection should not be made solely on the ground of social position, wealth or political influence, but on the basis of special fitness...'⁶⁵

The law envisages that the balance between 'formal' and 'informal' systems will ensure that the monitoring will be non-partisan.⁶⁶ A report of the IJC in 1919 states that the system of official and non-official visitors would ensure the 'existence of a body of free and unbiased observers, whose visits serve as a guarantee to the Government and to the public, that the rules of the Prisons Act and Prison Manuals are duly observed, and that abuses, if they were to spring up, would be speedily brought to light.'⁶⁷

The law envisages that the balance between 'formal' and 'informal' systems will ensure that the monitoring will be non-partisan



Functions and Powers

Official Visitors

While each state in India has separate rules for visitors, generally an official visitor is empowered 'to examine all or any of the books, papers and records of any department of jail and may interview any prisoner confined therein.'⁶⁸ Subject to proper regulations, official visitors are allowed access to all parts of the prison, all prisoners and to every facility for observing the state of the prison and the management.⁶⁹

Official visitors should also satisfy themselves that the provisions of the Prison Act, and all rules, regulations, orders, and directions made or issued thereunder, are being implemented. Official visitors are empowered to hear and bring to notice any complaint or representation made to them by any prisoner.⁷⁰

Non-Official Visitors

Non-official visitors are appointed for a period of two years; however, they may be re-appointed.⁷¹ Every non-official visitor is expected to interest themselves in the affairs of the prison and visit the prison, once a month and more often, if possible.⁷²

The Ministry of Home Affairs in February 2011 issued an advisory to all provincial state departments in charge of prisons highlighting that the prison visiting system relating to non-official visitors needs to be streamlined and that non-official visitors be appointed for all prisons without delay. The advisory *inter alia* provides that the terms of reference for such visitors should include the following: monitoring of prison conditions; implementation of prison reforms; provision of legal, mental and rehabilitative assistance; dealing with prisoners' grievances; and staff problems.

However, in reality, reports show that non-official visitors are not encouraged to visit prisons regularly, and are discouraged to write their suggestions and recommendations in the Visitors' Book.⁷³ Prison Superintendents are supposed to submit a six-monthly report to the Director General of Police regarding the regularity of visits and the nature of work done by non-official visitors,⁷⁴ however apparently the recommendations recorded by the non-official visitors are seldom communicated to prison authorities.⁷⁵

Board of Visitors

The State Government Rules also provide for the establishment of a Board of Visitors for each prison comprising official and non-official visitors.⁷⁶ The purpose of these Boards is:

- To regulate prison visits by official and non-official visitors through the roster of visitors;
- To ensure at least one visit of the prison per month be made by an agency other than the officials of the department;
- To involve all persons nominated as official or non-official visitors and to give each one of them an opportunity to visit prison; and
- To provide a forum for discussing problems of prisons and prisoners outside the intervention of the prison department.

The Rules provide that a Board of Visitors shall be selected every other year by the Collector and District Magistrate of the concerned district from amongst the official and non-official visitors of each prison, and this Board must inspect the prison twice a year on dates to be fixed by the superintendent in consultation with the President and members of the Board of Visitors.⁷⁷ The Board of Visitors must include two official and two non-official members, one of whom shall be nominated Chairman by the Collector and District Magistrate. Boards of Visitors must meet at least once per quarter.

The Supreme Court of India has recommended that the Board should consist of members from different sections of the society and should include people with good backgrounds, social activists and people connected with news media, female social workers, jurists, retired public officers from the judiciary and the executive.⁷⁸

Under Trial Review Committees

India has another oversight mechanism for prisoners awaiting trial. The Law Commission of India in 1978-1979 recommended the creation of independent committees to review cases of prisoners awaiting trial.⁷⁹ This recommendation was echoed by subsequent reports and court decisions.⁸⁰ In May 2011, the Ministry of Home Affairs issued an advisory directing the formation of the Under Trial Review Committee (“UTRC”) in every District.⁸¹ This was further supported by another advisory in 2013, directing all states to constitute a Review Committee in every district with the District Judge as Chairman, and the District Magistrate and District Superintendent of Police as members to meet every three months and review the cases. The advisory directed States to educate prisoners about their rights and provide legal aid where necessary.⁸²

The mandate of the UTRC was clarified by the Supreme Court in *Re: Inhuman conditions in 1382 prisons*,⁸³ and includes a review of 16 different categories of prisoners including, but not limited to: prisoners who have undergone half of a maximum sentence, prisoners awaiting trial and released on bail but not able to furnish sureties, and prisoners awaiting trial and accused of compoundable offenses.⁸⁴



Independence

The construction of the Indian prison oversight mechanism seems to lend itself to impaired autonomy. Official visitors are members of the government and therefore, while not part of the prison department directly, they may be amenable to their fellow party members. Similarly, despite the fact that the Rules provide for non-official visitors to be independent of any government affiliations, research has shown that ‘non-official visitors are almost inevitably selected from amongst party members and against criteria that is amenable to loose definition and does not necessarily throw up people with skills and professional experience relevant to the post.’⁸⁵ This is problematic as it lends itself to a lack of associational independence, specifically institutional capture.

The construction of the Indian prison oversight mechanism seems to lend itself to impaired autonomy

Furthermore, there is very little security of tenure for non-official visitors, considering that in many cases the criteria for appointment as well as the number of appointments required is almost non-existent.⁸⁶



Accessibility

The Rules provide pressure-free redress for prisoners’ grievances. The Rules also provide that no prisoners shall be punished for any statement made to a visitor unless an enquiry made by a Magistrate results in a finding that the statement made was false.⁸⁷ Visitors may meet privately with prisoners.⁸⁸ The Supreme Court of India has observed that fair inquiry into a complaint made by a prisoner must be carried out as quickly as possible and assurance must be given to the prisoner that they will not suffer any ill consequences for lodging a complaint.

However, a visitor is only empowered to meet one prisoner at a time and ‘anything in the nature of a meeting or conference whether for the discussion of political topics of the ventilation of jail grievances is strictly prohibited’.⁸⁹

The Supreme Court of India in *Sunil Batra v Delhi Administration*,⁹⁰ observed that visitors ‘could be an instant administrative grievance mechanism to protect the rights of prisoners,’ but specifically cautioned visitors that the pressure of warders or officials could be inhibitive to

prisoners' reporting grievances, or the resolution thereof and must be avoided.⁹¹ In fact, the Haze Report shows that prisoners are afraid to talk to non-official visitors freely in the presence of officials – which definitely impedes the visitors' functionality – and that prison staff considers prison visitors as an unnecessary intrusion in their work.⁹²

Overall Assessment

While the Rules provide for prison oversight mechanisms through official and non-official prison visitors, implementation remains erratic. The prison visiting system seems to be irregular and the mechanism at many places is defunct because of a lack of transparency and seeming lack of commitment, despite constant recognition by Indian courts.

The Haze Report examined the number of official and non-official visitors currently appointed in the prisons across each State, the constitution of Board of Visitors, and the work undertaken by the Board. It indicates that the overall picture of the prison visiting system in the country is bleak and in need of immediate attention. Across India, Boards Of Visitors are not constituted, do not meet regularly or fail to inspect prisons. Non-Official Visitors are irregularly or not appointed at all, do not visit prisons, or do so sporadically and have little idea of their duties. Neither official nor non-official visitors are held accountable for neglecting their mandates.

LESSONS FROM THE GLOBAL NORTH

In order to grasp a global perspective of prison oversight bodies, it may be useful for South Africa to consider models applied in the North to supplement its own systems. In doing so, however, it is important to remain cognisant of the fact that South Africa's democracy is younger than many of those in the North. Greater protections of its institutions' independence may be necessary than is the case in countries such as England and Canada.

1. CANADA: OFFICE OF THE CORRECTIONAL INVESTIGATOR



Functions and Powers

In Canada, section 158 of the Corrections and Conditional Release Act ("CCRA")⁹³ establishes the Office of the Correctional Investigator ("OCI"). Section 167(1) of the CCRA provides:

"It is the function of the Correctional Investigator to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group."

The function of the Correctional Investigator is to investigate problems affecting either individual offenders or offenders as a group that arise from decisions, acts or omissions of the Commissioner of Corrections. The Correctional Investigator may investigate any problem of an offender provided that such problems result from the conduct of the Correctional Service of Canada staff and their representatives (in other words, only complaints from federal corrections facilities, not provincial ones). This includes problems arising from broad policy initiatives or from everyday operational decision-making.⁹⁴

The Correctional Investigator may commence an investigation on receipt of a complaint by an offender or on behalf of an offender; at the request of the Minister of Public Safety; or on the Correctional Investigator's own initiative.⁹⁵ The Correctional Investigator has full discretion as to whether or not to investigate a complaint or request, how to investigate, and whether or not to terminate an investigation before completion.⁹⁶

In the course of an investigation, Correctional Investigator staff have authority to enter premises, acquire files or information from individuals, hold hearings, and summon and examine under oath any person who is able to provide information about the matter being investigated.⁹⁷ However, it should be noted that strict legal rules limit the Correctional Investigator's power to disclose any of the information gathered in the course of its investigation.⁹⁸ This is intended to act as an assurance to those with whom the Correctional Investigator deals, so as to encourage honest and accurate disclosure.⁹⁹

Should the Correctional Investigator determine on the basis of an investigation that there is a problem, they must inform the Commissioner of Corrections, and if the Correctional Investigator is of the opinion that a decision, action or omission was unlawful, unjust, oppressive or discriminatory, or that a discretionary power has been exercised improperly, they should indicate this as well.¹⁰⁰ The Correctional Investigator may also make recommendations that they deem appropriate for the resolution of the problem.¹⁰¹ As an ombudsman, the Correctional Investigator only has the power to make recommendations for the resolution of offender problems, and the CCRA explicitly provides that these recommendations are not binding on the Commissioner.¹⁰² However, section 180 of the CCRA does provide that,

"If within a reasonable time after informing the Commissioner, or the Commissioner and the Chairperson of the Parole Board of Canada, as the case may be, of a problem, no action is taken that seems to the Correctional Investigator to be adequate and appropriate, the Correctional Investigator shall inform the Minister of that fact and provide the Minister with whatever information was originally provided to the Commissioner...."¹⁰³

The Correctional Investigator must also provide the Minister of Public Safety with an annual report on their activities, which the Minister must present to Parliament within the first 30 days that Parliament is sitting after the report is submitted to the Minister.¹⁰⁴ Further, if the Correctional Investigator considers a matter to be urgent or important, they can make a special report to the Minister, and the Minister must make certain that the report is provided to Parliament within the first 30 days of its sitting subsequent to the report being submitted to the Minister.¹⁰⁵ Beyond this, however, the Correctional Investigator has no power to enforce its recommendations.



Independence

The OCI is given a clear statutory mandate by the CCRA, as mentioned above, and the Correctional Investigator "has the control and management of all matters connected with the office of the Correctional Investigator."¹⁰⁶ Therefore the OCI has the statutory authority to develop and implement its own processes. However, the Correctional Investigator reports to the Commissioner of Corrections and the Minister of Public Safety, which, in the eyes of the South African Constitutional Court, detracts from the office's independence.¹⁰⁷ Traditionally Ombudsmen report directly to the legislature, not to the executive or administrative power that they oversee. Reporting to the department or ministry over which a body is supposed to have oversight hinders its independence by leaving it open to political influence. The OCI has itself identified this as an area for improvement, arguing that it should report directly to Parliament.¹⁰⁸

Per the CCRA, the Correctional Investigator is appointed by the Governor in Council (“GIC”).¹⁰⁹ GIC appointments are made by the Governor General on the advice of the Queen’s Privy Council for Canada, in other words, the Cabinet. The Correctional Investigator holds office for a term of five years, but “may be suspended or removed *for cause* at any time by the Governor in Council”.¹¹⁰ This means that the power to remove the Correctional Investigator is not simply discretionary.¹¹¹ Following their first or any subsequent term of office, the Correctional Investigator may be re-appointed for a further term. The Correctional Investigator’s remuneration is fixed by the GIC, and they are entitled to be paid reasonable travel and living expenses incurred in the course of their duties.¹¹² The Correctional Investigator is also entitled to a pension under the Public Service Superannuation Act.¹¹³ The Correctional Investigator thus enjoys some degree of security of tenure, although it is not ideal for the purposes of their independence that they are selected by a Cabinet that includes the Minister of Public Safety, over whom they are supposed to exercise oversight. Moreover, South African courts consider the possibility of a renewable term of office to allow for undue political influence, compromising independence.¹¹⁴

Other staff of the Correctional Investigator “as are necessary to enable the Correctional Investigator to perform their functions and duties” are appointed by the Canadian Public Service Commission according to the provisions of the Public Service Employment Act.^{115,116} The appointment and dismissal processes are thus transparent, and not influenced by Correctional Services, the Commissioner of Correctional Services or the Minister of Public Safety, allowing for greater security of tenure and autonomy of the OCI.

The Correctional Investigator and their staff must take an oath on the commencement of their duties that they will “faithfully and impartially to the best of [their] abilities perform the duties required of [them].”¹¹⁷ This at least indicates that every member of the OCI is independently bound by oath to the execution of their functions with impartiality.¹¹⁸ They are also protected from criminal and civil court proceedings by section 188 of the CCRA, insulating them from political pressure.

The OCI receives most of its funding directly from Parliament, with a small portion allocated by statute, which helps to ensure its financial autonomy from the department of corrections.¹¹⁹



Accessibility

Section 169 of the CCRA obligates the Correctional Investigator to keep prisoners informed about the function of the Correctional Investigator, its independence, and the circumstances in which the OCI may investigate. This places a statutory obligation on the OCI to make the Correctional Investigator more accessible to prisoners.

Federal offenders, incarcerated or in the community, may make complaints on their own behalf or on behalf of other offenders. Family members and friends may also make complaints on behalf of offenders. Complaints are made directly to the OCI by mail, telephone or in person during scheduled visits by OCI staff.¹²⁰ This means that at least in theory prisoners can raise grievances without using the channels provided by the Department of Corrections. Unfortunately, there is insufficient literature evaluating whether or not this is actually the case. Many complaints made directly to the OCI are also referred back to the correctional institution,¹²¹ which might expose prisoners to institutional backlash.

This means that at least in theory prisoners can raise grievances without using the channels provided by the Department of Corrections

Per section 181 of the CCRA, where an investigation arises from a complaint, the Correctional Investigator must inform the complainant of the results of the investigation. The focus of the OCI is on persuasion due to the power only to make recommendations. This means that they tend to address only the most urgent and significant unresolved matters in statutory reports, so it is only these matters that reach Parliament.¹²² Further, because they must substantiate their recommendations with thorough research, the number of complaints that they can address is limited. That said, of the 5434 complaints received in the 2013-2014 fiscal year, 2492 were addressed internally through the immediate provision of information, assistance or referral to the institutional itself; 2515 led to inquiries; and 427 were investigated.¹²³ This raises concerns as referral back to the institutions themselves for resolution may defeat the purpose of having an external grievance procedure, and may place prisoners at risk for retaliation, which would have a negative impact on prisoners' trust and confidence in the OCI. It also seems that only a small number of complaints are actually investigated fully, which raises questions about the OCI's capacity and efficacy, and similarly might affect prisoners' confidence in the OCI



Overall Assessment

The Office of the Correctional Investigator is an ombudsman and therefore an investigative body. This means that its role is more reactive to than preventative of human rights abuses. Although this is an important function of prison oversight, ideally the human rights abuses would not happen at all, which would require regular monitoring of prisons as well as investigations once abuses have occurred. The Correctional Investigator has extensive powers that enable thorough investigations; however, it is subject to strict rules regarding disclosure, creating an obstacle to transparency and defeating an important aspect of oversight. The Correctional Investigator enjoys a large degree of financial and operational autonomy, and employment security, although their term of office is renewable, potentially opening them up to political influence. It is important that there is a statutory obligation to keep prisoners and the public informed about the function of the Correctional Investigator, contributing to its accessibility. On the other hand, that they only assist federal prisoners definitely limits their accessibility. It is also problematic for accountability purposes that the Correctional Investigator has no power to enforce its recommendations; its powers are purely persuasive.

2. UNITED STATES

2.1. CALIFORNIA: OFFICE OF THE INSPECTOR GENERAL



Functions and Powers

The Office of the Inspector General (“OIG”) was created by section 6125 of the Penal Code of California (1872), which establishes the OIG as an independent government entity for the “contemporaneous oversight of internal affairs investigations and the disciplinary process of the Department of Corrections and Rehabilitation”.¹²⁴ It has the power to review, inspect, monitor and report, and to a limited extent, to investigate and audit.

Although the OIG was previously mandated to conduct audits and investigations of the California Department of Corrections and Rehabilitation (“CDCR”),¹²⁵ since 2011 this power has been reframed as the power to conduct policy and performance reviews of the CDCR when requested by the Governor of California, the Senate Committee on Rules, or the Speaker of the Assembly.¹²⁶ The Inspector General may also recommend to the Governor, Senate Committee or Assembly a review of specific policies, practices or procedures that raise a “significant correctional issue relevant to the effectiveness of the department”,¹²⁷ granting the OIG some degree of initiative. If circumstances arise that are life-threatening to inmates, wards, parolees or staff, the Inspector General ‘may’ notify the Governor, Senate Committee on Rules or the Speaker of the Assembly.¹²⁸

Once the Inspector General has completed a review, they must submit a confidential report to the entity who requested the review and to the appropriate law enforcement agency. The Inspector General must also prepare a public report, but has the discretion to protect the information of individuals or locations or any facts that might obstruct any prosecution arising from the review.¹²⁹ The OIG must also produce semi-annual and annual reports detailing the significant problems discovered by the OIG, and whether or not the OIG’s recommendations have been implemented. These reports must be submitted to the California legislature and governor, and published on the OIG website.¹³⁰

The OIG may receive complaints of improper activity within the CDCR, yet aside from complaints under the Prison Rape Elimination Act (“PREA”) and retaliation complaints, the OIG may not investigate these complaints. However, the OIG does contact the relevant correctional institutions to remedy issues raised in complaints, and where a complaint expresses potentially unsafe conditions, the OIG requires that the CDCR provides a status of the situation and addresses safety concerns.¹³¹ Under section 2641 of the Penal Code of California, the OIG acts as the ombudsperson for complaints of sexual abuse in detention facilities. The OIG must review allegations of mishandling of sexual abuse investigations, maintain the confidentiality of victims, and ensure resolution of sexual abuse complaints.¹³²

The OIG must review allegations of mishandling of sexual abuse investigations, maintain the confidentiality of victims, and ensure resolution of sexual abuse complaints

The Inspector General reviews the Governor’s candidates for appointment as wardens or superintendents at correctional and juvenile facilities.¹³³ The findings of the Inspector General are not binding on the Governor when making appointments; however, should the Governor appoint someone that the Inspector General finds unqualified, the Inspector General may make this public.¹³⁴ This function provides for some accountability in the appointment of prison wardens, and could be an important way for an oversight body to help shift institutional culture within facilities themselves.

The OIG monitors CDCR’s internal affairs, including its decision-making process when hiring employees and the discipline of employees, and reports on the CDCR’s adherence to its operating rules in its semi-annual reports.¹³⁵ The OIG monitors “critical incidents” and subsequent investigations, focusing specifically on what led to the incident, how the incident was handled and what action should be taken subsequent to the incident. The OIG may recommend and monitor investigations, as well as recommend state-wide or institutional policy changes to avoid similar incidents in the future. The OIG also monitors CDCR’s use-of-force reports, makes recommendations to the CDCR on the development of new use-of-force policies, and reports on its findings on a semi-annual basis.¹³⁶ Unfortunately, this relies upon the self-reporting by the CDCR, which is likely to have some impact on the OIG’s ability to monitor effectively.

The Inspector General must conduct periodic inspections of health care facilities at each state prison, as well as inspections to review the implementation of reforms at prisons.¹³⁷

The OIG also has the power to access and examine, and to reproduce, any books, accounts, reports, correspondence and other documents, as well as bank accounts, money or other property of the CDCR in course of carrying out its functions.¹³⁸ They may also interview any employee of the CDCR.¹³⁹ Officers and employees of the CDCR are legally obligated to permit access to these records or property upon the request of the OIG.¹⁴⁰ The OIG’s powers to access records and documents also extend to private and public entities or persons that are regulated by the CDCR.¹⁴¹



Independence

The OIG has a clear statutory mandate from the California state legislature provided by the Penal Code of California sections 6125-6141, which specifically provide for its independence by stating that it is an “independent” office that “shall not be a subdivision of any other governmental entity”.¹⁴² The OIG reports directly to the Governor, the California State Senate Committee on Rules, the California state legislature, and the public.¹⁴³ Because the OIG is outside of the department that it oversees, and does not report to the department, it has more independence to publicly report concerns about the department. This also contributes to public perceptions of its independence and credibility.¹⁴⁴

Because the OIG is outside of the department that it oversees, and does not report to the department, it has more independence to publicly report concerns about the department

The Inspector General is appointed by the Governor, and the appointment is confirmed by the California state senate. The Inspector General’s term of office is six years, and they may only be removed for good cause.¹⁴⁵ The legislation makes no mention of whether or not the Inspector General’s term is renewable, but historically the term has not been renewed.¹⁴⁶

The California State Senate appropriates the budget of the California Inspector General. The appropriation comes from the State of California’s Department of Finance. This General Fund is the same fund from which the California State Fiscal Budget is created.¹⁴⁷



Accessibility

The OIG may receive communications from anyone who believes that they may have information about improper governmental activity.¹⁴⁸ The OIG also facilitates accessibility by having a public, toll-free telephone number to receive complaints from the public.¹⁴⁹ In addition to this phone number, the public is able to file complaints with the office electronically and by mail.¹⁵⁰

As a safeguard for prisoners who make complaints, the OIG operates using a Confidentiality and Protection from Retaliation standard. Exceptions are that, “the information is released in confidence to the California State Governor, the Secretary of the California Department of Corrections and Rehabilitation, the Chief Deputy Secretary, or Chairperson of the correctional entity being investigated, or to law enforcement agencies for appropriate action.”¹⁵¹ Additionally, the Inspector General can break confidentiality “in the interest of justice”, or in response to a court order.

California state law establishes penalties for those who retaliate against anyone that reports misconduct to the Office. If retaliation is reported, the Inspector General is required by law to investigate the claim.

Overall Assessment

The OIG has a number of the functions that Deitch identifies as necessary for effective prison oversight: review, inspect, monitor, report, and limited powers to investigate and audit. The power to review candidates for appointment to positions as wardens and superintendents, as well as other employees, is important, acting as a form of quality insurance and potentially sifting out unsuitable or problematic candidates. That the OIG has an inspection role, and monitors ‘critical incidents’ and subsequent investigations is a further strength, acting as a preventative measure against human rights abuses. Its relationship with the media and the public is an important component of accountability. Further, it has extensive powers when it comes to accessing documents and records and interviewing employees of the CDCR, and it is notable that this power extends to private entities regulated by the CDCR, as correctional services are often contracted to private service providers who should also be held accountable. The OIG enjoys a strong degree of operational and financial independence. This is helped by its empowering legislation, the language of which is useful as a basis for advocacy in South Africa.

2.2. NEW YORK: CORRECTIONAL ASSOCIATION

The Correctional Association of New York (“NYCA”) is an independent not-for-profit citizens’ organization founded in 1844 that advocates for a more humane and effective criminal justice system.¹⁵² In 1846, the New York State Legislature granted the NYCA authority to access and inspect prisons in the state of New York and to report its findings on conditions of confinement and the effects on both inmates and corrections staff.¹⁵³ It is only one of three state-wide advocacy groups in the United States that has formal or informal access to correctional facilities for monitoring purposes.



Functions and Powers

The NYCA has unlimited access to all state correctional facilities. Its monitoring of prisons includes the following activities:

i) Prison visits

The NYCA’s Prison Visiting Project visits between six and ten prisons every year, and the Women in Prison Project visits all-female incarceration facilities every year. These visits generally involve a full day spent on-site and are conducted by the NYCA Visiting Committee (“Visiting Committee”), which consists of five to eight NYCA staff and board members and includes medical and psychiatric professionals, formerly incarcerated people, advocates and concerned individuals. The Visiting Committee inspects all areas of

the prison, including housing areas, the recreational yard, the medical clinic, mental health units, and solitary confinement areas. The Visiting Committee interviews inmates using a standardised survey and meets with the facility's administrative team, corrections officers, civilian staff, and the Inmate Liaison Committee – a leadership group elected to voice prisoners' concerns.¹⁵⁴ Its methods are fairly holistic, as it engages with all stakeholders and uses different methods of data collection.

ii) **Data collection**

The NYCA collects data from each facility that it visits on the facility's staff, programmes, services, unusual incidents and disciplinary processes. It gathers this data through a survey administered to the superintendent of each facility prior to a visit. This allows the NYCA to recognize systemic issues, compare different facilities with similar populations, and identify both areas of concern and model programmes.

iii) **Report of Prisons Visits and 'State of the Prisons' Report**

After each visit, the NYCA publishes a detailed report including findings and recommendations. A draft of the report is sent to the superintendent and Department of Correctional Services ("DOCS") officials, giving them the opportunity to correct any errors and to supplement information gathered during the visit. It also provides for a discussion of the NYCA's recommendations with regard to their feasibility, and for DOCS to put forward alternative recommendations. Once this process is complete, a final report is issued and distributed to policy makers, inmates and the public.¹⁵⁵

The NYCA also produces a 'State of the Prisons' report containing an analysis of the entire state prison system, as well as summaries of the findings from each prison visit conducted in the reporting period. The objective of this report is to make recommendations for systemic improvements to prison conditions and practices.¹⁵⁶

iv) **Inmate correspondence**

The Prison Visiting Project receives letters from inmates requesting information or assistance, or informing the Prison Visiting Project about conditions within prisons. This correspondence helps to shed light on specific areas so that they can focus their inquiries when they visit prisons.¹⁵⁷

v) **Studies of specific prison issues**

The NYCA also conducts long-term studies of critical issues arising in New York state prisons, such as how DOCS provides services to inmates who have a history of substance abuse. The NYCA identifies shortcomings and accomplishments, and gives recommendations for how to improve prison conditions, as well as DOCS' policies and practices. In conducting these studies, the NYCA carries out focused visits to prisons and administers detailed surveys to the prison populations and prison staff, monitors systemic data and visits facilities outside the State to determine best practice models that can be replicated in New York.¹⁵⁸

vi) **Education and advocacy**

The NYCA also makes an effort to educate the public on the realities of the prison system by including members of the public in prison visits, and maintaining relationships with the media. This is important as it keeps prisons in the public eye, and ensures that inmates, their communities and the general public are aware of crucial issues that affect them. As part of its advocacy, the NYCA meets regularly with legislative officials to report its findings and to keep them informed of its work towards achieving positive change. It is also a member of several coalitions advocating for prisoners' rights, does work drafting and promoting the adoption of legislation for the improvement of prisons, and advocates for the development of better policies, practices and budget allocation.¹⁵⁹



Independence

As a non-governmental organisation, the NYCA operates outside of government structures and is not subject to limitations by any state entity.¹⁶⁰ It appoints its own board of directors, and determines its own agenda, best practices and policies. It has a legislative mandate to oversee prisons granted to it by an 1846 statute,¹⁶¹ which means that its access to prisons is legally entrenched and not dependent on its relationship with any organ of government, allowing for a great degree of independence and autonomy. It is accountable not to the State, but to its donors. Unfortunately, because it depends entirely on private funding, like all non-profit organizations, its financial position is precarious. However, it enjoys financial autonomy from the department that it oversees, which further contributes to its independence.

Although the NYCA technically has a legislative mandate to access prisons, practically, it has an adversarial relationship with DOCS, which is strained by the NYCA's aggressive public reporting on, and advocacy around, deficiencies in prisons.¹⁶² Moreover, the NYCA cannot enforce its recommendations and must pursue change by being persuasive in its advocacy and reporting.¹⁶³ However, the NYCA does enjoy a close relationship with the legislature, often assisting legislators by compiling data to support legislative reform.¹⁶⁴



Accessibility

Prisoners and the public can contact the NYCA by mail, phone, or through a proxy.¹⁶⁵ The NYCA receives between 100 and 150 complaints from prisoners each month. However, the NYCA is not able to address or resolve complaints itself; it can only incorporate them into its data capturing and reporting.¹⁶⁶

Overall Assessment

The NYCA enjoys a great degree of independence because it is a civil society organisation external to the state government. Further, its powers are endorsed by legislation and well entrenched. It enjoys a good relationship with the state legislature and the public, working hard to keep both informed about the state of New York state prisons. Its role as a civil society inspectorate is also important, as it plays a preventative role through its inspections and data collection, and provides an important and necessary link between prisoners and the public, ensuring that the conditions in prisons are kept in the public eye. However, it cannot enforce any of its recommendations, making it somewhat toothless. This may be why it receives so few complaints proportionate to the size of the New York state prison population. That said, the importance of its monitoring and reporting role should not be underestimated. An entity like this would, however, need to work in conjunction with other oversight bodies that do have investigative and enforcement powers.

3. ENGLAND AND WALES: HER MAJESTY'S INSPECTORATE OF PRISONS, INDIVIDUAL MONITORING BOARDS AND THE PRISONS AND PROBATION OMBUDSMAN

England and Wales have three separate oversight bodies that jointly operate to ensure safe and humane prison conditions through monitoring, inspecting and reporting. These bodies are Her Majesty's Inspectorate of Prisons ("the Inspectorate"), the Individual Monitoring Boards ("the Boards"), and the Prisons and Probation Ombudsman ("the Ombudsman"). Together the Inspectorate and the Boards act as the OPCAT National Preventative Mechanism for England and Wales.



Functions and Powers

Her Majesty's Inspectorate of Prisons

The Inspectorate was established by the Prison Act¹⁶⁷ as amended by section 57 of the Criminal Justice Act.¹⁶⁸ Per the Prisons Act, the role of the Inspectorate is to inspect prisons in England and Wales and report to the Secretary of State for Justice ("Justice Secretary"), focusing specifically on the treatment of prisoners and conditions of incarceration.¹⁶⁹

The Justice Secretary may refer specific matters to the Inspectorate to report on.¹⁷⁰ The Inspectorate must submit an annual report to the Home Secretary and the Justice Secretary, who must table the report before Parliament.¹⁷¹ The Inspectorate also prepares reports on issues that cut across operations of the entire prison system.¹⁷²

The function of the Inspectorate is purely to monitor prison conditions; it cannot investigate allegations of wrongdoing. Its aim is to identify problems and correct them.¹⁷³ Furthermore the Inspectorate does not audit the Prison Service; its focus is purely on the treatment of prisoners and the conditions of their incarceration.¹⁷⁴

Individual Monitoring Boards

The Boards monitor and report on prisons, and receive complaints and requests from prisoners. The Boards are comprised of independent, unpaid members of the public who work for two to three days a month. They receive their mandate from the Prisons Act¹⁷⁵ and the Prison Rules.¹⁷⁶ Their duties are to visit prisons frequently to monitor prison premises, prison administration and the treatment of prisoners, and to inquire into and report on any matter referred to them by the Secretary of State.¹⁷⁷ They have access to every part of the prison at any time, to all the records of the prison, and to any prisoner, who they may interview without prison officials present.¹⁷⁸ Board members must also hear any prisoner complaints and requests, and are specifically required by the Prison Rules to inspect the prison food.¹⁷⁹ The Boards should bring to the attention of the head of prison any matter which he/she needs to address and must immediately inform the Justice Secretary of any abuse which comes to their attention.¹⁸⁰

Finally, the Boards must report annually to the Secretary of State, and can include in their report advice or suggestions that they consider appropriate.¹⁸¹ The Boards are not executive bodies and have no power to demand or enforce action. The Prison Rules do not provide for any enforcement mechanism for their recommendations. A board member interviewed by the Lloyd Working Group in 2007 described the Boards as 'watchdogs howling into empty space'; they have eyes and ears but are essentially toothless.¹⁸² However, it is necessary to emphasise their importance as witnesses in what is otherwise a closed world. Their presence plays a role in reminding prisoners and prison staff that prisoners are not despised enemies; they are still citizens and retain their rights to be treated humanely.¹⁸³

Their presence plays a role in reminding prisoners and prison staff that prisoners are not despised enemies; they are still citizens and retain their rights to be treated humanely

Prisons and Probations Ombudsman

The third agency responsible for prison oversight, the Ombudsman, investigates complaints made by incarcerated persons, detainees and offenders under probation supervision, and deaths of incarcerated persons due to any cause, including any apparent suicides and natural causes.¹⁸⁴ The Ombudsman may investigate all decisions and actions, including failures or refusals to act,

related to the management and treatment of prisoners by prison and detention centre staff as well as contractors, and has unfettered access to all relevant documents, including classified material and information. With regard to investigations into deaths, the Ombudsman's aims are to establish the circumstances surrounding the death, and to examine whether such an occurrence could be avoided by changing operational methods or policies. They may also examine relevant health issues and evaluate clinical care.

The Ombudsman and their staff can access the premises of the authorities 'at reasonable times specified by the Ombudsman' for the purposes of interviewing employees and other individuals and examining documents.¹⁸⁵ The Ombudsman must submit an annual report to the Justice Secretary, who will present it to Parliament. This report includes the recommendations made by the Ombudsman and responses to recommendations. The Ombudsman may also publish additional topic-specific reports, and if requested, the Secretary of State must present these reports to Parliament.¹⁸⁶ Specific to investigations into prisoner deaths, the Ombudsman must present the relevant authorities and the family with a report, which may include recommendations. An anonymised report is also published on the Ombudsman's website. The relevant authorities must respond to the report and deal with the Ombudsman's recommendations within a set time.¹⁸⁷ The Ombudsman does not have enforcement powers.



Her Majesty's Inspectorate of Prisons

The Inspectorate has a clear statutory mandate under the Prisons Act as amended by the Criminal Justice Act. The body reports to the Justice Secretary, who is ultimately responsible for prisons in England and Wales. According to the Inspectorate's terms of reference, the Secretary of State may specify the form the inspection should take, which limits the Inspectorate's authority to develop and implement its own processes. The Inspectorate's operational autonomy is therefore limited.

The Inspectorate is led by Her Majesty's Chief Inspector of Prisons ("the Chief Inspector"), who is appointed from outside the Prison Service by the Crown in terms of section 5A(1) of the Prisons Act for a term of five years. The Chief Inspector is not considered an employee of the government, ensuring their independence from the government and the department that they oversee. The Prisons Act does not provide grounds for the removal of the Chief Inspector, nor does it specify whether or not their term of office is renewable. The Inspectorate chooses and appoints its own inspectors, half of which are drawn from a prison background, but importantly not from the Prison Service. The remainder are chosen for their skills and experience in social work, probation, psychology, civil service, health care and drug treatment work.¹⁸⁸ The Chief Inspector and their staff seem to enjoy security of tenure, which contributes to the independence of the Inspectorate.

Unfortunately, the Inspectorate's budget is determined by the Secretary of State (upon approval by the Treasury),¹⁸⁹ and its funding is drawn from the same pool as that of the Prison Service. This compromises the Inspectorate's financial independence.

Independent Monitoring Boards

The Boards have a statutory mandate under section 6 of the Prisons Act. Their duties and proceedings are explicitly set out by the Prison Rules.¹⁹⁰ This provides some independence for the Boards, which accordingly do not rely on Prison Services for access to prisons, and effectively have terms of reference for their proceedings and duties. However, the Boards report to the Secretary of State, who may direct them to focus on certain issues or themes, which has an impact on their operational autonomy.

Board members are appointed by the Secretary of State in consultation with the relevant Board members who interview the candidate. According to the Prison Rules, Board members “hold office for three years, or such lesser period as the Secretary of State may appoint”. This is a significant impediment to security of tenure.

The Secretary of State also has the power to remove members on the grounds listed in the Prison Rules.¹⁹¹ These grounds are fairly broad, ranging from a failure to perform their duties satisfactorily to a failure to undergo required training to a conflict of interests. While the inclusion of a conflict of interest as a ground for removal is important for the independence of Board members, the hiring and firing power of the Secretary of State, who oversees prisons, and to whom the Boards report, undermines the employment security of Board members.

The Boards report to the Secretary of State, who may direct them to focus on certain issues or themes, which has an impact on their operational autonomy

Boards are comprised of lay persons, but every Board must include at least two Justices of the Peace, or Magistrates.¹⁹² Members are not paid, but receive compensation from the Ministry of Justice for travel and subsistence expenses.¹⁹³ The Ministry of Justice has budgetary control over the Boards, undermining their financial autonomy.

Prisons and Probations Ombudsman

The Ombudsman has no statutory basis, something that has raised questions as to its perceived independence. The Office of the Ombudsman’s terms of reference state that the office is ‘wholly independent’ of the prison service; however, the Ombudsman is funded by the Ministry of Justice, receiving an amount of £5.2 million in 2015-2016.¹⁹⁴ Moreover the Ombudsman is appointed by and answerable to the Secretary of State for Justice, the body it is overseeing.¹⁹⁵ Because of this flaw in the perceived independence of the Ombudsman, the British and Irish Ombudsman Association has denied the Prisons and Probation Ombudsman the status of voting member.¹⁹⁶ The Ombudsman has a fixed term of office, however, which does contribute to their independence.¹⁹⁷ The Office of the Ombudsman also sets its own agenda each year¹⁹⁸ and it is housed separately from the ministry.¹⁹⁹

Unlike the Canada’s OCI, the lack of statutory authority has the consequence of, to some degree, subjecting the Ombudsman’s efficacy to political will, as its terms of reference can be revised.



Accessibility

Her Majesty’s Inspectorate of Prisons

The Inspectorate has the responsibility to inspect every prison in England and Wales and all places of immigration detention in the UK.²⁰⁰ It also now has a programme of inspection of all police custody suites, and by invitation, the military’s central detention facility in the UK.²⁰¹ The Inspectorate has these extensive inspection powers because it is the coordinating body for the UK’s National Preventive Mechanism under OPCAT.

The inspection methods of the Inspectorate are holistic. Teams of inspectors monitor prison facilities with a combination of surprise in-depth inspections, follow-up visits and prisoner surveys.²⁰² Prior to the inspection, researchers visit the prison and carry out a confidential survey with a statistically significant number of randomly selected prisoners.²⁰³ This survey asks more than 100 questions about all aspects of prison life. The results of these surveys are kept on a database and are compared to the results from other prisons, as well as to the responses

received from the same prison in previous visits. These surveys also disaggregate data, such as statistics on race or disability, enabling a comparison of experiences on the basis of race or disability.²⁰⁴

During the inspection, a team of inspectors will examine every aspect of prison life, including admission, segregation, activities, and resettlement. They meet confidentially with prisoners, both in groups and individually, and with prison staff. They also examine prison records. They are assisted by specialists in health care, substance-use and education. Inspectors give evaluations according to the Inspectorate's comprehensive published criteria, 'Expectations'.²⁰⁵ These criteria deal with safety, respect, purposeful activity, resettlement, and specialist units such as maternal and mental health units.²⁰⁶ The Inspectors focus on outcomes and best practice, rather than processes and minimum standards.²⁰⁷

Following each visit, the Inspectorate provides detailed reports, including recommendations for improvement, the timing and substance of which is solely within the control of the Inspectorate.²⁰⁸ The prison agency is given the opportunity to respond to the report, and must present an action plan for complying with any recommendations, unless there is a written objection from the facility.²⁰⁹ The Inspectorate then does a follow up visit to determine the facility's level of compliance with its action plan. The Inspectorate must visit all prisons and establishments that detain people in England and Wales at least twice every five years, once for a full inspection and once for a follow-up inspection.²¹⁰

The Inspectorate must visit all prisons and establishments that detain people in England and Wales at least twice every five years

This methodology is comprehensive, and allows for some degree of accessibility for prisoners, as they are consulted before and during the process. There is also some degree of accountability, as the prison facility has to provide an action plan and is then assessed against their action plan. Former Chief Inspector, Anne Owers, reported that around 70% of the Inspectorate's recommendations had been implemented, wholly or partially, indicating that the Inspectorate is fairly effective.²¹¹

Independent Monitoring Boards

The Boards monitor the day-to-day life of prisoners in their assigned prison through regular inspection, at least once per month and often more frequently.²¹² As part of their inspections, members must visit the prison's kitchen, health care unit and segregation unit. The Boards are accessible to prisoners, as they receive prisoner complaints²¹³ and have the power to interview prisoners out of sight and earshot of prison officials.²¹⁴ The power to ensure privacy when interviewing does provide for some protection for prisoners who come forward with complaints.

The Boards must meet on a monthly basis with the director of the prison to discuss the results of their inspection and to relay concerns raised by prisoners, acting as a conduit between prisoners and prison management. The law is silent on whether or not they may maintain the anonymity of the complainant. Because the Boards inspect prisons at least once a month, and are present at every prison, they are also far more accessible than the Inspectorate for prisoners. Prisoners can complain directly to the Boards.²¹⁵

Finally, Board members must be alerted and called to the prison when serious instances occur, such as: escapes, hostage taking, deaths, roof climbing, barricades, fires, food refusal, or deliberate self-harm. Board members must monitor and record serious incidents, and must

observe until the incident has been resolved. They must also monitor any use of restraint on prisoners and the treatment of prisoners placed in segregation cells.²¹⁶ This bearing witness in extreme circumstances is an important component of oversight as it is most often in such trying instances that human rights are most likely to be violated.

Prisons and Probation Ombudsman

The Ombudsman is the investigative arm of the oversight trio, and investigates individual prisoners' complaints before making a finding. The Ombudsman's findings are not enforceable, but they are implemented in the majority of cases.²¹⁷ Prisoners must first use the relevant prison's grievance mechanism before being able to access the Ombudsman, which limits accessibility. The Ombudsman also investigates all deaths in prisons and probations and publishes reports recommending changes in practice or policy. These recommendations are likely to be enforced too, as prisons are liable under corporate manslaughter legislation.²¹⁸ In the 2013-2014 year, the Ombudsman received 4879 complaints, of which only 53% were eligible for investigation – the remainder had not exhausted the prisons' internal complaint system.²¹⁹ Of the eligible complaints (2585), 2111 were investigated.²²⁰ The Ombudsman targets the most serious complaints that they consider will have a worthwhile outcome.²²¹ 34% of the complaints were upheld in favour of the complainant.²²² Roughly 70% of complainants whose complaints had been upheld felt that their complaint had been taken seriously by the Ombudsman.²²³ No survey was taken of those whose complaints were not upheld. The Ombudsman was also notified of 256 deaths and investigated 239 – 17 deaths were outside the remit of the Ombudsman.²²⁴



Overall Assessment

The prison oversight bodies of England and Wales are not as independent as they should be because they receive funding and direction from, and must report to, the ministry that they oversee. However, their multi-pronged approach to oversight makes them accessible and means that their work is thorough and holistic. They inspect, monitor and report, and investigate. Further, their inspections are comprehensive, including: surveys of, and consultations with, prisoners; inspections of cells, kitchens and health care units; monitoring the quality of food served to prisoners; investigations into deaths of all prisoners; and reporting on their findings. It is also notable that prison facilities must respond to reports with action plans, and that secondary inspections are conducted to assess compliance with these action plans. Overall, this system is a good model, but would be stronger and more effective if greater independence was allowed.

Independent Police Investigative Directorate

Although this report aims to ascertain a best practice model for a *prison* oversight body in South Africa, it may be useful to consider the functionality and efficacy of another oversight mechanism in South Africa - the Independent Police Investigative Directorate (“IPID”), the South African police oversight body.

IPID was established by section 3 of the IPID Act to give effect to section 206(6) of the South African Constitution, which provides:

On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.



Functions and Powers

The IPID Act sets out the IPID’s mandate, functions, powers and duties relatively clearly. In section 2, the IPID Act states that the objects of the statute are, *inter alia*, to “ensure independent oversight of the South African Police Service; ... to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service; to make disciplinary recommendations in respect of members of the South African Police Service; to provide for close cooperation between the IPID and the Civilian Secretariat for Police Service; and to enhance accountability and transparency by South African Police Service members...in accordance with the principles of the Constitution.” The IPID therefore has a clear investigative function, as well as a mandate to report and make recommendations.

The IPID is led by the Executive Director, who heads the National Office of the IPID. Each province also has a provincial office under the direction of their own provincial heads. The functions, powers and duties of the Executive Director, the National Office, and provincial heads are clearly listed in sections 7 and 9 of the IPID Act. The Executive Director’s responsibilities include: maintaining financial records and reporting annually on these to Parliament; appointing provincial heads; and developing policies and guidelines for investigators. Section 8 of the IPID Act specifies the composition of the National Office which is responsible for assisting the Executive Director by, *inter alia*: developing and implementing policy for the IPID; submitting annual reports to the Minister for Police and Parliament; managing provincial offices; gathering and analysing information relating to investigations; conducting internal audits; and providing administrative support for the IPID.

Investigators are granted the same powers to investigate as members of the South African Police Service (“SAPS”) and peace officers. These are extensive powers. The IPID Act also explicitly provides a non-exhaustive list of the circumstances that must be reported by members of SAPS and investigated by the IPID, including: assault by police officials or in police custody; acts of torture in police custody; rape by police officials; and acts of corruption or systemic corruption within SAPS. The Regulations For the Operation of the Independent Police Investigative Directorate (“the IPID Regulations”)²²⁵ details the specific steps to be taken in investigations according to the allegations being investigated. The IPID Act obligates members of SAPS to assist investigators in the performance of their functions, and makes it a criminal offence to in any way obstruct an

investigation by IPID. Finally, the IPID Act absolves investigators of liability for good faith acts or omissions in the performance of their functions, excluding gross negligence. Overall, this means that the powers of the IPID and its investigators are fairly extensive, at least according to the empowering legislation.

Upon conclusion of an investigation, the IPID has the power to refer cases to the National Prosecuting Authority (“NPA”) for prosecution, and the NPA must respond within a period of 30 days with its intention to prosecute or not to prosecute. The IPID may also make disciplinary recommendations to the National Commissioner or provincial commissioners, who must initiate disciplinary actions per the recommendations within 30 days and must report back to the IPID upon conclusion of the disciplinary matter. This means that the recommendations of the IPID are enforceable, unlike those of JICS, allowing for greater accountability of SAPS.

Finally, the IPID must report annually to the Minister of Police, who must table the report before Parliament within 30 days.



Independence

Importantly for the IPID, it is a body that is enshrined in the South African Constitution, rather than simply a creature of statute. This alone provides it with a degree of independence not enjoyed by JICS. Further, section 4 of the IPID Act expressly provides for the IPID’s independence from the SAPS and charges each organ of state with assisting the IPID to “maintain its impartiality and to perform its functions effectively”.

The IPID’s budget is appropriated directly by Parliament, and is not controlled by SAPS or the Minister of Police. Moreover, the body is responsible for managing its own finances and has the power to conduct internal audits. It is subject to an annual audit by the Auditor-General and must provide the Minister of Police and Parliament with a financial report annually. This is important for ensuring its financial autonomy.

Importantly for the IPID, it is a body that is enshrined in the South African Constitution

Operationally, the IPID is able to formulate and implement its own processes to fulfil its mandate. However, due to limited resources, the IPID has to rely on SAPS and other Departments for support and technical expertise (for example, forensics and ballistics) in order to effectively investigate cases.²²⁶ This not only has the potential to impact on the integrity of the investigations carried out, but also may compromise the IPID’s independence. Therefore, at the moment, the IPID’s degree of operational independence is somewhat hampered.

The IPID’s Executive Director is nominated by the Minister of Police, but their appointment must be confirmed by Parliament. However, the IPID Act only stipulates that the nominee must be ‘suitably qualified’ without explaining further. Their term of office is 5 years, and may be renewed only once. Furthermore, the grounds for removal of the Executive Director – misconduct, incapacity or ill-health – are not particularly strenuous and their removal from office on these grounds does not appear to require confirmation from Parliament. This, together with the possibility of a renewable term of office, potentially leaves the Executive Director open to political influence. It is notable, however, that in the recent case *McBride v Minister of Police and Another*,²²⁷ the Court found sections 6(3) and 6(6) of the IPID Act to be “unconstitutional and invalid to the extent that they purport to authorise the Minister of Police to unilaterally suspend, discipline, and remove from office the Executive Director of IPID, and accordingly do not provide for any parliamentary oversight in the suspension and removal of the Executive Director.” As a result, there is a process underway to amend these, and other, sections of the IPID Act.²²⁸

The Executive Director is responsible for the appointment of staff in the National Office as well as provincial heads. National Office staff are subjected to a security screening in consultation with the National Intelligence Agency. Provincial heads are appointed on a permanent basis, providing them with employment security and ensuring a degree of independence in the performance of their functions. Provincial heads' performance is measured against a performance agreement made with the Executive Director at the commencement of their employment. This is important for accountability in the performance of their functions, and insulates them from external influence.

Investigators are appointed by the Executive Director in consultation with provincial heads. The IPID Act requires that investigators be 'fit and proper' persons with at minimum a Grade 12 certificate and relevant experience, and are subject to a security screening before they can be appointed. Their terms and conditions of employment are the same as detectives in the SAPS. In terms of the IPID Act, the IPID must have a cooperative relationship with the Secretariat through the Consultative Forum, established by section 15 to facilitate the sharing and development of recommendations. This does pose a risk insofar as it might foster institutional capture; however, elsewhere the IPID Act stipulates that the IPID must be allowed to perform its functions independently of the SAPS, and it is possible that this provision counteracts the potential for undue political influence.

The IPID Act deals specifically with the potential for conflicts of interest. The IPID must maintain a register of declarations of interest for managers and investigators.²²⁹ Under section 25 of the Act, no member of the IPID may conduct or participate in an investigation where they have financial or other interests. If during the course of an investigation a member of the IPID becomes aware of a conflict of interest, they must declare it and recuse themselves from the investigation. This is an important provision as conflict of interest has a strong potential to contaminate the integrity of an investigation and affect ideological and associational independence.



Accessibility

The IPID is a relatively accessible body. Complaints can be lodged by any person, either as a victim, witness or representative; as well as non-governmental and community-based organisations. A complaint may be lodged in person, by telephone, per letter or e-mail to any IPID office. The complainant must fill in a Complaint Reporting Form, which can be obtained from any IPID office or online.²³⁰

The geographical location of some of IPID offices does however make it difficult for ordinary citizens in rural or far-fetched areas to access its services.²³¹ In addition, this geographical location necessitates extensive traveling for IPID investigators, thereby requiring and exhausting the greater part of the budget on travelling and accommodation.

Complaints can be lodged by any person, either as a victim, witness or representative; as well as non-governmental and community-based organisations

Overall assessment

The IPID is a constitutionally recognised body, and as such enjoys a degree of independence and insulation from political influence that JICS does not. Moreover, it has an entire statute and regulations dedicated to its establishment and mandate, which provides it with a clear outline of the extent of its functions and powers. This is important and necessary for it to function effectively. The power to investigate and to recommend disciplinary action, as well as the power to refer criminal allegations to the NPA, gives the IPID a great deal more clout than JICS has. Even more important is the obligation of the SAPS and the NPA respectively to implement the disciplinary actions recommended and to notify the IPID of intention to prosecute. A similar obligation on the part of DCS could be emulated with regard to JICS' recommendations. Furthermore, the IPID has a relationship with both the SAPS and the NPA that is built into the IPID Act, allowing for better cooperation between the three bodies. This is something to be considered with regard to JICS' relationship with DCS and the NPA.

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With regard to its independence, the express declaration of the IPID's independence in the IPID Act, the positive obligation upon all organs of state to assist the IPID with its functions and duties, and the negative duty not to interfere with its investigations are all vital to its independence as they are enforceable legal obligations. It enjoys far more financial and operational autonomy than JICS does, and while it does have a close relationship with the SAPS under its empowering legislation, its associational autonomy is both recognised and protected, not least by the obligation on all investigators to declare their interests and to recuse themselves from investigations where there is a conflict of interest.

While the effectiveness of the IPID does not depend on its empowering legislation alone, but requires firm implementation and public confidence in the IPID, the legislation does provide a solid framework for an independent and effective oversight body and is one that should be considered as a positive example when amending the legislation that empowers JICS.

Recommendations for the increased independence and effectiveness of the Judicial Inspectorate for Correctional Services in South Africa

In order to improve the efficacy of JICS as a legitimate, independent and accessible prison oversight body, the Correctional Services Act (and other relevant/affected legislation) should be amended to give effect to the following recommendations, all of which are supported by international best practice.



Functions and Powers

- As is the case with the IPID, **JICS' mandate, powers and functions must be set out clearly in the empowering legislation and the extent of these powers must be defined in accompanying regulations.** JICS should, at the very least, have the power to inspect, monitor, investigate, report and make binding recommendations. Other powers that it might be given could include the power to regulate and to institute legal proceedings when necessary to vindicate the human rights of inmates and detainees.
- To ensure effectiveness and accountability, **DCS should have an enforceable legal obligation to respond to reports and recommendations made by JICS** with an action plan within a fixed period of time. JICS should have the power to conduct a follow-up inspection to determine whether the action plan is being implemented (see England and Wales).
- Organs of state such as the DCS, SAPS and the NPA should have a **positive legal obligation to assist, and negative obligation to not impede,** JICS so as to allow it to operate independently and function effectively (see IPID).
- JICS should have the power to **investigate problems affecting either individual offenders or offenders as a group that arise from decisions, acts or omissions of the DCS,** including problems arising from broad policy initiatives or from everyday operational decision-making (see Canada).
- JICS should have the power to **access all places of detention,** including police holding cells and deportation centres (see England and Wales, Malawi, Zambia).
- An existing **independent civil society organisation (or coalition of organisations) with relevant content expertise** should be given a statutory mandate to inspect, monitor and report on prisons, and should receive funding from Treasury and protected by legislation to do so (see New York). This would provide greater transparency and accountability in correctional centres and of JICS, and would have the added benefit of improving public confidence in prison oversight.
- There should be a development of **inspection standards** in order to facilitate more effective and consistent oversight.
- JICS should be encouraged to hold public hearings, seminars, conferences, workshops and the like on thematic areas to ensure **wide dissemination of important findings and information.**



Independence

- As in Canada and California, to ensure that JICS remains free from political influence, it should **receive its budget directly from Parliament, not from DCS**, which it is tasked to oversee. It should report on its expenditure directly to Parliament and the Treasury.
- Similar to Canada and California, **the appointment and dismissal of the Inspecting Judge and JICS' CEO should not be under the control of DCS** or the Minister of Justice and Correctional Services. If the Minister is to have this power, any appointment or dismissal must be confirmed by Parliament, as is the case in England and Wales.
- The **term of the Inspecting Judge and the CEO should be fixed and non-renewable**. Clear and reasonable grounds for dismissal should be set out in the legislation or regulations (see Canada).
- **There must be measures put in place to ensure the institutional independence of JICS and its employees**, such as:
 - an oath to “faithfully and impartially to the best of their abilities perform the duties required of them”;
 - a register of declarations of interest (see IPID); and
 - criminal sanctions against actions seeking to obstruct or influence the oversight body in the exercise of its powers and functions (see IPID).
- JICS should be able to **determine its own operations independently of DCS**. It should have its own separate infrastructure and systems in place, and should not be dependent on DCS for office space, access to telephones, computers, printers or the internet, or the creation of posts, among other things.
- **JICS employees, including ICCVs, should be required to be ‘fit and proper persons’**. They should have, along with a Matric certificate, some relevant experience –preferably in the areas of prison governance and human rights. Furthermore, they should be provided with regular training on relevant issues (see IPID), such as the substantive content of the CSA and prisoner interaction skills.
- JICS should be required to have social workers, doctors, parole officers, drug treatment specialists, former correctional staff and former incarcerated persons on staff to ensure **a holistic understanding of the issues faced by incarcerated persons, correctional staff and not least, the JICS employees themselves**. The CSA currently provides for specialist assistants (section 89(4)), however this provision has not been utilised.



Accessibility

- JICS must be meaningfully accessible to prisoners if it is to be effective. Following the Canadian example, **prisoners need to be informed about the powers and functions of JICS**, its independence, and the circumstances in which it may investigate.
- Prisoners should be able to **make complaints on their own behalf, or on behalf of other offenders** (see Canada and California).
- There should be an obligation on JICS to **inform the public as well as prisoners of the results of investigations** (see Canada). At the very least, their prison visits reports and investigation results should be published on the JICS website.

- To encourage prisoners to forward complaints to JICS, there needs to be a way to **keep information confidential and protect complainant-inmates from retaliation.** Californian state law establishes penalties for anyone who retaliates against someone that reports misconduct to the Office. This fits with the idea that anyone seeking to obstruct or influence the unit should be sanctioned.
- There should be a **prisons ombudsman distinct from JICS** that accepts and arbitrates complaints about prisons, DCS and JICS, to ensure greater public confidence in JICS.
- A **multi-faceted system** should be developed to strengthen prison oversight (ideally if OPCAT is adopted), that includes JICS, the South African Human Rights Commission, judges and magistrates, as well as civil society organisations (such as the Detention Justice Forum).

Conclusion

An examination of the literature and of prison oversight models in a number of foreign jurisdictions shows that there is a best practice for effective prison oversight. Best practice prioritises meaningful independence, clarity of mandate, functions and powers, and the holistic practice of oversight that includes, at the very least, inspection, monitoring, investigative and reporting powers. Meaningful independence requires that the oversight body enjoy financial, legal, operational, and institutional independence, as well as security of tenure for its staff.

While South Africa's prison oversight mechanism may be the most developed on the continent, it is clear that there are still measures that must be put in place to ensure that it becomes a more effective guardian of the rights of prisoners and detainees. Of course the precise form that each jurisdiction has adopted is context specific, and any measures that are put in place must take into consideration the empowering and limiting factors unique to South Africa. This brief has provided recommendations that ought to be considered to make the JICS a more effective prison oversight body.

Endnotes

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- ²⁸Deitch, supra note 23 at 1440-1443.
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- ³⁰Ibid at para 213.
- ³¹Parkes and Pate, supra note 21 at 267.
- ³²Ibid.
- ³³*Glenister*, supra note 17 at para 222.
- ³⁴Ibid at para 223.
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- ⁴⁰Ibid at 270.
- ⁴¹Deitch, supra note 23 at 1443.
- ⁴²*S v Makwanyane* 1995 (6) BCLR 665, at para 143.
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