

Ten years after the Jali Commission

Assessing the state of South Africa's prisons

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Ten years have lapsed since the Jali Commission's final report became publicly available, and it is therefore an opportune time to assess the state of South Africa's prison system. The Jali Commission was appointed when it became clear that the state had lost control of the Department of Correctional Services (DCS). A decade on, some notable advances have been made in regaining control, and addressing corruption and maladministration. However, serious and persistent challenges remain. These are explored in this article, with a particular focus on policy development, the performance of the DCS against set targets, governance and human rights violations. In all four of these areas substantial shortcomings remain. Impunity for human rights violations is perhaps the most critical challenge, as the DCS has been reluctant to acknowledge the scale of this problem or to seriously address it.

In 2001, president Thabo Mbeki established the Jali Commission of Inquiry into Corruption and Maladministration in the Department of Correctional Services ('Jali Commission'). Before the establishment of the Jali Commission there had been at least 20 investigations into irregularities and abuses within the department.¹ In 2000 it was reported to Parliament that the state had lost control of the Department of Correctional Services (DCS).² It was in this context, and at the request of the then minister of Correctional Services, Ben Skosana of the Inkatha Freedom Party (IFP), that Mbeki established the Jali Commission in 2001.

In 2005 the Jali Commission submitted its full report with recommendations to Mbeki. Following much pressure from the Portfolio Committee on Correctional Services and Judge Jali himself, then minister Ngconde Balfour released the report to the public in November 2006. The findings were damning of the department's conduct as it related to corruption, maladministration and the treatment of prisoners. Nearly 10 years on it is opportune to assess the state of South Africa's DCS and the prison system itself.

This brief article provides an overview of the South African prison system post-Jali Commission, focusing on four key issues: policy development, delivery on set targets, governance and corruption, and human rights. Using the commission as a reference point,

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it provides a succinct overview of the most noteworthy developments within the DCS, or lack thereof, over the past 10 years.

The Jali Commission had a particular scope. It examined, for example, only nine of the department's 52 management areas as well as specific focal areas defined in the commission's terms of reference.³ The mandate given to the commission was indicative of the scale and scope of corruption, maladministration and rights violations in the DCS. It included investigations into the procurement of goods and services; the recruitment, appointment, promotion and dismissal of employees; the treatment of prisoners, dishonest practices and illicit relationships between employees and prisoners, leading to unlawful activities; alleged incidents of non-adherence to departmental policy and deviation from national norms and standards; alleged incidents of violence against or intimidation of employees; and to what extent recommendations from past investigations relating to the department had been implemented.

While it is acknowledged that there have been some notable improvements in the decade since the commission submitted its report, especially when assessed against the crises-engulfed DCS of the late 1990s, many also argue that imprisonment has not fundamentally changed since apartheid. On the positive side, great strides have been made to rid the DCS of high level corruption and to re-establish state control over the department. Supply chain management was improved, a new disciplinary code was established, corrupt officials were dismissed and large-scale training of staff was undertaken, to name just a few improvements. However, in respect of familiar problems such as human rights violations, legislative compliance, conditions of detention and access to much needed services, far less has been achieved.

The National Development Plan (NDP) provides guidance on the reforms necessary to ensure South Africa's criminal justice system is democratic and fair.⁴ The NDP asks, among other things, for the criminal justice system to have a single set of objectives, priorities and performance measurement targets; a demilitarised, professional police service that is sensitive to community needs; an inter-sectoral approach to safety; and a particular focus on vulnerable groups in society.⁵ There is, however, scant evidence in the annual reports of the justice and security cluster departments that any substantial realignment has taken place.

Policy development

The White Paper review

The highly anticipated 2005 White Paper on Corrections in South Africa (the 'White Paper') was in part drafted in response to the Jali Commission, but was widely criticised.⁶ Policy development has not been one of the department's strengths, as illustrated in Sloth-Nielsen's comprehensive overview of the erratic and at times illogical nature of policy development in the DCS at the time.⁷ The White Paper identified the rehabilitation of offenders as the 'core business' of the department. This was seen as misguided, given the serious and fundamental challenges facing the DCS, such as poorly skilled staff, overcrowding and gross human rights abuses – issues clearly identified by the Jali Commission. Eight years later, in April 2013, the DCS informed the parliamentary Portfolio Committee on Correctional Services that a review of the White Paper would be undertaken and that it would be completed by the end of that year.⁸ By August 2015 nothing had been delivered.⁹

From the available literature it is not clear why the White Paper review project seems to have been abandoned, especially as the DCS, the Portfolio Committee and civil society institutions

acknowledged the need for it. The 2005 draft and final White Paper brought a sense of purpose to the department, despite criticism that it was too ambitious and at odds with the realities of South Africa's prisons.¹⁰ With the White Paper having thus suffered a further serious blow to its credibility, the question arises as to what directs policy development in the DCS. It is clear from departmental communications that the White Paper no longer enjoys the same prominence it once did. The need for a review remains, because, as will be discussed below, some problems have remained persistently familiar.

Remand detention

In commenting on overcrowding in correctional facilities, the Jali Commission paid scant attention to the plight of awaiting trial prisoners. At the time the commission regarded the inspecting judge (the late Judge Hannes Fagan) as an adequate champion for the rights of remand detainees.¹¹ The commission was, however, concerned about the department's attitude towards overcrowding. The department blamed the police for the large awaiting trial population, and expressed the wish that awaiting trial prisoners be detained at police stations.¹² A policy framework on remand detention, as it became known, was not a priority for the Jali Commission.

Subsequently, the *White Paper on Remand Detention Management in South Africa* (the 'Remand White Paper') was released in March 2014, after extensive amendments to the Correctional Services Act 1998 (Act 111 of 1998) by means of the Correctional Matters Amendment Act 2011 (Act 5 of 2011). The Remand White Paper describes in detail the management of remand detainees, their rights and responsibilities, as well as cooperation between different government departments around remand detention. The language and detailed prescripts are akin to the departmental

standing orders, known as the 'B-Orders', which provide step-by-step guidance on nearly every aspect of DCS operations and are intended to be a central resource to officials. In overview, the Remand White Paper is regarded as a positive development that was intended to clarify a range of uncertainties of a legal and practical nature.

Despite its noble intentions, the Remand White Paper's implementation, with specific reference to the size of the remand population and duration of their custody, is highly dependent on other role players. The remand detention problem has two main drivers: too many people are held on remand, and those on remand stay for too long before being acquitted or convicted. Of the roughly 155 000 prisoners in South Africa in 2016, approximately one-third were awaiting trial on any one day. Moreover, half of those on remand had been there for three months or longer.¹³ This situation is the result of large numbers of unnecessary arrests by the police, and a criminal justice process that is extremely slow and inefficient.¹⁴ These are factors outside the control of the DCS, but they become the department's central problem: overcrowding in the large metropolitan remand detention facilities, such as Johannesburg, Durban Westville and Pollsmoor. With such severe overcrowding – above 175% occupancy – the good intentions of the Remand White Paper become unachievable and irrelevant.

The 2011 amendment to the Correctional Services Act attempted to create a mechanism that would limit the duration of remand detention by means of section 49G. This was incorporated into the Remand White Paper, and stipulates that the DCS must refer a remand detainee to court before s/he completes a detention period of two years, and annually thereafter if the detainee remains in custody after the initial referral.¹⁵

The 2013/14 DCS annual report noted that the average duration of custody had been reduced

by a modest 13 days since section 49G came into operation. While this may in part be due to other trends in the criminal justice system, the impact of the amendment has nonetheless been limited. As well-intentioned as section 49G may be, it will not have the desired effect, as it does not regulate the criminal justice process. Indeed, judicial review should be mandatory far sooner than two years. It should furthermore not be assumed that if a head of centre brings a section 49G case to court that the court will indeed undertake an investigation into an unduly delayed trial in terms of the provisions of the Criminal Procedure Act.¹⁶ Plainly put, the Correctional Services Act does not tell the court what to do with a section 49G case. Moreover, the constitutional right to a speedy trial is rendered meaningless when it takes two years before a delayed matter is brought to the attention of the court.¹⁷

If the Remand White Paper is to have an impact, the remand population has to be drastically reduced. This would necessitate the support and cooperation of the police, the National Prosecuting Authority (NPA) and the courts. The DCS framework and practice are simply not able to reduce the remand population. What is required is an interlinked, overarching framework covering the police, DCS, NPA and courts to ensure that suspects are not unnecessarily detained and that their cases are dealt with expeditiously, as recommended by the NDP. Ten years after Jali, the systemic causes of overcrowding remain unaddressed.

Gang management strategy and policy on sexual violence

The Jali Commission was extremely critical of how the department had failed to deal with prison gangs (and sexual violence), despite the ‘number gangs’ having been part of South African prisons for more than a century.¹⁸ It found that there was no strategy in place to

deal with the disruptive, corrupting impact of prison gangs on prison administration. Only in the 2009/10–2013/14 DCS Strategic Plan did the department identify the need for a gang management strategy and set out a basic process to develop one. At last there was recognition in the strategic plan that change was necessary and that ignoring the problem would not make it disappear. However, the subsequent strategic plan (2013/14–2016/17) mentioned gangs as a threat to prisoner safety, but did not mention a gang management strategy as such.

The 2014/15 DCS annual report provided no proper description of the gang management strategy, save for one reference to ‘Improved Implementation of Gang Management Strategy’ as a means to reduce inter-prisoner violence.¹⁹ The 2015/16 DCS annual report briefly mentioned that the ‘gang management checklist’ was implemented at ‘various centres’ and that a NICOC-led (National Intelligence Coordinating Committee) national gang management strategy was to be implemented.²⁰ Based on these reports, it appears that one of the most critical challenges to prisoner safety and good governance has been shifted on to the back burner.

Sexual violence is a regrettable part of South Africa’s prison landscape, and is frequently, but not exclusively, linked to the number gangs. Gear and Ngubeni have given an authoritative account of the insidious nature of sexual violence in South Africa’s prisons and the devastating consequences for survivors.²¹ Jali described it as ‘the horrific scourge of sexual violence that plagues our Prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners’.²² The Jali Commission was appalled at how the DCS had failed victims of sexual violence and how some warders were complicit in sexual violence, including the trafficking of prisoners.

Seven years later, in 2013, the DCS adopted a policy on the prevention of sexual violence, which had been developed in cooperation with two non-governmental organisations.²³ However, the 2014/15 and 2015/16 DCS annual reports made no mention of the strategy or of the implementation of any measures relating to the reduction of sexual violence among prisoners. Public recognition by the DCS of the problem, and of the policy document, has been scant and it appears to be similarly sitting on the back burner next to the gang management strategy.

The department's reluctance to deal with sexual violence in a concerted manner is inexplicable. The legislative framework is more than adequate, and the problem well-documented. Yet there remains little political recognition or condemnation of the problem, nor is the department fostering an environment where victims are taken seriously and supported, and active steps are taken to prevent sexual victimisation.

In respect of both these strategies it must be concluded that they are not priorities for the DCS, despite the constitutional right that all persons be free from all forms of violence.²⁴ The DCS has a particular responsibility in this regard as it has a legal obligation to ensure the safe and humane custody of all prisoners.²⁵

Delivery on targets

The Jali Commission did not focus specifically on departmental performance against set targets, but the range of problems identified, especially in relation to poor governance and maladministration, should be seen in this context. While the Jali Commission paid particular attention to widespread corruption and maladministration, the overall intention was, and is, to have a department that is well-managed, efficient in resource utilisation, and

fulfilling its mandate with particular reference to service delivery.

The DCS Strategic Plan, together with the annual reports, sets out the plans and targets for the medium term, as is generally required across the public service. In 2010 the auditor general started to include performance targets in his audits, the results of which are not particularly encouraging in the case of the DCS. In his 2011/12 report he noted that there were numerous problems with the quality of the information that was presented and made some critical remarks in this regard:

Treasury Regulation 5.2.4 requires that the strategic and annual performance plan should form the basis for the annual report, therefore requiring the consistency of indicators between planning and reporting documents. A total of 22% of the reported indicators were not consistent with the indicators as per the approved strategic and annual performance plan. This is due to the lack of alignment between the Strategic Plan indicators and the Annual Performance Plan indicators.²⁶

The auditor general's 2014/15 report expressed substantive concerns about the validity of information in the DCS annual report regarding the performance of the incarceration and rehabilitation programmes; non-compliance with material legislation; accuracy of financial statements; strategic planning and performance management; internal auditing; failure to constitute an audit committee; control of irregular expenditure; revenue management; filling of vacancies; poor leadership of the accounting officer; and weak financial and performance management.²⁷

The issues raised by the auditor general are not new. Since 1994 the DCS has not received an unqualified audit, although the subject and number of qualifications have changed over the years. When the basic requirements of public

administration, emphasising transparency and accountability, are not being complied with, it is unlikely that a human rights culture will flourish, and that prisoners will receive the services they are entitled to or be treated in a manner consistent with constitutional requirements.²⁸

While criticism should rightly be levelled at the DCS's senior management in respect of planning, it should also be held accountable for not holding officials to their set and largely modest performance targets. Good performance appears to be a function of individual managers at operational levels and is not being driven by generally applicable legislation and policy. Between 2006 and 2016, there seems to have been limited progress in creating a department that is well-managed and performance-driven.

Governance

Widespread corruption in the DCS was a central reason for the Jali Commission's establishment in 2001. In 2002 the DCS approached the Special Investigations Unit (SIU) to assist it in rooting out corruption.²⁹ The SIU achieved significant successes and played a substantial role in turning the 'captured ship' around. There is no doubt that the DCS and SIU cooperation helped reduce corruption and resulted in enormous savings to the tax payer.³⁰ The Jali Commission made extensive recommendations regarding poor governance and maladministration in respect of every focal area it investigated. Essentially these were aimed at regaining control over a department that had been captured by organised labour at all levels, including at head office. Whether petty corruption has been brought under control is not known, but, as illustrated below, some events suggest that high-level corruption remains.

In November 2009 the SIU reported to the Portfolio Committee on Correctional Services on its findings, following an investigation into

four major contracts awarded by the DCS to the Bosasa group of companies.³¹ The findings were damning, implicating DCS Chief Financial Officer Patrick Gillingham and former National Commissioner Linda Mti. The four contracts were awarded in similarly irregular ways, deviating from the Treasury Supply Chain Management Policy. The SIU's final report was handed to the minister of correctional services and the NPA in September 2009, but at the time of writing (November 2016) no criminal prosecutions had been initiated. The chief financial officer was suspended in September 2010 and ultimately resigned without facing departmental disciplinary action.³² Mti subsequently took up a position at the Nelson Mandela Bay Metro.

In June 2016, the Democratic Alliance (DA) motivated to have Mti's appointment at the metro overturned, as he was implicated in corruption and also convicted of drunk driving, but nothing happened in this regard. By June 2016 the NPA had not yet responded to questions from the DA regarding the prosecution of Mti – despite the fact that the findings of the SIU clearly implicated senior DCS officials and a *prima facie* case for prosecution undoubtedly existed.³³ One should not forget that the allegedly corrupt awarding of the high value contracts to Bosasa happened at a time when the ink had barely dried on the Jali Commission's final report. There are thus clear indications not only that some senior DCS managers are protected by other elites but also that criminal investigations hold little weight when one enjoys political protection. The lack of action from the NPA clearly communicates that some people can and do get away with crime.

In April 2016, the Office of the Chief Procurement Officer for the DCS ordered National Commissioner Zach Modise to cancel the awarding of a tender valued at R378 million to a company called Integritron. Integritron has links to the ruling party, and one of its subsidiaries is a benefactor of the ANC.³⁴ The chief procurement

officer found several irregularities in the awarding of the contract. As more information emerged, the minister of justice and correctional services, the minister of finance, Treasury and the auditor general became involved in a public spat. Ultimately, Minister of Finance Pravin Gordhan instructed his counterpart in Justice and Correctional Services, Michael Masutha, to cancel the deal, upon which Integritron obtained an interdict against the minister of justice and correctional services to refrain from taking any action that would affect the deal until the matter was properly adjudicated by a court.³⁵ The matter was subsequently placed on the ordinary roll, after an initial application to be heard on an urgent basis.

To add to the department's woes, in April and May 2016, Zuma proclaimed two cases for the SIU to investigate. These cases related to irregularities in the procurement of an electronic monitoring system and irregularities in the appointment of a service provider to render project management services and condition assessments in respect of correctional facilities.³⁶

Again, a key oversight function, namely that of the chief procurement officer, was undermined by forces of a political nature in the DCS. Whether the Integritron case will go the same route as the Bosasa case remains to be seen, but it is nonetheless clear that high-level corruption has not disappeared from the DCS.

Human rights

The Jali Commission found ample evidence of officials treating prisoners as though they had no rights.³⁷ While the commission acknowledged that overcrowding in prisons makes the protection of human rights very difficult, it rightly did not accept this as an excuse for the torture and ill-treatment of prisoners. The commission found that prisoners were subjected to torture, assault and abuse, and made to perform

duties that infringed on their dignity. It appeared to the commission that warders were generally of the opinion that prisoners were in prison 'for punishment' and not 'as punishment'.³⁸ Regrettably, it remains the case that large volumes of human rights violations are still reported in the DCS and Judicial Inspectorate for Correctional Services (JICS) annual reports, and that Jali's remarks remain by and large true.

It is not within the scope of this article to provide details on human rights violations – the DCS annual reports and the JICS do so adequately. A few key indicators are, however, worthy of mention. In 2014/15 the JICS inspected 90 prisons and found that 61 exceeded 100% of their capacity, 21 exceeded more than 150% of their capacity, and 10 more than 175%.³⁹ In 2014/15 more than 3 150 prisoners alleged that they had been assaulted by officials; an increase of more than 3 000 compared to 2011/12.⁴⁰ Reported intra-prisoner violence increased from fewer than 4 000 cases in 2011/12 to 7 388 cases in 2014/15, despite the prison population being relatively stable since 2008.⁴¹

Poor conditions of detention are a major source of prisoner complaints to the JICS. In 2014/15 nearly 34 000 complaints of this nature were recorded.⁴² Other major sources of complaints relate to nutrition, access to reading material, healthcare and access to legal representation. A total of 57 175 complaints regarding healthcare were recorded by the JICS in 2014/15, an increase of 67% from 2011/12.⁴³ The profile of complaints has also remained remarkably consistent from one year to the next, indicating that they are not regarded as systemic problems and consequently not addressed in a systemic manner.

Conclusion

The overall impression gained is that many of the problems identified by the Jali Commission 10 years ago are still present in the prison system.

While overcrowding is largely a problem created outside of the department's control, rights violations such as assaults by officials, inter-prisoner violence, access to healthcare and other support services are very much within the department's control. Based on the figures reported above, it also appears that the situation is getting worse. It is in particular egregious rights violations such as assault and torture that are not thoroughly investigated and thus create a situation of *de facto* impunity.⁴⁴ It is indeed a rare occurrence that DCS officials are criminally prosecuted for human rights violations perpetrated against prisoners. To the best knowledge of the author, there has not yet been a successful prosecution against a state official for the crime of torture since it was criminalised in 2013.

Ten years after the Jali Commission released its report, the DCS remains beset by the same problems as those the commission was established to address: overcrowding, corruption, impunity, rights violations and services that do not reach sufficient numbers of prisoners and leave much to be desired with regard to impact. All indications are that there have been significant improvements in the DCS, especially regarding corruption and maladministration, but that there is plenty that remains unacceptably dysfunctional. The Bosasa and Integritron cases are testimony to this, as are the 2016 proclaimed investigations.

This brief review of the DCS 10 years after the Jali Commission demonstrates the medium-term limitations of judicial commissions of inquiry. For the Jali Commission to have a sustained impact it needed the support of Parliament, which it lost in 2014 when the Portfolio Committee on Correctional Services was merged with the Portfolio Committee on Justice. Since then it appears that, in part due to this reconstituted committee's workload,

the Correctional Services portfolio has been shifted to the background. This is of particular concern, considering that the DCS has an almost allergic reaction to external criticism, oversight and accountability.

Gross human rights violations continue to occur and may even be increasing. This is reason for deep concern. If the department is to have one priority for the next 10 years, it should be to address rights violations and the culture of *de facto* impunity. Good governance and human rights are inter-connected and mutually reinforcing, and compliance with the Bill of Rights necessitates a well-managed organisation.



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Notes

- 1 Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation in the Department of Correctional Services (Jali Commission), *Final report*, 2005, 885, http://www.gov.za/sites/www.gov.za/files/jali_comm_full_0.pdf (accessed 22 November 2016); Julia Sloth-Nielsen, The state of the nation's prisons, in Sakhela Buhlungu et al. (eds), *State of the nation – South Africa 2007*, Cape Town: HSRC Press, 2007, 380.
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- 3 A management area may contain one or more prisons, depending on the size of the prison population in that area and geographical spread. Each management area is headed by an area commissioner.
- 4 The National Development Plan (2030) is a high-level long-term plan that aims to reduce poverty and eliminate discrimination by 2030. Developed by the National Planning Commission in the Presidency, the plan aims to achieve these goals by drawing on the energies of the country's people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society. See South African Government, *National Development Plan 2030*, <http://www.gov.za/issues/national-development-plan-2030> (accessed 21 October 2016).
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- 6 Department of Correctional Services (DCS), *White Paper on Corrections in South Africa*, Pretoria: Department of Correctional Services, 2005, 59, para 2.9.6.

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- 12 *Ibid.*, 635.
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- 15 DCS, White Paper on Remand Detention Management in South Africa, 2014, 55.
- 16 Criminal Procedure Act 1977 (Act 51 of 1977), Pretoria: Government Printer, 1977, Section 342A.
- 17 South African Constitution 1996 (Act 108 of 1996), Pretoria: Government Printer, 1996, Section 35(3)(d).
- 18 The so-called number gangs came into being in the late 19th century in what is now known as Gauteng. The ‘number’ refers to their names – the 26, 27 and 28 – as the three main prison gangs. Other gangs include the Big 5, which collaborates with the authorities, and the Air Force, which specialises in escapes. The 26 and 28 are the main and larger gangs, whereas the 27 is intended to be the go-between or peacemaker. Their structures are hierarchical and discipline is strictly enforced on members, from whom absolute loyalty is expected. Their influence has spread to most prisons in South Africa. Their history is steeped in myth and secrecy and it must be accepted that little is understood about how they function. For insightful accounts into the number gangs see Sasha Gear and Kindiza Ngubeni, *Daai ding: sex, sexual violence and coercion in men’s prisons*, Johannesburg: Centre for the Study of Violence and Reconciliation (CSV), 2002; Jonny Steinberg, *Nongoloza’s children: Western Cape prison gangs during and after apartheid*, Johannesburg: CSV, 2004.
- 19 DCS, Annual report 2014/15, 2015, 49.
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- 21 Gear and Ngubeni, *Daai ding*.
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- 27 DCS, Annual report 2014/15, 106–108.
- 28 South African Constitution, Section 195.
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- 34 *Business Day Live*, Chief procurement officer orders Modise to cancel deal, 14 April 2016, <http://www.bdlive.co.za/national/2016/04/14/chief-procurement-officer-orders-modise-to-cancel-deal> (accessed 8 August 2016). Integratron is part of the Sasstec group of companies, which have benefited from government tenders in the past. Integratron is a security system business, providing services in perimeter detection, access control and software solutions. It was contracted to develop a system to monitor inmates electronically for the department.
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- 40 JICS, Annual report 2011/12, 2012, 43; JICS, Annual report 2014/15, 77.
- 41 JICS, Annual report 2011/12, 43; JICS, Annual report 2014/15, 77.
- 42 JICS, Annual report 2014/15, 77.
- 43 JICS, Annual report 2011/12, 43; JICS, Annual report 2014/15, 77.
- 44 Lukas Muntingh and Gwénaëlle Dereymaeker, Understanding impunity in the South African law enforcement agencies, CSPRI, Research Report, Bellville: Community Law Centre, 2013.