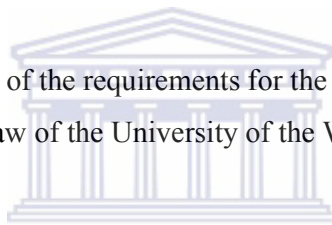


AN ANALYTICAL STUDY OF SOUTH AFRICAN PRISON REFORM AFTER 1994

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Thesis submitted in fulfilment of the requirements for the degree of Doctor of Law in the
Faculty of Law of the University of the Western Cape.



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ABSTRACT

The history of prison reform after 1994 was shaped by the relationship between governance and human rights standards; the requirements for both are set out in the Constitution and elaborated on in the Correctional Services Act. Good governance and human rights converge in five dimensions of a constitutional democracy: legitimacy, transparency, accountability, the rule of law; and resource utilisation. The new constitutional order established a set of governance and rights requirements for the prison system demanding fundamental reform. It de-legitimised the existing prison system and thus placed it in a crisis. This required its reinvention to establish a system compatible with constitutional demands. The thesis investigates whether constitutionalism provided the necessary transformative basis for prison reform in South Africa after 1994. The Department of Correctional Services (DCS) senior management failed to anticipate this in the period 1990 to 1994. In the five years after 1994 senior management equally failed to initiate a fundamental reform process. This lack of vision, as well as a number of external factors relating to the state of the public service in the period 1994 to 2000, gave rise to a second crisis: the collapse of order and discipline in the DCS. By the late 1990s the state had lost control of the DCS and its internal workings can be described as a mess – a highly interactive set of problems in causal relationships. In many regards the problems beleaguering the prison system were created in the period 1994 – 1999. The leadership at the time did not recognize that the prison system was in crisis or that the crisis presented an opportunity for fundamental reform. The new democratic order demanded constitutional and political imagination, but this failed to materialise. Consequently, the role and function of imprisonment within the criminal justice system has remained fundamentally unchanged and there has not been a critical re-examination of its purpose, save that the criminal justice system has become more punitive.

Several investigations (1998-2006) into the DCS found widespread corruption and rights violations. Organised labour understood transformation primarily as the racial transformation of the staff corps and embarked on an organised campaign to seize control of management and key positions. This introduced a culture of lawlessness, enabling widespread corruption. Under new leadership by 2001 and facing pressure from the national government, the DCS responded to the situation by focusing on corruption and on regaining control of the Department. A number of gains have been made since then, especially after 2004. Regaining control of the Department focused on addressing systemic weaknesses, enforcing the

disciplinary code and defining a new employer-employee relationship. This has been a slow process with notable setbacks, but it continues to form part of the Department's strategic direction. It is concluded that the DCS has engaged with and developed a deeper understanding of its constitutional obligations insofar as they pertain to governance requirements in the Constitution.

However, compliance with human rights standards had not received the same attention and areas of substantial non-compliance remain in violation of the Constitution and subordinate legislation. Overcrowding, violations of personal safety, poor services and/or lack of access to services persist. Despite the detailed rights standards set out in the Correctional Services Act, there is little to indicate that legislative compliance is an overt focus for the DCS. While meeting the minimum standards of humane detention, as required by the Constitution, should have been the strategic focus of the DCS in relation to the prison population, the 2004 White Paper defines "offender rehabilitation" as the core business of the DCS. In many regards the DCS has assigned more prominence and weight to the White Paper than to its obligations under the Correctional Services Act. In an attempt to legitimise the prison system, the DCS defined for itself a goal that is required neither by the Constitution nor the Correctional Services Act. Compliance with the minimum standards of humane detention must be regarded as a prerequisite for successful interventions to reduce future criminality. After seven years, delivery results on the rehabilitation objective have been minimal and not objectively measurable. The noble and over-ambitious focus on rehabilitation at policy level distracted the DCS from its primary constitutional obligation, namely to ensure safe and humane custody under conditions of human dignity.

Throughout the period (1994 to 2012) the DCS has been suspicious if not dismissive of advice, guidance and at times orders (including court orders) offered or given by external stakeholders. Its relationship with civil society organisations remain strained and there is no formal structure for interaction. Since 2004 Parliament has reasserted its authority over the DCS, not hesitating to criticise poor decisions and sub-standard performance. Civil society organisations have increasingly used Parliament as a platform for raising concerns about prison reform. Litigation by civil society and prisoners has also been used on a growing scale to ensure legislative compliance. It is concluded that prison reform efforts needs to refocus on the rights requirements set out in the Correctional Services Act and approach this task in an inclusive, transparent and accountable manner.

DECLARATION

I declare that *An analytical study of South African prison reform after 1994* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Lukas Marthinus Muntingh



March 2012

Signed:

A handwritten signature in black ink, appearing to read "L. M. Muntingh".

Acknowledgments

Reflecting on prison reform in South Africa after 1994 presented the opportunity to take stock of progress made towards giving life and meaning to the Constitution for those individuals deprived of their liberty in prison. Writing this thesis was a satisfying process on a personal, professional and intellectual level. It would not have been possible without the encouragement of Prof. Julia Sloth-Nielsen, Dean at the Faculty of Law (University of the Western Cape). I am deeply indebted to her for her guidance, ideas and intellectual rigour applied over the many years that we have worked together on criminal justice and specifically prison reform. I am also grateful to the Community Law Centre for allowing me the time and space to pursue my personal, academic and advocacy objectives. In particular, I express my gratitude to Prof. Nico Steytler, Director at the Community Law Centre, and Jill Claassen, librarian at the Centre.

Since 2003 I have been involved in the Civil Society Prison Reform Initiative (CSPRI) and since 2005 its full-time project coordinator at the Community Law Centre. CSPRI has, since its inception in 2003, been funded by the Open Society Foundation (South Africa), for which all involved in the project are immensely grateful. Over the years other funders have also supported CSPRI, namely the Ford Foundation, Rockefeller Brothers Fund, European Union, Open Society Initiative for Southern Africa (OSISA) and the Open Society Foundations Rights Initiative Global Criminal Justice Fund. Without the support of these donors, CSPRI would not have been possible. CSPRI created the opportunity for me to pursue academic goals, and this thesis is a milestone in that journey. I am deeply grateful to the donors mentioned above and their staff, with whom I have cooperated over the years.

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Abbreviations

ACU	Anti-Corruption Unit
AIDS	Acquired Immune Deficiency Syndrome
ALP	Aids Law Project
ANC	African National Congress
ART	Anti-retroviral therapy
ARV	Anti-retroviral medication
CAT	United Nations Committee against Torture
CCMA	Commission for Conciliation, Mediation and Arbitration
CDC	Chief Deputy Commissioner
CEU	Code Enforcement Unit
CFO	Chief Financial Officer
CMC	Case Management Committee
CRC	United Nations Convention on the Rights of the Child
CSPB	Correctional Supervision and Parole Board
CSPRI	Civil Society Prison Reform Initiative
CSVR	Centre for the Study of Violence and Reconciliation
DCS	Department of Correctional Services
DG	Director General
DIU	Departmental Investigative Unit
DPCI	Directorate for Priority Crime Investigations
DPSA	Department of Public Service and Administration
GNU	Government of National Unity
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate
IFP	Inkatha Freedom Party
ILO	International Labour Organisation
NACF	National Anti-Corruption Forum
NCCS	National Crime Combating Strategy
NCPS	National Crime Prevention Strategy
NGO	Non-governmental organisation
NICRO	National Institute for the Prevention of Crime and the Reintegration of Offenders
NPA	National Prosecuting Authority
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
OSD	Occupation Specific Dispensation
PFMA	Public Finance Management Act
PMG	Parliamentary Monitoring Group
POPCRU	Police and Prisons Civil Rights Union
PPP	Public Private Partnership
PRLG	Penal Reform Lobby Group
PRLG	Penal Reform Lobby Group
PSA	Public Servants Association
PSC	Public Service Commission
PSCBC	Public Service Coordinating Bargaining Council
RUD	Rights Ventricular Displasia

SAHRC	South African Human Rights Commission
SAMDI	South African Management Development Institute
SAPOHR	South African Prisoners Organisation for Human Rights
SAPS	South African Police Services
SCOPA	Standing Committee on Public Accounts
SDE	Seven Day Establishment
SIU	Special Investigations Unit
SMS	Senior Management Services
SPT	Sub-Committee on the Prevention of Torture
TAC	Treatment Action Campaign
TB	Tuberculosis
TFCS	Transformation Forum on Correctional Services
UNCAT	United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNSMR	United Nations Standard Minimum Rules on the Treatment of Prisoners
VCT	Voluntary Counselling and Testing



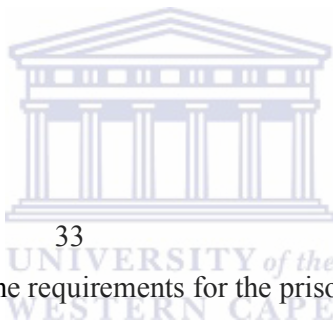
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Chapter 1 - Introduction

1. Background to the study

Seventeen years after the first democratic elections, and 15 years after the final Constitution was adopted, South Africa remains a society in transition, one grappling with complex socio-economic, political and human rights dilemmas. These tensions persist due to South Africa's unique and variously interpreted history, its divergent political discourses, the aspirations of multiple interest groups, and the requirements set in the Constitution. It remains a society characterised by flux and transition.

Perhaps the single greatest threat to democratic South Africa has been the high rate of crime, particularly violent crime, and the question of how to respond to it. The high violent crime rate has had pervasive effects on the fabric of society and the aspirations of its members. Responses from both the state and broader society have resulted in a critical interrogation of the constitutional order and the Bill of Rights. Frustrated with the crime rate, post-1994 governments have adopted an approach emphasising “law and order” or “getting tough on crime” in their attempts to reduce it, and in the process they have invested heavily in strengthening the criminal justice system, especially the police and prison system.

The prison system in post-1994 South Africa has been characterised by a range of persistent challenges such as corruption, gross human rights violations, leadership instability, and lack of direction. While the Constitution placed radically different demands upon the prison system, with detailed rights enumerated in the Bill of Rights,¹ the first six years of democratic rule saw problems in the prison system deepening and discipline and order collapsing. As early as 1996, the Portfolio Committee on Correctional Services requested an investigation into the prison system, and by 2000 there was a real fear that the state had lost control of the Department of Correctional Services (DCS).² It was ultimately in response to the

¹ s 35 Act 108 of 1996.

² Muntingh, L. (2006) *Corruption in the prisons context*, CSPRI Research Paper, Bellville: Community Law Centre. PMG Report on the meeting of the Portfolio Committee on Correctional Services of 14 March 2000 <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services>. Accessed 15 December 2011.

assassination of a potential whistleblower that, in 2001, President Mbeki appointed a Judicial Commission on Inquiry into corruption and maladministration in the DCS (the Jali Commission).³ Although all government departments have had to deal with the special challenges of the South African democratic project, the events that unfolded in the DCS were in many ways unique in their nature, scope and extent.

When the African National Congress (ANC) came to power in 1994, there was a legitimate expectation that the combined effect of, first, a progressive and liberal constitution, and, second, the fact that so many leaders in the liberation movements had themselves been imprisoned, there would be a rapid and fundamental transformation of the apartheid-era prison system; this transformation would not only be compatible with the new Constitution but exemplary in embodying the successful transition to a constitutional democracy. For human rights advocates and other observers, this was a logical, even inevitable, conclusion. Regrettably, it did not come to pass. South African prisons remain overcrowded, gross human rights violations are common, services to prisoners are limited and poorly developed, corruption is rife, and litigation by prisoners against the DCS is increasing. In many regards the DCS is not complying with its principal legislation, the Correctional Services Act (111 of 1998), and the requirements in the Bill of Rights.

This thesis will explore and analyse the reasons why the reform of the South African prison system, from an arrangement inherited from the previous regime to one compatible with a constitutional democracy, has faltered. This is not to argue that it has failed or is in the process of failing, as there is evidence to the contrary; rather, it is to argue that the reinvention of the prison system into one that is compatible with a constitutional democracy has proven to be an extremely difficult process and has yielded limited achievements. Within the broader context of criminal justice reform, it is therefore important to identify, describe and understand the reasons underlying the difficulties of the prison-reform process in South Africa; it is equally important to identify the positive achievements and the reasons for these successes. Doing so will enable the formulation of recommendations for prison system transformation, recommendations which may be applicable in other jurisdictions undergoing similar processes.

³ Sloth-Nielsen, J. (2007) The State of the Nation's Prisons. In S. Buhlungu, J. Daniel, R. Southall, and J. Latchman, *State of the Nation: South Africa 2007*. Pretoria: HSRC Press, p. 380.

2. Statement of the problem

Although numerous scholars have described the nature of the faltering processes of prison reform, the recent (that is, post-2004) literature does not provide a comprehensive description and analysis of the factors that have undermined the process of prison reform. Furthermore, there is a need for a study reviewing the entire period from 1994 to present (2012).

The first cohort of published research on prison reform focused on describing events unfolding in the prison system during the period 1994 to 2002 and how the latter had failed to meet expectations.⁴ These works provided valuable descriptions and analyses at the time, and are drawn on extensively in the present study's account of the history of prison reform during the earlier years.

The second cohort of more recent publications either continued the overview-descriptive trend,⁵ took a philosophical perspective,⁶ or focused on particular and substantive aspects of the prison system. These include sexual violence,⁷ sentencing,⁸ unsentenced prisoners and

⁴Giffard, C. (1997) *Out of Step? The Transformation Process in the South African Department of Correctional Services*, unpublished MSc dissertation, University of Leicester; Oppler, S. (1998) *Correcting Corrections Prospects for South Africa's Prisons*. Pretoria: Institute for Security Studies; Pete, S. (1998) The Politics of Imprisonment in the aftermath of South Africa's first democratic election, *South African Journal on Criminal Justice*, 51 (7); Dissel, A. (2002) Tracking Transformation in South African Prisons. *Track Two*, 11 (2); Dissel, A. and Ellis, S. (2002) *Reform and Stasis: Transformation in South African Prisons*. Johannesburg: CSVR; Sloth-Nielsen, J. (2003) *Overview of Policy Developments in South African Correctional Services*. Bellville: Community Law Centre; Van Zyl Smit, D. (2001) South Africa. In D. Van Zyl Smit & F. Dunkel, *Imprisonment Today and Tomorrow* (pp. 589-608) London: Kluwer Law International; Van Zyl Smit, D. (2004) Swimming against the tide. In B. Dixon and E. Van der Spuy, *Justice Gained* (pp. 227-258) Cape Town: Willan.

⁵Luyt, W. (2008) Contemporary corrections in South Africa after more than a decade of transformation, *Acta Criminologica*, 21 (2), 176-195; Sloth-Nielsen, J. (2007); Super, G. (2011) Like some rough beast slouching towards Bethlehem to be born – a historical perspective on the institution of the prison in South Africa 1976-2004, *British Journal of Criminology*, Vol. 51.

⁶ Gillespie, K. (2007) *Criminal abstractions and the post-apartheid prison*. Chicago: A dissertation submitted to the Faculty of the Division of the Social Sciences in candidacy for the Degree of Doctor of Philosophy. University of Chicago.

⁷ Gear, S. (2007) *Fear, violence and sexual violence in a Gauteng Juvenile Correctional Centre for males*. Johannesburg: Centre for the Study of Violence and Reconciliation; Gear, S. and Ngubeni, K. (2002) *Daai Ding*. Johannesburg: Centre for the Study of Violence and Reconciliation.; Muntingh, L. and Satardien, Z.

caseflow management,⁹ offender reintegration,¹⁰ HIV and AIDS,¹¹ prisoners' rights and the prevention of torture,¹² corruption,¹³ children in prison,¹⁴ prison governance,¹⁵ comparative

(2011) Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex, *SA Journal for Criminal Justice*, Vol. 24 No. 1; Muntingh, L. and Satardien, Z. (2011) Sexual violence in prisons – Part 2: The duty to provide safe custody and the nature of prison sex, *SA Journal for Criminal Justice*, Vol. 24 No. 2.

⁸ Skelton, A. (2004) *Alternative Sentencing Review*. Bellville: Community Law Centre; Giffard, C. and Muntingh, L. (2007) *The Effect of Sentencing on the Size of the Prison Population*. Cape Town: Open Society Foundation; Mujuzi, J. (2008) *The Changing Face of Life Imprisonment in South Africa*. CSPRI Research Report, Bellville: Community Law Centre; Redpath, J. and O'Donovan, M. (2006) *The Impact of Minimum Sentencing in South Africa*. Cape Town: Open Society Foundation.

⁹ Karth, V. (2008) *Between A Rock And A Hard Place - Bail decisions in three South African courts*. Cape Town: Open Society Foundation.

¹⁰ Muntingh, L. (2005) *Offender rehabilitation and reintegration: Taking the White Paper on Corrections forward*. Bellville: Community Law Centre.; Muntingh, L. (2008) *A Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration*. Pretoria: Institute for Security Studies.; Muntingh, L. (2008) *Crime and Punishment - Don't expect prisons to reduce crime*. SA Crime Quarterly, No. 26.; Muntingh, L. (2008) *Prisoner Re-Entry in Cape Town – An Exploratory Study*. Bellville: Community Law Centre.; Muntingh, L. (2009) *Ex-prisoners' Views on Imprisonment and Re-Entry*. Bellville: Community Law Centre.

¹¹ Tapscott, C. (2008) *An Assessment of the Impact of HIV/AIDS on Correctional System governance with Special Emphasis on Correctional Services Staff*. Bellville: Community Law Centre.; Muntingh, L. and Tapscott, C. (2009) HIV/AIDS and the Prison System. In Rohleder, P. et al (eds) *HIV/AIDS in South Africa – 25 years on*, New York: Springer.

¹² Muntingh, L. (2008) The betrayal of Steve Biko - South Africa's initial report to the UN Committee against Torture and responses from civil society. *Law Democracy and Development*, Vol. 12 No. 1; Muntingh, L. and Fernandez, L. (2008) A Review of measures in place to effect the prevention and combating of torture with specific reference to places of detention in South Africa, *SA Journal of Human Rights*, Vol. 24 No. 1; Mubangizi, J.C. (2002) The Constitutional Rights of Prisoners in South Africa: A Critical Review, *De Jure*, Vol. 35; Mubangizi, J.C. (2002) Some Reflections on the Promotion of the Rights of Prisoners in South Africa, *Acta Criminologica*, Vol. 15 No. 2; Mubangizi, J.C. (2002) The Constitutional Rights of Prisoners in Selected African Countries: A Comparative Review, *The Comparative and International Law Journal of Southern Africa*, Vol. 35 No 3; Mubangizi, J.C. (2001) Prisons and Prisoners' Rights: Some Jurisprudential and Historical Perspectives, *Acta Criminologica*, Vol. 14 No 3; Mubangizi, J.C. (2001) The Constitutional Rights of Prisoners: The Law Versus the Practice. *South African Journal of Criminal Justice*, Vol. 14; Mubangizi, J.C. (2001) International Human Rights Protection for Prisoners: Which Way South Africa? *South African Yearbook of International Law*, Vol. 26.

¹³ Muntingh, L. (2005) *Corruption in the prisons context*. Bellville: Community Law Centre; Muntingh, L. (2005) *Investigating prison corruption*. Bellville: Community Law Centre.

analysis,¹⁶ the Judicial Inspectorate of Prisons,¹⁷ oversight over the prison system,¹⁸ and litigation on prisoners' rights.¹⁹

There also exists a body of international literature focusing on the transformation of institutions of state and more specifically on the reform of prison systems.²⁰ A substantial

¹⁴ Odongo, G. and Gallinetti, J. (2005) *The Treatment of Children in South African Prisons - A Report on the Applicable Domestic and International Minimum Standards*. Bellville: Community Law Centre; Muntingh, L. and Ballard, C. (2012 forthcoming) *Children in correctional centres in South Africa*, Bellville: Community Law Centre.

¹⁵ Tapscott, C. (2005) *A study of best practice in prison governance*. Bellville: Community Law Centre.

¹⁶ Buntman, F. (2009) Prison and Democracy: Lessons Learned and not learned from 1989 to 2009. *International Journal of Politics, Culture and Society*, Vol. 22.

¹⁷ Gallinetti, J. (2004) *Report on the evaluation of the Independent Prison Visitor (IPV) system*. Bellville: Community Law Centre; Jagwanth, S. (2004) *A Review of the Judicial Inspectorate of Prisons of South Africa*. Bellville: Community Law Centre.

¹⁸ Dissel, A. (2003) *A Review of civilian oversight over Correctional Services in the last decade*. Bellville: Community Law Centre; Muntingh, L. (2007) Has prison oversight come of age in South Africa? *CSPRI Newsletter*; Muntingh, L. (2009) The Correctional Services Portfolio Committee. *CSPRI Newsletter*, No. 29.

¹⁹ De Vos, P. (2003) *Prisoner's rights litigation in South Africa since 1994: A critical evaluation*. Bellville: Community Law Centre.

²⁰ Blitz, B. (2008) Post-socialist transformation, penal reform and justice sector transition in Albania. *Journal of Southeast European & Black Sea Studies*, Vol. 8 No. 4; Sabree, A. (2007) Georgia Reentry: A Transformation in Correctional Philosophy. *Corrections*, Vol. 69 No. 6.; Loury, G. (2007) The new untouchables. *UN Chronicle*, Vol. 44 No. 3; Simpson, L. (2007) Transforming the prison: outrageous and bodacious behaviour in Angela Davis: an autobiography, *CLA Journal*, Vol. 50 No. 3; Al-Hashimi, H., and Goerzig, C. (2007) Change through Debate: The Case of Egypt's Counter-terrorism Strategy Towards the Gamaa Islamia. *Conference Papers - American Political Science Association 2007 Annual Meeting*, 1-19; Wright, K., & Bronstein, L. (2007) Creating Decent Prisons: A Serendipitous Finding about Prison Hospice. *Journal of Offender Rehabilitation*, Vol. 44 No. 4, 1-16.; Lynch, M. (2004) Punishing images. *Punishment & Society*, Vol. 6 No. 3, 255-270; Nash, M., and Ryan, M. (2003) Modernizing and joining-up government: the case of the prison and probation services. *Contemporary Politics*, Vol. 9 No. 2; Tonry, M. (2001) Symbol, substance, and severity in western penal policies. *Punishment & Society*, Vol. 3 No. 4; Beijing Review. (2001) Chinese prisoners. *Beijing Review*, Vol. 44 No. 22, 25; MacDonald, M., & Watson, L. (2001) Creating choices, changing lives: The Transformation of Women's Corrections in Canada. *Corrections Today*, Vol. 63 No. 1; McEvoy, K. (2000) Law, Struggle, and Political Transformation in Northern Ireland. *Journal of Law & Society*, Vol. 27 No. 4; Carrabine, E. (2000) Discourse, governmentality and translation: Towards a social theory of imprisonment. *Theoretical Criminology*, Vol. 4 No. 3; Pratt, T., Maahs, J., & Stehr, S. (1998) The Symbolic Ownership of the Corrections 'Problem': A Framework for Understanding the Development of Corrections Policy in the United States. *Prison*

body of research has emerged in South Africa in the past seventeen years on specific issues of imprisonment, the prison system and experiences of released prisoners. The focused South African research referred to above continued to describe, but in more detail than earlier work, the range of continual problems in the prison system and how the prison system was falling short of Constitutional requirements. It is also the case that the Annual Reports of the DCS, strategic plans of the DCS, and reports by the Auditor General on the DCS have become more sophisticated and comprehensive, thus providing valuable official information on the workings of the prison system.

The recent history of prison reform in South Africa is notable for two important events that inserted new energy into the discourse on imprisonment in South Africa: first, the promulgation in full of the Correctional Services Act (111 of 1998) in October 2004, and, second, the release of the White Paper on Corrections in South Africa (the 2004 White Paper) in March 2004. After the Correctional Services Act was adopted by Parliament in 1998, a limited number of chapters were brought into operation in 1999 and 2000, but the bulk of the Act would remain without force until July and October 2004. Inevitably the in-limbo status of the Correctional Services Act between 1998 and 2004 resulted in great legal uncertainty, since the Department's core mandate was defined at the time by the chapters of the 1998 Act that were in force as well by the remaining provisions of the 1959 legislation.²¹ Importantly, the chapters dealing with conditions of detention and the treatment of prisoners would only come into force in 2004. The situation was not assisted by the absence of an overarching policy framework. The year 2004 is therefore important for the analysis presented in this present study.

Although a White Paper was developed in 1994 as the overarching policy framework, it failed to engage effectively with the Interim Constitution (200 of 1993) which provided detailed rights to prisoners, and thus did not address the fundamental challenges facing the prison system. Ten years later, the 2004 White Paper saw the light and articulated a new vision for the DCS. The 2004 White Paper followed the appointment of a new leadership corps to the Department from 2001 onwards that brought about some measure of stability.

Journal, Vol. 78 No. 4; Hogan, N. (1997) The social construction of target populations and the transformation of prison-based AIDS policy. *Journal of Homosexuality*, Vol. 32 No. 3.

²¹ Act 8 of 1959. Mubangizi, J.C. (2002) Some Reflections on the Promotion of the Rights of Prisoners in South Africa. *Acta Criminologica*, Vol. 15 No. 2.

Unlike the 1994 White Paper, the 2004 White Paper is remarkably honest about the challenges that the DCS faced in terms of its self-reinvention. It notes, for example, the deficits the DCS has in respect of the quality of human resources, and refers to the culture of the Department at operational level. It remains surprising and perplexing that, despite the substantive challenges that the White Paper articulated, it established at the same time a vision at a bar higher than what the Constitution requires, given that the White Paper defines rehabilitation as the “core business” of the Department. While the Constitution is clear about maintaining the minimum standards of humane detention, it does not articulate a right to rehabilitation services for offenders and prisoners in particular. Commentators at the time of the White Paper’s release emphasised the importance of meeting the minimum standards of humane detention, on the grounds that prison overcrowding was (and remains) a key challenge. The ambitiousness of the White Paper is striking, since it regards “corrections as a societal responsibility” (Chapter 3) and envisages that “members of the public will support internal rehabilitation programmes”.²² The White Paper adopts unit management as the model of delivery, and prescribes in Chapter 9 that “needs-based intervention plans” must be developed for all offenders. In short, the White Paper articulates a vision for the prison system that even well-resourced prison systems with adequate professionally qualified staff in industrialised countries struggle to attain. The appropriateness of the 2004 White Paper as a guide to future prison reform therefore requires closer analysis.

Seven years after the White Paper was adopted, the Department’s performance continues to fall materially short of this vision and there are substantive issues of non-compliance with the Correctional Services Act. The DCS spent a fair amount of energy and resources in promoting the 2004 White Paper amongst its staff corps, and consequently established it as the primary reference document for decisions and rhetoric. Since 2004, a plethora of policy documents have been developed from the White Paper, and the latest reports indicate that these have now been enhanced by procedures development.²³ By contrast, the Correctional Services Act has been relegated to relative obscurity. Public statements by DCS officials are more likely to refer to the 2004 White Paper than the Correctional Services Act. As an indicator of this trend, the Department’s Strategic Plan for 2009/10 to 2013/14 emphasises,

²² Department of Correctional Services (2004 b) *The White Paper on Corrections in South Africa*. Pretoria: Department of Correctional Services, p. 67.

²³ Department of Correctional Services (2009) *Annual Report 2008/9*. Pretoria: Department of Correctional Services.

first, the development of internal systems and management procedures, and second, goals and objectives derived from the White Paper.²⁴ In addition, since 2002 the DCS has become increasingly inwardly-focused in its managerial style, a tendency reflected in the growing number of projects and targets relating to building internal information systems, developing procedures and solving problems within the management of the Department (e.g. addressing audit qualifications).

In overview, the post-1994 history of reform in the prison system can be divided into two periods – the period from 1994 roughly to 2004, and the period from 2004 onwards. While the first period has been described to some extent in the literature, the challenges in reform after 2004, especially since the adoption of the White Paper and the coming into force of the Correctional Services Act, have not been analysed and described in a comprehensive manner.

The post-1994 prison system can be characterised by two substantial crises. The first was occasioned by the new demands placed on the prison system, initially by the Interim Constitution²⁵ and later the final Constitution.²⁶ Both of these articulated detailed rights for arrested and detained persons, including prisoners, rights which were derived from the right to dignity. This de-legitimised the system inherited from the apartheid government and necessitated that the prison system be reformed in alignment with the Constitution. The second crisis emerged particularly after 1996 and saw the collapse of discipline and order in the DCS. It will be argued that the two crises presented opportunities for reform; however, utilising crisis for successful reform depends on a number of variable organisational characteristics. Furthermore, the Constitution places particular demands on the prison system in respect of upholding prisoners' rights and adherence to the principles of good governance. The relationship between human rights and good governance is therefore key to the analysis to be presented.

This study will argue that a combination of factors (poor responses to the political environment, poor governance, ineffective leadership and management, legal uncertainty, policy vagueness, and poor oversight) undermined the process of prison reform. The opposite

²⁴ Department of Correctional Services (2008) *Strategic Plan 2009/10-2013/14*. Pretoria: Department of Correctional Services.

²⁵ Act 200 of 1993.

²⁶ Act 108 of 1996.

will also be demonstrated, namely that when certain problems were addressed, it was possible to make progress in reforming the South African prison system.

3. Research question

After 1994 there was a legitimate expectation that the Interim and final Constitutions, providing for a bill of rights and regulating how the state may or may not exercise its power, would provide the basis for reform of the prison system. The expectation that the Constitution would spark as well as guide reform was not limited to the prison system but held by broader society, too. Klare, with reference to the South African Constitution, refers to “transformative constitutionalism” as:

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.²⁷

The transformative character of the South African Constitution was also recognised by former Chief Justice Pius Langa, citing from the epilogue of the Interim Constitution:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.²⁸

The Preamble to the 1996 Constitution encapsulates the transformative purpose of the South African constitutionalism into four distinct aims, namely to:

²⁷ Klare, K. (1998) Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, Vol. 14, p. 150.

²⁸ Langa, P. (2006) Transformative constitutionalism, *Stellenbosch Law Review*, Vol 17, No. 3, p. 352.

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.²⁹

The Constitution is therefore written firmly with a view to the future, but, in the light of the country's past, recognises that achieving these aims is a transformative process. The "ism" of constitutionalism in South Africa is thus defined by the four cited aims above.

Turning to the transformation of the prison system, constitutional obligations in respect of good governance in the prison system and of prisoners' rights, and their inextricable nexus, are the central foci of constitutionalism for the purposes of the analysis. Reflecting on the post-1994 period of prison reform in South Africa, the research question of this thesis is:

Did constitutionalism provide a transformative basis for advancing good governance and compliance with human rights standards in the post-1994 prison system in South Africa?

4. Aims of the study

As noted above, after 1994 there was a legitimate expectation that a democratic South Africa would see the relatively easy emergence of a new prison system that was the antithesis of the apartheid-era prison system. This did not happen, and the DCS was beset by a number of persistent problems that prevented the emergence of a prison system fully compatible with a constitutional democracy. The aim of the study is consequently to provide an analysis of prison reform and its failures after 1994 in order to assess the impact of constitutionalism on the prison system.

Prisons compatible with a constitutional democracy are understood to meet four basic

²⁹ Preamble, Constitution of the Republic of South Africa, 108 of 1996.

requirements: there must be an underlying philosophical framework based on knowledge and Constitutional standards; the rights of prisoners must be upheld and the necessary preventive and reactive measures must be in place to achieve this; the prison system must be transparent, and the managers and officials working in the prison system must be accountable to effective oversight.³⁰ Reform, for the purposes of this thesis, refers to the processes embarked upon to meet the above four requirements.

The literature cited above has documented various ways in which the South African prison system has not lived up to these requirements. At a systemic level this requires further enquiry, enquiry which the present study will make according to a number of defined dimensions that are regarded as the key arenas of reform. In respect of each of the arenas of reform, a four-pronged analysis, supported by comparative methodologies where appropriate, will be undertaken. First, a careful analysis will be conducted of the nature, scope and causes of the problems that have undermined transformation. Second, an analysis will be provided of the steps taken, or not taken, by the state and the DCS in particular to address the problems; the reasons why these steps were taken or not will also be examined. Third, the efficacy of these state responses will be described and analysed in order to extract the lessons that were learnt. Fourth, recommendations for improvement and/or strengthened reform will be developed.

Based on the extant literature, four themes are identified as key arenas of reform. First, it is necessary to understand the crises in the prison system as they unfolded during the period 1994 to 2004. Even though this may now be regarded as having only historical importance (given that new reform efforts have subsequently been implemented), documenting and analysing the dimensions of the crises enables significant lessons to be distilled, both about the successes as well as the failures.

The second arena of reform is the extent to which the principles of good governance were promoted, established and complied with in the DCS. Immediately after 1994 the DCS underwent an extremely difficult period characterised by wide-spread and high-level corruption and violence amongst its staff corps. The role of organised labour in this regard

³⁰ Muntingh, L. (2008) *Prisons in South Africa's Constitutional Democracy*. Johannesburg: Centre for the Study of Violence and Reconciliation.

stands out, and there is good reason to conclude that, at least in certain geographical areas, the state lost control of the DCS as it was captured by groups from within organised labour. While corruption was not unique to DCS, the scope and scale of the problem was of such a nature that the DCS remains the only Department where a judicial commission of inquiry was established to investigate corruption. Apart from Department-specific steps to address corruption and promote good governance, broader state-wide steps were also implemented by government through improved legislation to combat corruption, the development of minimum anti-corruption capacity requirements applicable to all Departments, numerous measures to improve financial management, and the establishment of an anti-corruption hotline by the Public Service Commission (PSC). In addition, the DCS entered into a multi-year agreement with the Special Investigations Unit (SIU) to investigate corruption and developed its own internal capacity to address corruption and disciplinary-code enforcement. Effective leadership during reform is generally accepted as a critical component of success. In analysing the state of governance in the DCS, it is therefore necessary to assess the role of the senior leadership. A closer analysis is also required of management processes aimed at facilitating reform. In this regard, special attention is paid to the alignment of resources to the strategic objectives articulated in the 2004 White Paper and the obligations under the Correctional Services Act. Of particular importance are human resource management; the role of knowledge in decision-making; performance management; the nature of policy development; enforcing discipline; and the involvement of the private sector in the Department. A comprehensive analysis is therefore necessary to assess the Department's overall attempts at promoting good governance and regaining control of its staff and subordinate structures.

The third arena of reform assesses the situation in respect of human rights. It is fundamental to this enquiry that, from a human rights perspective, the prison system must be compatible with Constitutional requirements and standards in subordinate legislation. Included in this framework is international human rights law, specifically the human rights instruments that South Africa has ratified. Compliance with human rights standards is central to assessing the state of prison reform, because the denial of rights under the apartheid regime, especially the rights to dignity and equality, characterised that prison system. Giving full expression to enumerated rights in the Constitution and prescripts in the Correctional Services Act (111 of 1998) is therefore a central requirement of a reformed prison system. In this regard, conditions of detention consonant with human dignity, the right to life, and the right to bodily

and psychological integrity are important. Furthermore, the rights and treatment of particular categories of prisoners form part of the enquiry, with specific reference to sentenced and unsentenced prisoners as well as imprisoned women and children.

The fourth arena of reform concerns the responses from external stakeholders and interactions of the prison system with the broader political environment. More specifically, the focus is placed on the responsiveness of the DCS to external influences and its dedicated oversight structures. In this regard it is important to reflect on the history of the Correctional Services portfolio within the Government of National Unity (GNU) (1994-1999)³¹ as this appears to have been a critically important period in the history of prison reform in South Africa. Moreover, in successive governments since 1994 the role of the prison system in a broader crime-reduction strategy seems to have been poorly defined, and the 2004 White Paper's emphasis on rehabilitation still remains at odds with successive ANC governments' "law and order" approach and "tough on crime" rhetoric. Key to this enquiry is the envisaged role or roles of the prison system in a constitutional democracy and the question of whether or not the existence of such a vision has facilitated reform in the prison system itself.

Prison reform was also influenced by civil society organisations that were concerned about the lack of progress being made in establishing a reformed prison system and which consequently intervened, or attempted to intervene, especially where it concerned prisoners' rights. While civil society organisations were attempting to advance rights-based prison reform, organised labour in the DCS, especially between 1996 and 2001, followed a different agenda that was in many ways destructive. In post-1994 South Africa the media has become a formidable force on the political landscape, and the prison system and its failures featured regularly in this regard. In 2000 the Judicial Inspectorate for Prisons (later renamed the Judicial Inspectorate for Correctional Services) was established as the dedicated oversight structure to monitor the treatment of prisoners and to report on dishonest and corrupt practices. Its role in advancing prison reform requires a critical assessment. The Parliamentary Portfolio Committee on Correctional Services emerged from a hiatus after 2004 and took on a more forceful role in holding the DCS accountable; its influence on

³¹ The GNU was the result of a negotiated settlement reflected in the Interim Constitution that would give each political party with more than 5% of the votes in the 1994 election representation in Cabinet (s 88(2) Interim Constitution Act 200 of 1993).

prison reform since 1994 therefore also requires closer analysis.

Prison systems, in order to function within the bounds of accepted human rights and governance standards, require effective oversight. While both human rights and governance are areas of specialisation, they are inextricably linked. On both these fronts the DCS has a chequered history, with qualified audits for ten consecutive years by 2010/11 and numerous human rights violations reported to the Judicial Inspectorate for Correctional Services. Formal oversight over the DCS since 1994 has been of varying quality, and there is little doubt that, negatively or positively, this has had a profound impact on how progress towards transformation has been made.

5. Methodology

The point of departure of this study is that South Africa is a society in transition towards compliance with the values and precepts of the Constitution. With reference to prison reform, the nexus between governance and human rights is central to the analysis. At the theoretical level, it will be argued that the state must play a leading role in this process, but the extent to which the state has been able to achieve this requires critical examination. Furthermore, it will be argued that the state can and should be held accountable for the steps it takes or fails to take in transforming South African society and, more specifically, the institutions of the state itself. As much as the state should take a leading role in the process of transformation it is not the sole actor, and successful transformation depends on an inclusive dialogue between stakeholders regulated by Constitutional and legal requirements. It is therefore assumed that the South African Constitution and subordinate legislation provides an adequate framework for the transformation of society and, more particularly, the prison system. However, while the rule of law and a market economy are well-established, this did not result in the full realisation of democratic rights, and especially not in the prison system.

Beneath the high-level view of South African society layers, there are, then, layers where democratic values and practices are contested by different stakeholders. Specifically in the case of substantive reform of the prison system, there seem to be fissures between different institutions of state about penal policy and the purpose of the prison system in an overall strategy to reduce crime. While the 2004 White Paper on Corrections argues for the

rehabilitation model, founded on the belief that imprisonment must serve a useful purpose, the sentencing regime that has emerged especially since 1997 stands in sharp contrast to this model. The harshness of the South African sentencing regime is testimony to the fact that it was politicians who recaptured penal policy from the judiciary and other professionals³² and used it in an attempt to appease an electorate that increasingly doubted their ability to deal with the high violent crime rate. Questions about penal policy and its underlying theory therefore remain and warrant further analysis.

This thesis will review reform in the South African prison system by analysing past events in order to gain a better understanding of the challenges and achievements of the past 17 years and thereby extract lessons learnt and develop recommendations. The analysis will be undertaken from a socio-legal perspective and supported by concepts from a public service management perspective as well as, where appropriate, research from other jurisdictions.

Although new information continues to emerge, the formal cut-off date for the purposes of the description and analysis is 31 December 2011.

The thesis relies exclusively on the available literature, and a deliberate decision was taken not to engage in interviews with individuals who may have been influential in prison reform in South Africa. This decision was motivated by the fact that, since 2003, the author has been an active actor in the theatre of prison reform in South Africa by way of the Civil Society Prison Reform Initiative at the Community Law Centre (University of the Western Cape). Given this role, it was concluded that it would have created more problems than solutions to embark on a process of interviewing individuals who may have been influential in prison reform since 1994. The concern was that interviewees, especially those from government, would have been tempted to reconstruct events in a sanitised light, a temptation that was judged all the more likely given that the events described in this thesis frequently reflect negatively on the government. To counter this risk, the decision was taken to rely on the available literature instead.

³² Garland, D. (2003) Penal modernism and postmodernism. In T. Blomberg & S. Cohen, *Punishment and Social Control* (2 ed), New York: Aldine De Gruyter, pp. 45-74.

5.1 Limitations

The thesis provides a broad overview of the history of prison reform from 1994 to the end of 2011; in addition, it reflects briefly on the period 1990-1994 in order to contextualise the transition to democratic rule. Covering a period more than 20 in length years yields an abundance of rich and detailed historical facts, but the risk is that the analysis itself might get lost amidst it all. To retain focus and sustain a meaningful analysis, a limited number of thematic issues were selected as a basis for structuring this thesis, which is therefore not a historical account of prison reform but rather an analysis that uses representative historical data as far as possible.

Since the thesis uses data from the available literature, it is constrained by what is available in the public domain. Prisons are notoriously opaque institutions, and this was even more so the case prior to 1990. The daily minutiae of prison life across South Africa's 240 prisons are not recorded and made accessible to public scrutiny. Very often information becomes available only when something has gone wrong and it develops into a scandal. Official reports, such as Departmental Annual Reports, invariably present a sanitised version of events; nonetheless, they remain the official document and must be treated as such. It is for the researcher to analyse them carefully, to make comparisons and seek inconsistencies. In this thesis the proceedings of the Portfolio Committee on Correctional Services are a valuable source of information; the records were obtained from the Parliamentary Monitoring Group (PMG), a non-governmental organisation that documents the proceedings for public benefit. Although the PMG reports are not official minutes, they are widely accepted as reliable accounts of the committee meetings.

5.2 Nomenclature

In 2008 the Correctional Services Act was amended and its nomenclature changed.³³ For example, the term “prisoner” was replaced by “inmate”, a “prison” became a “correctional centre” and a “sentenced prisoner” became an “offender”. For the sake of consistency and clarity, the terms “prisoner” and “prison” is used throughout this thesis unless there is a

³³ Correctional Services Amendment Act 25 of 2008.

citation from a DCS publication employing the new terms. Furthermore, the Constitution, the international instruments and, generally, the academic literature use the term “prisoner”.

6. Chapter outline

Including the present chapter, the thesis consists of seven chapters. Chapter 2 introduces the theoretical framework and key concepts to be used in the thesis. Key concepts are reform, crisis, legitimacy and the nature of effective policy development. The chapter also outlines the requirements of a prison system in a constitutional democracy with reference to the South African Constitution. It is argued that such a prison system must have an underlying philosophy that is knowledge-based; there should be full recognition in law and practice of prisoners’ rights; the prison system should function in a transparent manner; and the officials working in the prison system and its leadership must be accountable. These four requirements are the anchor points of the thesis.

Chapter 3 describes the crises as they unfolded in the DCS between 1994 and 2004, but the account is preceded by a discussion on governance and human rights in order to contextualize the crises. The chapter also provides a description of the prison system inherited from the apartheid government in 1994 and argues that the non-responsive nature of the DCS management prior to 1994 was at least in part responsible for later problems. The chapter offers a detailed description of the crises that pays particular attention to poor strategy and policy development, leadership instability, violence and intimidation, and corruption and maladministration. The argument is that crisis afforded opportunities for reform but these were not seized owing to poor leadership, a lack of vision and a loss of control over the Department.

The next chapter deals with the Department’s response to the crises. It is argued that although the Jali Commission (and other investigations) uncovered both corruption and human rights violations, a decision was made to focus on addressing corruption alone. This was done in an effort to regain control of the Department and it entailed: redefining the employer-employee relationship; developing internal capacity to investigate corruption and enforce a revised disciplinary code; the involvement of external agencies to assist the DCS; and the development of a new policy framework (the 2004 White Paper). It is concluded that a number advances, if modest, have been made in addressing corruption and maladministration.

Furthermore, it is argued that the Head Office has regained some control over the Department but that the matter has not yet been completely resolved. Against the background of efforts to regain control and address corruption in the Department, there have also been a number of notable setbacks after 2004 that tainted the efforts and integrity of the Department and its leadership. The chapter establishes that, through concerted, focused and sustained efforts, advances were nevertheless made towards meeting the good-governance requirements articulated in the Constitution.

Chapter 5 assesses the human rights situation in South Africa's prisons; here, the implications of the strategic choice to focus on corruption (as described in Chapter 4) become evident. The chapter analyses the state of human rights across several thematic areas: overcrowding; deaths in custody; assaults and torture; the use of mechanical restraints, force and solitary confinement; super-maximum prisons; sexual violence; parole; children; women and unsentenced prisoners. Across all of these themes it was found that there remain substantial areas of non-compliance with the Constitution and the standards set out in the Correctional Services Act (111 of 1998). While the Department has made advances in addressing corruption and maladministration by implementing a range of remedial measures, the same was not done in respect of concerns about prisoners' rights. Whereas a clearer understanding of constitutional obligations with reference to good governance developed in DCS after 2001, the same cannot be said of human rights standards.

Chapter 6 assesses the role of external stakeholders and events on prison reform. In this regard the role of national government is analysed with reference to policy development and the priorities set by government in the period 1994 to 2000 in relation to crime, poverty and affirmative action. This created a particular milieu for the Department at the time and had an important effect on prison reform or, rather, the lack thereof. Civil society's influence is also assessed. After initial activity between 1994 and 1996, its involvement became minimal until a resurrection took place in 2003. Civil society re-emerged as a critical stakeholder, especially through its relationship with the Portfolio Committee on Correctional Services, which experienced a similar pattern of hiatus followed by re-emergence. The Portfolio Committee reasserted its authority over the DCS, and a number of gains were made thanks to more effective Parliamentary oversight.

The last chapter presents an overview of the main conclusions of the thesis. It proceeds to synthesise them into a range of thematic issues that are related to: the importance of having a

constitutional imagination in prison reform; building consensus on what reform means and the agenda for reform; and the centrality of transparency in reform processes. The ideal of rehabilitation, set forth in the 2004 White Paper, is critically assessed and its appropriateness as guide to prison reform for the next 15 years is put into question. The chapter concludes by discussing several lessons that can be learnt from South Africa's history of prison reform, lessons which may well be applicable in jurisdictions elsewhere in the world.



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Chapter 2 - Key concepts and theoretical perspectives on prison and institutional reform

1 Introduction

This chapter presents key concepts for the analysis. It reviews the domestic and international theoretical literature on prison and institutional reform and, as such, lays the analytical framework for the chapters to follow. The aim is not to present one all-encompassing theory, but rather to highlight and take note of theoretical constructs in understanding prison reform in the analysis covering the period 1994 to 2011, a period of 17 years. Efforts at prison reform in South Africa commenced prior to 1994, and the 2 February 1990 announcements by then President de Klerk¹ are accepted as the starting-point for the commencement of fundamental reforms. On 27 April 1994 South Africa held its first democratic elections and the Interim Constitution² came into force on that date. The Interim Constitution afforded prisoners extensive rights³ and would place substantially different demands on the prison system.

Key concepts to be explored in this chapter are: the nature of reform; crisis as a catalyst for reform; legitimacy, and the principles for effective policy development. These concepts are used to investigate the process of prison reform after 1994 in the newly established constitutional democracy. Given the demands of a new constitutional order after 1994, this chapter (in section 3) explores the requirements of the prison system in a constitutional democracy, focusing on four broad requirements. First, there should be an underlying philosophy; second, there should be legal and practical recognition of prisoners' rights; third, the prison system and its officials must be accountable; and fourth, the prison system should

¹ On 2 February 1990 President De Klerk announced wide reforms to bring apartheid to an end and enable reforms towards democracy. This included the unbanning of opposition organisations such as the ANC and the release of political prisoners and a moratorium on executions.

² Act 200 of 1993.

³ s 11 and s 25 of Act 200 of 1993.

function in a transparent manner. These four requirements shape the remainder of the thesis and are thus the cornerstones of its analysis.

2 Key concepts

2.1 Reform

In technical terms “reform” can be defined as the “intended fundamental change of the policy and/or administration of a policy sector”.⁴ The policy sector analysed here is the South African prison system and the efforts undertaken by the state to align the prison system with the Interim and 1996 Constitutions.⁵ Reform efforts in the prison system are therefore regarded as particular actions undertaken by the state and its stakeholders to change the prison system, actions necessitated by the large-scale socio-political changes taking place in South Africa from 1994 onwards. The scope of reform therefore includes, but is not limited to, policies, strategic direction, the legislative framework (including subordinate legislation), organisational structure, human resources, financial management, and day-to-day operations. Reforms of large organisations, in particular prison systems, may encounter numerous obstacles such as budgetary constraints, goals set by outsiders to the sector (e.g. Parliament or civil society), the sector’s dominant paradigm (which includes values dictating goals and practices for dealing with problems or avoiding them), internal resistance in the form of civil servants’ reluctance to implement reforms,⁶ and lack of political will.⁷ Once reform processes are deemed necessary, policy-makers may experience further constraints. Resodihardjo identifies three such categories: individual, organisational and political constraints.⁸

Because the existing policy creates benefits (e.g. financial or status benefits) for a number of individuals, they will attempt to keep the status quo intact. For example, the proposed demilitarisation of DCS was met with caution and suspicion, if not overt resistance, in the

⁴ Resodihardjo, S.L. (2009) *Crisis and change in the British and Dutch prison service – understanding crisis-reform processes*, Surrey: Ashgate, p. 1.

⁵ Act 200 of 1993, Act 108 of 1996.

⁶ Resodihardjo, S.L. (2009), p. 1.

⁷ Coyle, A. (2002) *Managing prisons in a time of change*. London: International Centre for Prison Studies, p. 24.

⁸ Resodihardjo, S.L. (2009), pp. 8-11.

1994 White Paper.⁹ The DCS responded to the call for demilitarisation by stating it would investigate the proposal yet simultaneously extolling the virtues of military structure and citing its perceived attractiveness for new recruits. The simple reason for this was that the existing staff corps benefited materially and otherwise from the existing dispensation.

Organisational constraints are “routines, standard operating procedures and decision-making rules that characterise the policy sector”.¹⁰ According to Resodihardjo, decision-making rules in particular can present significant constraints in that any reform proposal has to go through a number of “veto points”, and the more of these points there are, the more opportunities arise for the proposal to be amended, diluted or stopped.¹¹ Equally important as constraints are the norms, values and ideas characterising the organisation – its paradigm. The latter sets the parameters of what is acceptable or not when solving problems. Introducing ideas that fall outside the paradigm may be extremely difficult, if not at times impossible, to do. As such, the 1994 proposal to demilitarise the DCS not only mobilised individual constraints but fell beyond the pale of what the dominant paradigm considered acceptable.

Political constraints are created by the policy sector’s political masters and by way of the particular goals that they set, the budgets they secure and the legacies they bequeath to their successors. A new minister is constrained by the budget he inherits from his predecessor as well as by large-scale pre-existing commitments such as long-term capital expenditure programmes. For example, the contracts for the two private prisons in South Africa (operational since 2000 and 2001 respectively¹²) were signed by then Minister of Correctional Services, Siphso Mzimela (IFP), in 1997¹³ and thereafter placed a significant financial burden on the DCS, one it will have to shoulder for the full contract period of 25 years.¹⁴ A further point made by Resodihardjo is that individual, organisational and political constraints do not operate in isolation from each other but are interlinked. It is also the case

⁹ Department of Correctional Services (1994) *White Paper on the policy of the Department of Correctional Services in the new South Africa*, Department of Correctional Services: Pretoria, p. 22.

¹⁰ Resodihardjo, S.L. (2009), p. 9.

¹¹ Resodihardjo, S.L. (2009), p. 9.

¹² The one prison is situated in Bloemfontein (Mangaung) and the other in Makhado (Kutama Sinthumule).

¹³ Department of Correctional Services (1998) *Annual Report 1997*, Pretoria: Department of Correctional Services, Chapter 6.

¹⁴ The budgetary provision for the 2011/12 financial year for the two privately operated prisons is R808.8 million (US\$133.5 million) or 4.8% of the total budget (National Treasury (2011) *2011 Estimates of National Expenditure Vote 21 Correctional Services*. Pretoria, p. 24).

that certain interests groups may draw attention to particular constraints, such as limited financial resources, in order to protect individual interests and preserve the existing order.

These and other challenges and constraints are explored in detail in later chapters and do not constitute an exhaustive list. Moreover, the situation in post-1994 South Africa was, and remains, in many ways unique compared to other jurisdictions. A transparently negotiated transition to democracy underpinned by a liberal constitution paying particular attention to prisoners' rights is indeed not a common occurrence.

Prison reform is further challenged by the very nature of the prison as an institution. Prison systems are regarded as static and hierarchical organisations.¹⁵ They are static because their goals and objectives are “clear and unchanging”, and they are hierarchical as their lines of communication are vertical and accompanied by an expectation that junior officials will simply implement the orders handed down by seniors.¹⁶ The reasons for this are twofold: prisoners must not escape, and there must be order. These two imperatives require that staff and prisoners alike know “their place in the hierarchy and obey operational instructions without question”.¹⁷ This was particularly the case in South Africa, where the DCS remained a militarised organisation until 31 March 1996.¹⁸ The demilitarisation of the DCS on 1 April 1996 gave birth to a new set of reform challenges, to be discussed in subsequent chapters. It should be added that a static, hierarchical structure is acceptable and tolerable when the organisation is stable and not under pressure.¹⁹ This, however, was not the situation in South Africa in the mid-1990s. Not only was civil society under pressure to reform, but the state and its institutions were under a constitutional obligation to adapt themselves urgently to a democratic and non-racial order.

As noted above, reform is intentional and not accidental, nor is it merely the destruction of the existing order. It therefore follows that when assessing reform, it is important to enquire how this intention came about. Reform processes commence for a number of reasons, according to Resodihardjo.²⁰ First, political leaders and senior civil servants may introduce

¹⁵ Coyle, A. (2002), p. 11.

¹⁶ Coyle, A. (2002), p. 11.

¹⁷ Coyle, A. (2002), p. 11.

¹⁸ Department of Correctional Services (1997) *Annual Report of the Department of Correctional Services 1996*. Pretoria: DCS, p. 1.

¹⁹ Coyle, A. (2002), p. 12.

²⁰ Resodihardjo, S.L. (2009), p. 1.

reform. Second, “reform is stumbled upon” through a process of small incremental changes that individually may not deviate substantially from current policies but which cumulatively amount to “drastic change that surprise policy-makers”. Third, the incremental process of policy-making is disrupted as a result of a crisis and this presents an opportunity for reform. The history of prison reform in South Africa from 1994 onwards falls primarily in this third category, and the concept of reform through crisis is explored in the next section.

2.2 Crisis

The concept of crisis is central to this thesis, as prison reform in South Africa after 1994 was indeed shaped by two major crises. In its briefest form, an institution is in crisis when nothing anchors the future.²¹ The first was the new constitutional order (initially the 1993 Interim Constitution and later the 1996 Constitution) which presented the prison system with an entirely new environment, a new set of demands, and fundamentally different operational requirements. In effect it delegitimized the existing order and required the reinvention of the prison system. The second crisis was the collapse of discipline and order in the DCS, which culminated in the appointment of a judicial commission of inquiry (the Jali Commission) into corruption, maladministration and rights violations in the DCS. Chapter 3 will explore these two crises in more detail: the central issue is the manner in which the state in general, and the DCS management in particular, responded to them.

For the purposes of this thesis, crisis refers to an “institutional crisis”. Such a crisis occurs when the institutional structure of a policy sector “experiences a relatively strong decline in (followed by unusually low levels of) legitimacy”.²²

In a review of the extant literature on the crisis-reform thesis, Resodihardjo identified a number of common conclusions.²³ During a crisis the policies, paradigm, goals and functioning of a policy sector are severely criticised, such that the crisis poses a “severe threat to the core values of a social system” requiring stakeholders to make quick decisions. According to the crisis-reform thesis, a crisis has two important results. First, policy-makers

²¹ Boin, A. and T’Hart, P. (2000) Institutional crises and reforms in policy sectors. In Wagenaar, H. (ed) *Government institutions – effects, changes and normative foundations*. Dordrecht: Kluwer Academic Publishers, p. 12.

²² Boin, A. and T’Hart, P. (2000), p. 13.

²³ Resodihardjo, S.L. (2009), p. 2.

are under extreme pressure to find a solution to end the crisis. The media, civil society and Members of Parliament will critically question the functioning of the policy sector and demand better performance, and question the policy sector's regulatory framework and operations procedures. The second result is that the critical examination of the existing paradigm, policies, goals and functioning leads to diminished support for them and thus the constraints imposed by them are eroded. As these constraints are eroded, it becomes easier for stakeholders to push for more substantial and broad-ranging reform and introduce new policies, goals and modes of functioning. Due to the crisis and the diminished constraints imposed by existing policies, "policy-makers looking to end the crisis will have more leeway to suggest measures that were hitherto unacceptable or even unheard of".²⁴ Therefore, within the context of a crisis, policy-makers are not only under pressure to find a solution to end the crisis soon because it threatens core social values, but they also have more freedom to propose alternative solutions. A crisis is therefore an opportunity for reform.

A crisis should, however, be distinguished from general problems that any policy sector institutions may experience from time to time. For example, the poor service that one may receive at the municipal office during an attempt to rectify an accounting error does not mean that municipal services teeter on the brink of total collapse, even if such service is a common experience. An institutional crisis threatens core social values because of the extremely low levels of legitimacy experienced by the particular policy sector. When, for example, a prison system fails to implement the sentences imposed by the courts due to high numbers of escapes facilitated by corrupt officials, the crisis questions the general understanding that it is the responsibility of the prison system to detain those individuals society wishes to punish or who pose a particular risk. It therefore questions a key component in generally accepted and value-based notions of justice, punishment and the rule of law. As will be demonstrated in Chapter 3, the South African prison system faced precisely such an institutional crisis.

How a policy sector responds to a problem stems from the inherent tension between preservation (preserving existing values, traditional ways and adhering to institutional rules) and responsiveness (the ability to absorb new developments and adapt).²⁵ Ideally there should be healthy and constructive tension between preservation and responsiveness, but an over-

²⁴ Resodihardjo, S.L. (2009), p. 2.

²⁵ Boin, A. and T'Hart, P. (2000), p. 14.

emphasis on preservation leads to institutional rigidity whereas an overly responsive policy sector

may see responsiveness win out over integrity – a proclivity for change is no longer balanced by conservatism. Taken to an extreme, this results in an under-institutionalised sector, characterised by unstable coalitions, constant ad hocery, and lack of professional self-confidence by officials working in the sector. Everything flows, controversies abound, and there is not even a minimal set of shared beliefs guiding the policy agenda and problem-solving strategies. Trial and error becomes the order of the day; policy-making is exclusively reactive, and driven by incidents, mistakes and scandal. Consequently, overly responsive policy sectors are constantly in the grip of conflicts over their *raison d'être*, and are characterised by a sense of insecurity and value trade-offs.²⁶

A policy sector response to a crisis may also be influenced by endemic factors resulting in the further erosion of legitimacy. Boin and T'Hart distinguish three such endemic factors: crisis by ignorance, crisis by rigidity, and crisis by failed intervention.²⁷ Depending on the level of institutionalisation in a policy sector, different responses may emerge. In a policy sector, “there can be a more or less detailed and historically rooted organisation of policymaking and a more or less encompassing policy paradigm”.²⁸ When the main organisational practices and policy orientations have been in place for a long time, the institutional structure is established, taken for granted and seldom reviewed; this is characteristic of a high level of institutionalisation.²⁹ In short, it is known what the sector does, how this is done and why it is done in that way. On the other hand, if a sector displays significant levels of uncertainty and doubt about the nature of desirable policies and mixes of policy instruments, this indicates low levels of institutionalisation.³⁰ There is consequently constant discussion about what the sector does, ad hoc decision-making and fragmented analytical processes.³¹

²⁶ Boin, A. and T'Hart, P. (2000), p. 15.

²⁷ Boin, A. and T'Hart, P. (2000), p. 14.

²⁸ Boin, A. and T'Hart, P. (2000), p. 14.

²⁹ Boin, A. and T'Hart, P. (2000), p. 14.

³⁰ Boin, A. and T'Hart, P. (2000), p. 14.

³¹ Boin, A. and T'Hart, P. (2000), pp. 14.

Crisis by ignorance may result when highly institutionalised sectors continue to look inward rather than outward for solutions; it has been termed “cognitive arrogance – a hermetic, chronically overoptimistic self-image that shuts out discrepant information”.³² In sectors where institutionalisation is low, information cannot be assimilated in a useful manner as there is no agreed-upon interpretive framework to make sense of the large volume of information.³³ Crisis by rigidity occurs in highly institutionalised sectors when changes in the environment are noted but little is done – the too-little-too-late phenomenon.³⁴ In sectors with low levels of institutionalisation, the capacity to implement and consolidate reforms is absent and the sector experiences coordination problems, “zig-zag policies and inter-organisational friction”.³⁵ Crisis by failed intervention can take on two forms: “applying the wrong solution to the problems, or applying solutions to the wrong problems”.³⁶

Because a crisis questions the fundamentals of a policy sector, crisis management should be seen as “governance at the cross roads” and a policy sector can respond in essentially two ways.³⁷ The first is to take the sector back to a pre-crisis situation by restoring order or bringing back normalcy; the second is to renew and redesign the institution. Neither approach guarantees success. A failed conservative approach will result in a long period of stagnation, whereas a failed reformist approach leaves the sector “in limbo between a past that has been abolished and controversial designs for the future”.³⁸ To be successful, the reformist approach requires de-institutionalisation followed by re-institutionalisation, but this must be done with great speed if “perverse consequences are to be avoided in the future”.³⁹ Moreover, the consensus necessary to acknowledge and support the need for reform rarely lasts longer than the crisis.⁴⁰

³² Boin, A. and T’Hart, P. (2000), p. 17, citing Kouzmin, A. and Jarman, A. (1989) ‘Crisis decision making – towards a contingent decision path perspective’. In Rosenthal, U., Charles, M.T. and ‘T Hart, P. (eds) *Coping with crises: The management of disasters, riots and terrorism*. Springfield: Charles C. Thomas, pp. 397-435.

³³ Boin, A. and T’Hart, P. (2000), p. 17.

³⁴ Boin, A. and T’Hart, P. (2000), p. 18.

³⁵ Boin, A. and T’Hart, P. (2000), p. 18.

³⁶ Boin, A. and T’Hart, P. (2000), p. 18.

³⁷ Boin, A. and T’Hart, P. (2000), p. 21.

³⁸ Boin, A. and T’Hart, P. (2000), p. 21.

³⁹ Boin, A. and T’Hart, P. (2000), p. 27.

⁴⁰ Boin, A. and T’Hart, P. (2000), p. 27.

With regard to the South African prison system, some initial comments can be made before they are elaborated upon in later chapters. It can be surmised that in 1994 the DCS was highly institutionalised, with fixed procedures, values, structures and so forth, but in the space of two years the pendulum swung in the opposite position. This was the result not so much of demilitarisation (in 1996) *per se* but the failure to re-institutionalise immediately. It can also be concluded that the DCS was initially a “preserving” or conservative institution but that this changed shortly after 1994 when it became overly responsive; the upshot was a myriad of chaotic endeavours, poor decisions and a reactionary approach to the ensuing scandals (see Chapters 3 and 4). The situation was not helped by the endemic factors present in the Department with reference to how, and if, decisions were based on knowledge; the ability to establish and sustain reform efforts, and the foci of the Department’s reform efforts. The DCS simultaneously experienced crisis by rigidity, ignorance and failed interventions.

2.3 Legitimacy

Fundamental to the transformation of South African society post-1994 is the question of legitimacy and specifically the legitimacy of the state. The state enjoys legitimacy by being accountable to the people that elected it: they are the “constant and rightful monitors of the state”.⁴¹ Legitimacy is also a dynamic process of public discussions and the assessing of alternative policies and actions in a self-reinforcing relationship where authority is vested in the state to mobilise collective power.⁴² However, without elections electing new leaders or affirming existing leaders and their policies, there can be no new alternatives.⁴³ The 1994 and subsequent elections therefore vested legitimate power in the hands of a state clearly mandated to create and advance a constitutional democracy. However, elections alone do not make democracies, and as Picard notes, by May 1994 the public service faced a credibility problem because “the black majority quite understandably had come to regard public administration as something to be avoided, outwitted and, on occasion, sabotaged”.⁴⁴

⁴¹ Ghani, A. and Lockhart, C. (2009) *Fixing failed states – a framework for rebuilding a fractured world*. Oxford: Oxford University Press, p. 117.

⁴² Ghani, A. and Lockhart, C. (2009), p. 117.

⁴³ Ghani, A. and Lockhart, C. (2009), p. 117.

⁴⁴ Picard, L.A. (2005) *The state of the state – institutional transformation, capacity and political change in South Africa*. Johannesburg: P&DM Wits University Press, p. 93.

The first dimension of legitimacy is therefore the external legitimacy of the prison system as a whole. For example, prison systems during Africa’s colonial period were not only exceptionally inhumane and cruel but primarily arranged for the purposes of forced labour for commercial gain and the entrenchment of racial segregation.⁴⁵ These prison systems were imposed on populations without their support or approval, rendering them wholly illegitimate. It can thus be concluded that at the macro-level a prison system needs to have a clearly defined mandate that enjoys general support and aims which accord with generally accepted judicial, socio-cultural and political values.⁴⁶ This may indeed be at an abstract level, despite problems at implementation level, but nonetheless assigns to the prison system a legitimate *raison d'être*.

To turn to a second dimension of legitimacy, prisons and their regimes also require interior legitimacy, and in this respect a prison faces “special legitimation problems as it operates as an autocracy within a democratic polity”.⁴⁷ While the prison system as a national institution of state may enjoy legitimacy at a societal level, this does not mean that each and every prison in the system has legitimacy or that, once it is attained, it remains secure. Sparks and Bottoms cite the work of Beetham (1991), which sets out three criteria of legitimacy as well as their opposites, i.e. forms of non-legitimate power:⁴⁸

<i>Criteria of legitimacy</i>	<i>Form of non-legitimate power</i>
<ul style="list-style-type: none"> • Conformity to rules (legal validity) • Justifiability of rules in terms of shared beliefs 	<ul style="list-style-type: none"> • Illegitimacy (breach of rules) • Legitimacy deficit (discrepancy between the rules and supporting

⁴⁵ Bernault, F. (2003) ‘The Politics of enclosure and confinement in colonial and post-colonial Africa’. In Bernault, F. (ed) *A history of prison confinement in Africa*. Portsmouth: Heineman.

⁴⁶ It is not within the scope of this thesis to assess the legitimacy of imprisonment as a penal sanction in a constitutional democracy. The South African Constitution and jurisprudence allows for imprisonment, but there is support, especially in the United States, for the abolition of imprisonment on the grounds that it is ineffective, inhumane and race- and class-based. See, for example, Knopp, F.H. (2005) *Instead of prisons*, New York: Critical Resistance; Mathiesen, T. (1986) The politics of abolition, *Crime, Law and Social Change*, Vol. 10 No. 1.

⁴⁷ Liebling, A. (2004) *Prisons and their moral performance – a study of values, quality and prison life*. Oxford: Oxford University Press, p. 472.

⁴⁸ Sparks, J.R. and Bottoms, A.E. (1995) Legitimacy and order in prisons, *British Journal of Sociology*, No. 46 Vol. 1, p. 47.

	beliefs, or absence of shared beliefs)
• Legitimation through express consent	• Delegitimation (withdrawal of consent)

Based on this analysis, three questions are asked.⁴⁹ First, legal scholars will ask if the power has been legally obtained and if it is being exercised within the bounds of the law. Second, it is asked, philosophically, if the power relations at play are morally justifiable. Third, from a sociological perspective, enquiry is made into the actual beliefs of subjects about power and legitimacy.

Using this analysis, it is evident that legitimacy, especially at the interior level of the prison system, is fluid and may indeed be a “roller-coaster ride of waxing and waning legitimacy” for institutions of state.⁵⁰ Legitimacy, once attained, needs to be sustained through effective implementation of reforms addressing the legitimacy deficit, and “unless implementation becomes the leaders’ business and strategy the concern of everybody within either an organisation or a nation, the gap between plan and implementation is likely to grow only larger”.⁵¹ Even in the day-to-day minutiae of prison life the actions of prison management and its officials should at least be perceived to be just, fair and legitimate by prisoners. It is in this context that Sparks and Bottoms offer the following remarks about threats to legitimacy:

These include every instance of brutality in prisons, every casual racist joke, and demeaning remark, every ignored petition, every unwarranted bureaucratic delay, every inedible meal, every arbitrary decision to segregate or transfer without giving clear and well founded reasons, every petty miscarriage of justice, every futile and inactive period of time – is delegitimizing. The combination of an inherent legitimacy deficit with an unusually great disparity of power places a peculiar onus on prison authorities to attend to the legitimacy of their actions.⁵²

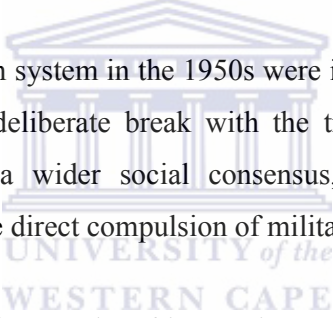
⁴⁹ Sparks, J.R. and Bottoms, A.E. (1995), p. 48.

⁵⁰ Sparks, J.R. and Bottoms, A.E. (1995), p. 48, Boin, A. and T’Hart, P. (2000), p. 13.

⁵¹ Ghani, A. and Lockhart, C. (2009), p. 197.

⁵² Sparks, J.R. and Bottoms, A.E. (1995), p. 60.

Against the backdrop of poor conditions of detention and strained relationships between staff and prisoners, a particular incident (e.g. assault of a prisoner) may indeed give rise to a violent uprising by prisoners, thus delegitimising the power of those in charge variously by breaking the rules, accentuating a legitimacy deficit and/or withdrawing voluntary consent. The legitimacy deficit of the prison system under the apartheid government was patently evident: prisoners had very limited rights, racial segregation was enforced, the prisons were not open to public scrutiny, few services were rendered to prisoners, gross rights violations were commonplace with limited scope for recourse, and so on.⁵³ The search for legitimacy in the South African prison system after 1994 thus has to contend with a deficit that had been created over several centuries. The deficit dates back to colonial times in general but more particularly – and recently – to 1959 and thereafter, this being the year in which the Prisons Act (8 of 1959) was adopted and thereby enabled apartheid policy to be implemented fully in the prison system.⁵⁴ As Van Zyl Smit observes:


Developments of the prison system in the 1950s were in many ways a move away from legitimacy. There was a deliberate break with the traditions and practices that had anchored the system in a wider social consensus, and towards a ‘hard’ prison administration based on the direct compulsion of military power.⁵⁵

The search for legitimacy in the South African prison system continues and has faced dramatic setbacks in the form of widespread corruption, maladministration and gross human rights violations from 1994 onwards. These are explored further in Chapters 3 to 5.

2.4 Policy development

In a reform process, especially one induced by crisis, it is critical that policy-makers develop, with a sense of urgency, a solution to the crisis in the form of new policy. In rapidly changing, or already changed, circumstances the new policy must provide a new vision, mission, policy goals, targets and so forth to guide ensuing decision-making in a manner that improves the situation and prevents the development of new crises, or prevents the current

⁵³ For a more detailed description, see Foster, D., Davis, D., & Sandler, D. (1987) *Detention and Torture in South Africa*. London: James Currey.

⁵⁴ Van Zyl Smit, D. (1992) *South African Prison Law and Practice*. Durban: Butterworth Publishers, p. 31.

⁵⁵ Van Zyl Smit, D. (1992), p. 31.

one from escalating. The central aim is to stabilise the situation by presenting a solution that should not only solve the crisis but also present an attainable future state of affairs that would win and consolidate the support of implementers and guide their day-to-day actions in the relevant institution to establish (or restore) legitimacy. In the post-1994 period the DCS has gone through two such processes of policy development. The first resulted in the hastily drafted 1994 *White Paper on the policy of the Department of Correctional Services in the new South Africa* (“the 1994 White Paper”), and, the second, in the 2004 *White Paper on Corrections in South Africa* (“the 2004 White Paper”).

Reflecting on both of these, it needs to be asked what good public policy should look like: Are there objective criteria that can be used to assess the quality of a given policy? Posing this question is important, for it is highly relevant to the enquiry into the nature, scope and success, or not, of prison reform in South Africa after 1994. It is necessary to ask if the 2004 White Paper in particular is indeed good and appropriate policy for the South African prison system. While the White Paper describes itself as a “policy framework”⁵⁶ and would thus guide subordinate policies, even at this superordinate level it is required that it set a particular standard and be developed according to the principles of good policy-making. Failure to do so would mean that the omissions and shortcomings in the policy framework are replicated in the subordinate policies.

Several definitions of “public policy” are available in the extant literature,⁵⁷ but for the purposes of this thesis the following is the accepted understanding: “Public policy is the broad framework of ideas and values within which decisions are taken and action, or inaction, is pursued by governments in relation to some issue or problem.”⁵⁸ It should be added that there are various types of public policy: (1) broad policies which articulate government-wide direction; (2) sector specific policy; (3) issue specific policy; and (4) operational policy

⁵⁶ Department of Correctional Services (2004 b) *White Paper on Corrections in South Africa*. Pretoria: Department of Correctional Services, para 1.2.3.

⁵⁷ Auditor General Manitoba (2003) *A Guide to Policy Development*. Manitoba, Canada, p. 2. Smith, B. L. (2002) *Public Policy and Public Participation Engaging Citizens and Community in the Development of Public Policy*. Report prepared for Prepared for the Population and Public Health Branch Atlantic Regional Office Health Canada, p. 8.

⁵⁸ Smith, B. L. (2002) *Public Policy and Public Participation Engaging Citizens and Community in the Development of Public Policy*. Report prepared for Prepared for the Population and Public Health Branch Atlantic Regional Office Health Canada, p. 8.

which may guide decisions on programmes and project selection.⁵⁹ It is generally the case that policies find expression and application in policy instruments such as legislation, regulations, and programmes.⁶⁰ For the purpose of this thesis, the two White Papers (1994 and 2004) are the key policy documents and are classified as sector-specific policies. It should also be noted that within the South African government there was, at the time of writing (December 2011), no consensus on the definition of “policy”, an issue raised by the legislature with the National Planning Commission in 2009.⁶¹ This lacuna will not, however, have a material effect on the current analysis, but points to a broader problem in respect of policy development in post-1994 governments.

In 1999 the UK government adopted the *Modernising Government White Paper* which in turn resulted in a significant amount of research being undertaken in that country on policy and policy development processes.⁶² In a subsequent report the UK government identified nine features of modern policy-making,⁶³ the usefulness of which was affirmed by later research.⁶⁴ The nine features of modern policy-making, as defined and developed by the UK government, are described below; they will be drawn upon for the purposes of policy assessment in subsequent chapters of the thesis, and specifically in Chapter 4.⁶⁵

Forward-looking: The policy-making process results in clearly defined outcomes that the policy is designed to achieve and takes a long-term view (five years), based on statistical trends and informed predictions of social, political, economic and cultural trends and the possible effect and impact of the policy. The following are examples: a statement of intended

⁵⁹ Auditor General Manitoba (2003), p. 2.

⁶⁰ Auditor General Manitoba (2003), p. 2.

⁶¹ National Planning Commission (2010) *Revised Green Paper: National Planning Commission*. Government Gazette 2 February 2010, No. 32928, Notice 101 of 2010, p. 4.

⁶² Office of the Prime Minister UK (1999) *Modernising Government White Paper*.

<http://www.nationalschool.gov.uk/policyhub/docs/modgov.pdf> Accessed 1 October 2011.

⁶³ UK Cabinet Office (1999) *Professional Policy Making for the Twenty-First Century*

<http://www.nationalschool.gov.uk/policyhub/docs/profpolicymaking.pdf> Accessed 1 October 2011.

⁶⁴ Bullock, H, Mountford, J, and Stanley, R. (2001) *Better Policy-Making*, London: Centre for Management and Policy Studies. Curtain, R. (2000) Good Public Policy Making: How Australia Fares. *Agenda: a Journal of Policy Analysis and Reform*. Vol. 8 No. 1.

⁶⁵ Bullock, H, Mountford, J, and Stanley, R. (2001), p.14.

outcomes is prepared at an early stage; contingency or scenario planning is used; account is taken of government's long term strategy; and use is made of forecasting research.

Outward-looking: National, regional and international influencing factors are taken into account, as are experiences from other countries. It also assesses how the policy will be communicated to the public and stakeholders. The following are examples: use is made of regional and international cooperation structures; policy-makers look at how other countries dealt with the issue; recognition is given to regional variation within the country; and a communications and presentation strategy is prepared and implemented.

Innovative, flexible and creative: Flexibility and innovation characterises the policy-making process. Critically examining established ways of dealing with problems is encouraged as well as developing creative solutions. The process is open to comments and suggestions of others, and risks are identified and actively managed. The following are examples: the process uses alternatives to the usual ways of working (brainstorming sessions, etc.); it defines success in terms of outcomes already identified; consciously assesses and manages risk; steps are taken to create management structures which promote new ideas and effective team working; and it includes people from outside in the policy team.

Evidence-based: Decisions of, and advice to, policy makers is based upon the best available evidence from a wide range of sources, and all key stakeholders are involved at an early stage and throughout the policy's development. All relevant evidence, including that from specialists, is available in an accessible and meaningful form to policy-makers. Key points of an evidence-based approach to policy-making include: reviewing existing research; commissioning new research; consulting relevant experts and/or use of internal and external consultants; and considering a range of properly costed and appraised options.

Inclusive: The policy-making process directly involves key stakeholders to take account of the impact on and/or meet the needs of all people directly or indirectly affected by the policy. An inclusive approach may include the following aspects: consulting those responsible for service delivery and implementation; consulting those at the receiving end or otherwise affected by the policy; carrying out impact assessments; seeking feedback on the policy from recipients and front line deliverers.

Joined-up: The process takes a holistic view by looking beyond institutional boundaries to the government's strategic objectives and seeks to establish the ethical, moral and legal base for policy. There is consideration of the appropriate management and organisational structures needed to deliver cross-cutting objectives. The following points demonstrate a joined-up approach to policy-making: cross-cutting objectives are clearly defined at the outset; joint working arrangements with other departments are clearly defined and well understood; barriers to effective joined-up work are clearly identified with a strategy to overcome them; and implementation is considered part of the policy-making process.

Review progress: Existing and established policy is constantly reviewed to ensure it is really dealing with problems it was designed to solve, taking account of associated effects elsewhere. Aspects of a reviewing approach to policy-making include: an ongoing review programme is in place with a range of meaningful performance measures; mechanisms to allow service deliverers and customers to provide feedback direct to policy-makers are set up; and redundant or failing policies are scrapped.

Evaluation: Systematic evaluation of the effectiveness of policy is built into the policy making process. Approaches to policy-making that demonstrate a commitment to evaluation include: a clearly defined purpose for the evaluation is set at outset; success criteria are defined; means of evaluation are built into the policy making process from the outset; and pilot projects are used to influence final outcomes.

Learns lessons: The process learns from experience of what works and what does not. A learning approach to policy development includes the following: information on lessons learned and good practice is disseminated; there is an account available of what was done by policy-makers as a result of lessons learned; there is a clear distinction drawn between failure of the policy to impact on the problem it was intended to resolve and managerial/operational failures of implementation.

In summary, it is concluded that good policy-making commences with a thorough understanding of the problem and society's needs; attention is paid to the process of policy-making, a process emphasising inclusivity while maintaining a forward- and outward-looking

perspective that is outcome-focused and knowledge-based.⁶⁶ In contrast, poor public policy-making is “an *ad hoc* or short-term policy response to an immediate problem. Poor policy making often results from unintended consequences that a piecemeal approach has not taken into account”.⁶⁷ This position was echoed by the British government in its efforts to modernise policy-making; according to the *Modernising Government White Paper*, “We will be forward-looking in developing policies to deliver outcomes that matter, not simply reacting to short-term pressures.”⁶⁸

3. A new democratic order and the requirements for the prison system

3.1 The demands of the new constitutional order

Imprisonment by definition implies a limitation of rights, and even democracies tend to be parsimonious in giving real expression to prisoners’ rights.⁶⁹ The advocacy of increased prisoners’ rights is seldom met with sympathy. The high violent crime rate in South Africa⁷⁰ also did not work in favour of prison reform after 1994. However, society is not completely insulated from the prison system. The overwhelming majority of prisoners will ultimately be released, and every day thousands of DCS officials also return to their communities. In short, what happens inside prisons does not stay there. In addition, the officials working in prisons are not immune to their effects. As Gibbons and Katzenbach note, “When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them.”⁷¹ Furthermore, high rates of imprisonment may aggravate the very problems that imprisonment is trying to solve.⁷² It must be concluded that the prison system

⁶⁶ Curtain, R. (2000) Good Public Policy Making: How Australia Fares, *Agenda: A Journal of Policy Analysis and Reform*, Vol. 8 No. 1, p. 36.

⁶⁷ Curtain, R. (2000), p. 38.

⁶⁸ UK Cabinet Office (1999) para 2.2.

⁶⁹ Muntingh, L. (2007 b) *Prisons in the South African constitutional democracy*. Johannesburg: Centre for the Study of Violence and Reconciliation, p. 5.

⁷⁰ Malby, S. (2010) Homicide. In Harrendorf, S., Keiskanen, M. and Malby, S. (eds) *International Statistics on crime and justice*. Vienna: UNODC, pp. 7-19

⁷¹ Gibbons, J. and Katzenbach, N. (2006) *Confronting Confinement*. The Commission on Safety and Abuse in America’s Prisons, Washington: Vera Institute of Justice, p. 11.

⁷² Clear, T. (2007) *Imprisoning Communities*. Oxford: Oxford University Press.

and its ills (or successes) has a permeating effect on the overall state of democracy, even if it is small and insidious – rights violations, corruption, impunity and a host of ills associated with prisons spill over into the domain of free citizens on an ideological level.⁷³ The way prisoners are treated and their experience of their rights shape particular constructs of the right to dignity and the duty (as well as ability) of the state to promote and uphold rights. Moreover, information and reports about what happens in prisons and to prisoners dynamically affects the shifting constructs of offenders, detained persons, punishment, and the use of force.⁷⁴

In the post-1994 era, then, the question should rightly be asked: What are the demands of a constitutional democracy on the prison system, or, more specifically, what does the Constitution mean for the prison system? It is acknowledged that prisons serve “a set of complex, mutually conflicting and hard-to-achieve goals”.⁷⁵ Prisons must house people in a humane manner but simultaneously punish them; order and security have to be maintained so as both to provide an effective deterrent and yet appease political opinion.⁷⁶ It is within this space of “inherent policy vagueness”⁷⁷ that stakeholders (e.g. politicians, bureaucrats, and civil society) must seek a solution meeting the requirements articulated in the Constitution.

As has been noted above, prisons are in themselves not democratic institutions but operate in the democratic polity.⁷⁸ The requirement, then, is that if prisons are not democracies, they should at least not offend the values of a constitutional democracy. The issue at stake is a normative one rooted in the belief that prisons (and prisoners)

will be better off if the values underpinning democracy find clear and tangible expression in the prison system: the rights of prisoners will be better protected, prisons will achieve better results, adherence to the rule of law will be maintained, and ultimately society will benefit through increased safety. The opposite of this position is

⁷³ Muntingh, L. (2007 b), p. 5.

⁷⁴ Muntingh, L. (2007 b), p. 5.

⁷⁵ Boin, A., James, O., and Lodge, M. (2005) *New Public Management and Political Control: Comparing three European Correctional Systems*, Paper prepared for the SCANCOR Workshop ‘Autonomization of the State: From integrated administrative models to single purpose organizations’, Stanford University, 1-2 April 2005, p. 7.

⁷⁶ Boin, A., James, O., and Lodge, M. (2005), p. 7.

⁷⁷ Boin, A., James, O., and Lodge, M. (2005), p. 7.

⁷⁸ Liebling, A. (2004), p. 472.

that prisons are an enclave hidden from the reach of the Constitution – an intolerable position under the current South African constitutional framework.⁷⁹

The Preamble to the Constitution notes the importance of South African history in present-day decisions and actions by emphasising the “injustices of the past” and the need for “healing the divisions of the past”. This is not unlike post-war Germany, where the aim of the Constitution was to define the spirit (*Geist*) of a new state that stood in total opposition to the one destroyed in May 1945.⁸⁰ The effect of apartheid, however, was not only felt in respect of racial discrimination but included a range of violations and inequalities characterising South African history. Therefore, attention needs to be drawn to the fact that prisons across the world, including South Africa’s, are filled with the poor, socially excluded and marginalised, and that the highly unequal nature of South African society is an important factor in shaping crime and consequently the prison population.⁸¹ Prison reform in South Africa should thus reflect this “new spirit” derived from the values of the Constitution, and, more specifically, demonstrate the aspirations of a society emancipating itself from its violent, authoritarian and dehumanising past.⁸² Even in the prison system the promotion of human dignity, equality and the advancement of human rights and freedoms⁸³ are central aims. The historical mission set for the state by the Constitution is, then, to establish, develop and promote a prison system fundamentally different in nature, processes and outcomes to one that was inherited from the previous regime,⁸⁴ inasmuch as it should recognise rights, be transparent and accountable, and be based on knowledge. The Constitution enumerates a number of rights of particular relevance to those deprived of their liberty: the right to equality,⁸⁵ the right to dignity,⁸⁶ the right to life,⁸⁷ the right to be free from torture and other ill treatment⁸⁸ and, specifically, the

⁷⁹ Muntingh, L. (2007 b), p. 5.

⁸⁰ Lazarus, L. (2004) *Contrasting Prisoners’ Rights*. Oxford: Oxford Monographs on Criminal Law and Justice, p. 25.

⁸¹ Dünkel, F. and Van Zyl Smit, D. (2001) ‘Conclusion’. In Dünkel, F. and Van Zyl Smit, D. *Imprisonment Today and Tomorrow*. The Hague: Kluwer Law, p. 809.

⁸² Muntingh, L. (2007 b), p. 6; Mubangizi, J.C. (2001) Prisons and Prisoners' Rights: Some Jurisprudential and Historical Perspectives, *Acta Criminologica*, Vol. 14 No. 3.

⁸³ Constitution s 1(a) Act 108 of 1996.

⁸⁴ Muntingh, L. (2007 b), p. 6.

⁸⁵ s 9.

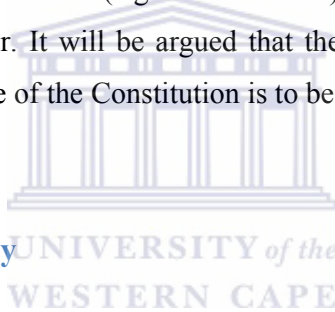
⁸⁶ s 10.

⁸⁷ s 11.

⁸⁸ s 12(1)(d-e)

rights afforded to arrested and detained persons.⁸⁹ These rights can be said to have placed particular transformative obligations on the prison system.

In the subsequent sections, this demand for a prison system compatible with the South African constitutional democracy is further unpacked with reference to four thematic areas.⁹⁰ First, the prison system must have an underlying philosophical framework derived from the Constitution, setting out the justification and knowledge-defined purposes of imprisonment. Second, imprisonment must not violate the rights of prisoners, particularly not those rights listed in the table of non-derogable rights and the rights specifically afforded in the Constitution to arrested and detained persons. Third, the executive must be accountable in respect of the prison system and the treatment of prisoners, with that accountability being both vertical and horizontal. Horizontal accountability refers to institutions that the state develops for itself to hold governments accountable (e.g. Parliament); vertical accountability refers to institutions outside of the state (e.g. the electorate). Fourth, the prison system must function in a transparent manner. It will be argued that these four requirements have to be met if the transformative purpose of the Constitution is to be given concrete expression.



3.2 An underlying philosophy

For the South African prison system to be compatible with the requirements of a constitutional democracy, an underlying philosophy should exist to provide a compass for strategic direction and policy development. In this section the following are described as the key features of such an underlying philosophy: imprisonment should be used as a measure of last resort and this should find expression in a policy on imprisonment; there should be an acceptance and confirmation that the state has inescapable responsibility towards prisoners; imprisonment should be constitutionally justifiable; the prison regime should be humane and human rights-based; the prison system should render effective interventions to all sentenced offenders to reduce their chances of re-offending; and the prison system should be subject to judicial oversight and control.

⁸⁹ s 35.

⁹⁰ The basis for this section was developed and first published in Muntingh, L. (2007 b).

3.2.1 A measure of last resort

Imprisonment limits a number of rights immediately, such as the right to liberty,⁹¹ the right to freedom of assembly,⁹² the right to freedom of association,⁹³ and freedom of movement and residence.⁹⁴ Fundamentally, imprisonment affects the right to dignity⁹⁵ and poor prison conditions may indeed have severe consequences for this right. Given that imprisonment automatically limits a number of fundamental rights, and further that other violations may ensue due to imprisonment, the point of departure should therefore be that imprisonment ought to be used only as a measure of last resort, meaning that all other options need to be assessed and exhausted before a person is deprived of his liberty.⁹⁶

In respect of children, this is a requirement of the Constitution⁹⁷ that has been recently⁹⁸ given statutory effect by the Child Justice Act (75 of 2008). Section 30 of the Child Justice Act establishes numerous procedural and substantive safeguards relating to the detention of unsentenced children in a prison. Section 77 of the same Act sets similar safeguards to limit the use of imprisonment as a sentencing option for children. The Constitution does not make similar pronouncements in respect of adults, but in respect of unconvicted persons the right to be brought promptly before a court, the right to legal representation and the right to challenge the lawfulness of the detention must be read together and regarded as safety mechanisms to prevent, or at least limit, pre-trial detention. The effectiveness of these safeguards has been severely criticised in the light of the high number of pre-trial detainees who spend

⁹¹ s 12(1) Act 108 of 1996.

⁹² s 17 Act 108 of 1996.

⁹³ s 18 Act 108 of 1996.

⁹⁴ s 21 Act 108 of 1996.

⁹⁵ s 10 Act 108 of 1996. *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A); *S v Makwanyane* 1995 6 BCLR 665; *August v Electoral Commissioner* 1999 (3) SA 1 (CC).

⁹⁶ Muntingh, L. (2007 b), p. 6.

⁹⁷ s 28(1)(g) of Act 108 of 2006. 'Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time ...'

⁹⁸ The Child Justice Act came into operation on 1 April 2010.

excessively long periods in detention before their trials commence.⁹⁹ Pre-trial detention is discussed further in Chapter 5 (section 11).

With regard to adult convicted offenders the Constitution is silent about punishment, save for providing for the right to appeal or review and entitling the offender to the least severe punishment if the prescribed punishment for the specific offence has changed since the commission of the offence.¹⁰⁰ The sentence of imprisonment, so long as it is imposed by a court in respect of legislation that is constitutional, would not amount to a violation of the right to liberty or to be deprived of that right arbitrarily; that being said, the length of the term of imprisonment remains subject to the principle of proportionality.¹⁰¹

3.2.2 A policy on imprisonment

Following the abolition of the death penalty¹⁰² and corporal punishment,¹⁰³ imprisonment is the most severe sanction that can be imposed by a court in South Africa. Guided by section 36(1)(e), the sentence of imprisonment may be imposed only if no other less restrictive sanction would have been reasonably able to achieve the same results intended by the court.¹⁰⁴ Given this open mandate granted by the Constitution to the courts, there remains a real risk that imprisonment may be used unnecessarily in the form of short prison sentences imposed without there having been a sufficient exploration of the alternatives. The problems with the wide discretion granted to courts in matters of sentencing have been well described

⁹⁹ Ballard, C. (2011) *Research report on remand detention in South Africa – an overview of the current law and proposals for reform*. CSPRI Research Report, Bellville: Community Law Centre.

¹⁰⁰ s 35(3)(n)-(o).

¹⁰¹ Steytler, N. (1998) *Constitutional Criminal Procedure – a commentary on the Constitution of the Republic of South Africa 1996*, Durban: Butterworths, p. 415.

¹⁰² *S v Makwanyane* 1995 6 BCLR 665.

¹⁰³ *S v Williams* 1995 7 BCLR 861.

¹⁰⁴ s 36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. *S v Scheepers* 1977 (2) SA 155(A); *S v Phalafala* [2011] ZANWHC 33.

in work by the SA Law Reform Commission (SALRC),¹⁰⁵ which has made numerous recommendations for improving consistency and developing a sentencing policy.¹⁰⁶ Such a policy needs to address the use of imprisonment within the context of scarce resources (i.e. of available space in prisons).¹⁰⁷

Imprisonment *per se* has been found to be ineffective in reducing re-offending rates; more importantly, longer terms of imprisonment are associated with higher recidivism rates, especially when used with low-risk offenders.¹⁰⁸ Gendreau, Goggin and Cullen conclude that “the primary justification for use of prisons is incapacitation and retribution, both of which come with a ‘price’, if prisons are used injudiciously”.¹⁰⁹ What is needed to enable a judicious and sparing use of imprisonment is something which can be described broadly as an “imprisonment policy”.¹¹⁰ Such a policy would define the purpose of imprisonment in relation to other sanctions, the overall function of prison in society, the known risks of imprisonment, and what can realistically be expected as the outcomes of imprisonment.¹¹¹

It is commonly the perception that the size of the prison population is the result of increasing or decreasing crime trends - the more the crime rate goes up, the more prisoners there will be and vice versa. In recent years this perception has been challenged by a number of scholars who argue that the size of a prison population is in fact attributable more directly to political sentiments and penal policy.¹¹² In conclusion, to prevent the unnecessary deprivation of

¹⁰⁵ For example, the Commission noted: ‘There is a clear absence of a structured sentencing policy and sentencing guidelines. Most sentencers appear to approach the question of sentencing in an intuitive and unscientific manner.’ (SA Law Reform Commission (1997) *Sentencing - Mandatory Minimum Sentences*. Issue Paper 11, Project 82. Pretoria: SALRC p. 31.)

¹⁰⁶ SA Law Reform Commission (1997).

¹⁰⁷ SA Law Reform Commission (1997), p. 35.

¹⁰⁸ Gendreau, P., Goggin, C. and Cullen, F.T. (1999) *The Effects of Prison Sentences on Recidivism*. Solicitor General: Canada.

¹⁰⁹ Gendreau, P., Goggin, C. and Cullen, F.T. (1999), p. 12; Cullen F.T. and Gendreau, P. (2000) Assessing Correctional Rehabilitation: Policy Practice and Prospects in J Horney (ed) *Criminal Justice 2000, Volume 3: Changes in Decision Making and Discretion in the Criminal Justice System*, US Department of Justice, Washington, p. 155.

¹¹⁰ Muntingh, L. (2007 b), p. 7.

¹¹¹ Muntingh, L. (2007 b), p. 7.

¹¹² Dünkel, F. and Van Zyl Smit, D. (2001) ‘Conclusion’. In Dünkel, F. and Van Zyl Smit, D. *Imprisonment Today and Tomorrow*. The Hague: Kluwer Law, p. 825; Gardner, D. (2002) Finland is soft on crime. *New Politics*, XI No. 3; Tonry, M. (2006) Keynote address. *Conference on Sentencing in South Africa*, hosted by the

liberty as punishment, the use of imprisonment should be determined by targeted policy and constitutional imperatives, namely to curtail as far as possible the limitation of rights. Such a policy has not emerged in South Africa, and in this vacuum the courts have wide discretion in imposing punishments, including the sentence of imprisonment.

3.2.3 A responsibility relationship

The Constitution sets detailed standards in respect of the conditions of detention for detained persons, including sentenced prisoners. Every detained person and sentenced prisoner, has the right

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and (f) to communicate with, and be visited by, that person's - (i) spouse or partner; (ii) next of kin; (iii) chosen religious counsellor; and (iv) chosen medical practitioner.¹¹³

The rights enumerated in section 35 are, however, not the only rights applicable to prisoners; the rights to equality, dignity, life, freedom and security of the person, privacy, freedom of religion, freedom of expression, property, and access to information also apply.¹¹⁴ The Correctional Services Act (Act 111 of 1998), especially in Chapter 2, describes in detail the minimum standards for the detention of all prisoners under conditions of human dignity. These standards deal with: the admission process to prison; the nature of accommodation; nutrition; clothing and bedding; exercise; health care; contact with the community; deaths in prison; development and support services; recreation; access to legal services; reading material; discipline; safe custody; searches by officials; identification of prisoners; the use of

Open Society Foundation (SA), Cape Town (2006, October 25-26); Lappi-Seppälä, T. (2000) 'The Fall of the Finnish Prison Population', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Vol. 1, pp. 27-40.

¹¹³ s 35 (2)(e-f) Act 108 of 1996.

¹¹⁴ Schwikkard, P.J. (2005) 'Arrested and detained persons'. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, p. 740

mechanical restraints; and the use of force as well as lethal and non-lethal incapacitating devices.¹¹⁵

The standards set by the Correctional Services Act for conditions of imprisonment are not relative to what is happening in free society;¹¹⁶ instead they are absolute and meant to be complied with whenever the state imprisons someone. The Constitution places a clear obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights,¹¹⁷ a duty which has been the subject of a number of court decisions in recent years.¹¹⁸ The implication flowing from the standards set in the Constitution and the Correctional Services Act is that the state should use imprisonment with caution and mindful of the fact that standards are onerous. Moreover, the state's duty to provide such conditions is inescapable. It is not a bystander when conditions of detention fail to meet these standards but is in the first instance the party responsible for these failures, given that it is the state which places people in conditions that may adversely affect their rights to dignity and safety.¹¹⁹ The state's relationship of responsibility towards the dignity and safety of prisoners is thus fundamental to an understanding of prisons in a constitutional democracy.¹²⁰

3.2.4 A constitutionally justifiable limitation

For imprisonment (applying to both sentenced and unsentenced prisoners) to be constitutionally justifiable, since it limits several rights, a number of requirements need to be met from the outset, as measured against section 12(1)(a) (right to freedom and security of the person) and section 36 (the limitations clause) of the Constitution.¹²¹ The first

¹¹⁵ ss 2-21 Correctional Services Act (111 of 1998).

¹¹⁶ Dünkel, F. and Van Zyl Smit, D. (2001), p. 825.

¹¹⁷ s 7(2) Act 108 of 1996.

¹¹⁸ *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384(C); *Minister of Justice v Hofmeyr* 1993(3) SA 131(A); *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C); *Strydom v Minister of Correctional Services* 1999(3) BCLR 342 (W); *Minister of Correctional Services v Kwakwa* 2002 (4) SA 455 (SCA); *August v Electoral Commissioner* 1999 (3) SA 1 (CC); *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC).

¹¹⁹ Muntingh, L. (2007 b), p. 7.

¹²⁰ Muntingh, L. (2007 b), p. 7; Mubangizi, J.C. (2002) Some Reflections on the Promotion of the Rights of Prisoners in South Africa, *Acta Criminologica*, Vol. 15 No. 2.

¹²¹ For a detailed discussion on the limitation of a right, see Currie, I. and De Waal, J. (2005) 'Limitation of rights'. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, pp. 163-188.

requirement is, according to Ballard relying on *De Lange v Smuts*,¹²² that the limitation of a right may not be arbitrary and that there should thus be a “rational connection” between the limitation and “some objectively determinable purpose” – in other words, a just cause.¹²³ In assessing arbitrariness, it has to be determining if the limitation has a source in law and whether it serves a legitimate government purpose.¹²⁴ In respect of the just cause, it is also required that the limitation be proportional.¹²⁵ The limitation must also not impose costs that are disproportionate to the benefits gained by limiting rights of great constitutional importance whilst achieving benefits of lesser importance.¹²⁶ In addition, a law or action should not limit a right where the outcome could have been obtained through less restrictive means.¹²⁷

This distinction between the purpose of the limitation (i.e. punishment) and the benefits to be gained is also made in the Correctional Services Act. Section 36 of the Correctional Services Act assigns a quite specific purpose to a sentence of imprisonment, stating that, after having due regard that the deprivation of liberty serves the purposes of punishment, the purpose of a term of imprisonment is to enable the sentenced prisoner to lead a socially responsible and crime-free life in the future. Not only must the individual sentenced prisoner benefit – by avoiding future criminal activity and thus possible imprisonment – but so must society as a whole, by means of the reduction in crime. Imprisonment is therefore not an opportunity for the state to add additional and incidental punishments on the offender, for example through poor conditions of detention, but rather the opposite: to create the opportunities, and make available the means and resources, for preventing the offender from committing further crimes after his release from the sentence of imprisonment. There is thus a just cause for limiting the right to freedom, namely to enable the offender to lead a crime-free life in the future. It does mean, however, that the state should enable the achievement of this objective in some demonstrable way through various interventions with offenders. This objective should hence be seen as the constitutional justification for the rights limitations resulting

¹²² *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC). See also the reasonableness test in *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 53.

¹²³ Ballard, C. (2011), p. 9.

¹²⁴ Ballard, C. (2011), p. 9.

¹²⁵ Ballard, C. (2011), p. 11.

¹²⁶ Currie, I. and De Waal, J. (2005), pp. 185.

¹²⁷ Currie, I. and De Waal, J. (2005), pp. 185.

from a sentence of imprisonment.¹²⁸ The balancing of the limitation of a right (liberty) and the positive duty imposed on the state to assist individuals who, for whatever reason require assistance in their personal and social development, encapsulates the constitutional question regarding the sentence of imprisonment.

3.2.5 A humane and human rights-based regime

The Correctional Services Act articulates four objectives for the South African prison system: to implement the sentences of the court in the prescribed manner; to detain all prisoners in safe custody while ensuring their human dignity; to promote the social responsibility and human development of all prisoners and persons under community corrections; and manage remand detainees.¹²⁹ Safety, dignity, social responsibility and human development are values derived from the Constitution¹³⁰ and should be given expression in the daily functioning of prisons. Prisons should thus be managed and administered in a manner reflecting constitutional values, especially those facilitating the betterment of prisoners and giving expression to fostering social responsibility and human development.¹³¹ Fundamentally, this requires a human rights-based approach to prison management and daily practice.¹³²

Even if constitutionally justifiable, imprisonment is generally a painful experience and one should not lose sight of these pains. The pains of imprisonment, as coined by Sykes, are:

- The loss of liberty through confinement, separation from family and friends; rejection by the community and loss of citizenship (a civil death resulting in lost emotional relationships, loneliness and boredom);
- The deprivation of goods and services through limited choices, amenities and material possessions;

¹²⁸ Lazarus, L. (2004), p. 38.

¹²⁹ s 2 Correctional Services Act 111 of 1998. The fourth objective, to manage remand detainees, was added by the Correctional Matters Amendment Act (5 of 2011) and was not yet operational at the time of writing (December 2011).

¹³⁰ Constitution Preamble: 'Improve the quality of life of all citizens and free the potential of each person' and s 7(1).

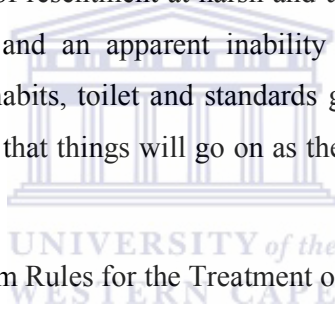
¹³¹ Muntingh, L. (2007 b), p. 8.

¹³² Coyle, A (2002), p. 3.

- The frustration of sexual desire by being figuratively castrated by involuntary celibacy;
- The deprivation of autonomy imposed by the regime's routine, work, activities, trivial and apparently meaningless restrictions, and lack of explanations; and
- The deprivation of security through the enforced association with other unpredictable prisoners causing fear and anxiety, resulting in frequent violence.¹³³

Imprisonment comes with significant risks to the individual. Long-term imprisonment in particular leads to the phenomenon of institutionalisation, known more aptly as “institutional neurosis” and described by Barton as:

. . . a disease characterised by apathy, lack of initiative, loss of interests more marked in things and events not immediately personal or present, submissiveness, and sometimes no expression of feelings of resentment at harsh and unfair orders. There is also a lack of interest in the future and an apparent inability to make practical plans for it, deterioration in personal habits, toilet and standards generally, a loss of individuality, and a resigned acceptance that things will go on as they are – unchangingly, inevitably and indefinitely.¹³⁴



While the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)¹³⁵ predates the research findings of Barton and Sykes cited above, Rule 60(1) of the UNSMR states: “The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.” Since section 36 of the Correctional Services Act (111 of 1998) states that the deprivation of liberty is the punishment, minimising the differences between life inside and outside of prison – and balancing this against reasonable safety and security requirements – is not only feasible but desirable as well.¹³⁶ Prison systems in

¹³³ Sykes (1958) cited in Liebling, A. and Maruna, S. (2005) ‘Introduction: the effects of imprisonment revisited’. In Liebling, A. and Maruna, S. *The effect of imprisonment*. London: Willan Publishing, p. 5-6.

¹³⁴ Barton (1966) cited in Liebling, A. and Maruna, S. (2005) ‘Introduction: the effects of imprisonment revisited’. In Liebling, A. and Maruna, S. *The effect of imprisonment*. London: Willan Publishing, p. 4.

¹³⁵ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹³⁶ Muntingh, L. (2007 b), p. 8.

northern Europe and Scandinavia that have given more tangible expression to this ideal have demonstrated good results without compromising public safety.¹³⁷ For the South African prison system the challenge is therefore to create a prison environment inculcating the values and habits that enable released prisoners to fulfil their roles as constructive citizens.¹³⁸ The creation of such a prison environment requires a fundamental redesign and development of how prisons function in order to undo the formal and informal regimes and sub-cultural traits inherited from the apartheid era. Indeed, Dünkel and Van Zyl Smit recommend that every opportunity should be investigated, explored and experimented with to develop, strengthen and enhance a liberal prison regime,¹³⁹ for it is in this milieu that the values underpinning the Constitution can find expression – not in a repressive, paternalistic and quasi-military one.

3.2.6 Effective interventions

In a preceding discussion (section 3.2.4) it was already pointed out that (a.) there needs to be a legal justification for the imposition of a sentence of imprisonment, and that (b.) such a justification is provided by section 36 of the Correctional Services Act, which states that the purpose of imprisonment is to enable the offender to lead a socially responsible and crime-free life in the future. In other words, a sentence of imprisonment must serve a useful purpose¹⁴⁰ in a manner that is acceptable from a human-rights perspective. This useful purpose is understood to be that offenders will leave prison less likely to commit further offences.¹⁴¹ Effective interventions with offenders, which are dealt with further below, require an appropriate institutional environment. According to Cullen and Gendreau,¹⁴² such an environment has to meet the six requirements of “evidence-based corrections”. First, the prison-system paradigm should embrace professionalism that is respectful of data. Second,

¹³⁷ Gardner, D. (2002) Finland is soft on crime. *New Politics*, XI No. 3; Dünkel, F. and Van Zyl Smit, D. (2001), p. 839.

¹³⁸ Muntingh, L. (2007 b), p. 8.

¹³⁹ Dünkel, F. and Van Zyl Smit, D. (2001), pp. 838 and 845.

¹⁴⁰ Cornwall, D.J. (2003) The role of criminology in custodial corrections – a multi-disciplinary approach, *Acta Criminologica*. Vol. 16 No. 5, p. 82.

¹⁴¹ Muntingh, L. (2005) *Offender rehabilitation and reintegration – taking the White Paper on Corrections forward*. CSPRI Research Report. Bellville: Community Law Centre, p. 31.

¹⁴² Cullen, F.T. and Gendreau, P. (2000) Assessing Correctional Rehabilitation: Policy Practice and Prospects in J Horney (ed) *Criminal Justice 2000, Volume 3: Changes in Decision Making and Discretion in the Criminal Justice System*, US Department of Justice, Washington, p. 111.

the training of practitioners is based on research which is, third, supported by the creation of correctional training academies. Fourth, programme implementation is informed by empirically-based theory of effective interventions. Fifth, the evaluation of programmes and interventions are regarded as part of delivery. Sixth, agencies and programmes are accredited and audited.

From this it follows that for prisoners to better themselves and for the prison service to meet the objective of promoting social responsibility and human development, the relevant that are must have been proven to be effective or at least be supported by evidence indicating their effectiveness.¹⁴³ There is indeed a growing body of empirical evidence of effective interventions with offenders.¹⁴⁴ Based on an extensive meta-analysis by Cullen and Gendreau, a number of principles for effective interventions have emerged. These are presented below.¹⁴⁵

First, interventions should target the known predictors of crime and recidivism, also referred to as criminogenic needs and divided into static and dynamic needs.¹⁴⁶ The focus of interventions is on dynamic predictors in particular, namely: anti-social or pro-criminal attitudes, values, beliefs and cognitive emotional states; pro-criminal associates and isolation from anti-criminal others; and anti-social personal factors such as impulsiveness, risk-taking, and low self-control. Second, the treatment services should be behavioural in nature.¹⁴⁷ In this regard it is important to match the interventions with the needs of offenders or to ensure “general responsivity”. Moreover, interventions should be intensive, lasting from three to

¹⁴³Muntingh, L. (2007 b), p. 8.

¹⁴⁴ Muntingh, L. (2005), pp. 32 -39.

¹⁴⁵ Cullen, F.T. and Gendreau, P. (2000). See also McKenzie, D.L. ‘Criminal Justice and Crime Prevention’ in LW Sherman et al (1997) *Preventing Crime: What Works, What Doesn't, What's Promising*, National Institute of Justice, US Department of Justice, Washington.

¹⁴⁶ Williamson, P. et al (2003) ‘Assessing Offender Readiness to Change Problems with Anger’ *Psychology, Crime and Law*, Vol. 9 No. 4. Cullen F.T. and Gendreau P. (2000), p. 145.

¹⁴⁷ Deci, E.L. and Ryan, R.M. (2000) The ‘What’ and ‘Why’ of Goal Pursuits: Human Needs and the Self Determination of Behaviour, *Psychological Inquiry*, Vol. 11 No. 4; McMurrin, M. and Ward, T. (2004) ‘Motivating Offenders to Change in Therapy: An Organizing Framework’, *Legal and Criminal Psychology*, Vol. 9; Prochaska, J.M. et al (2004) ‘The Trans-theoretical Model of Change for Multi-level Intervention for Alcohol Abuse on Campus’, *Journal of Alcohol and Drug Education*, Vol. 47 Issue 3; Cullen, F.T. and Gendreau, P. (2000), p. 145.

nine months and occupying 40-70% of the offender's time when on the programme.¹⁴⁸ Short, generic, information-based, just-before-release interventions do not satisfy this principle.¹⁴⁹ Third, treatment interventions should be used with higher risk offenders and target their criminogenic needs to bring about for change.¹⁵⁰ It requires accurate risk assessments resulting in targeting high-risk individuals for interventions; this potentially has the biggest pay-off when successful, since these individuals are responsible for a larger proportion of crime. Fourth, a range of other considerations, if addressed, will increase treatment effectiveness.¹⁵¹ The work by Cullen and Gendreau also identified a wide range of issues that contribute to intervention-effectiveness, such as community-based interventions¹⁵² versus institutional interventions, ensuring well-trained staff and monitoring them, following up on and supporting offenders after they have completed the programme, and structured relapse-prevention. Matching the treatment and programme style to the learning styles of offenders has also been shown to be critically important. Further programme considerations include a lack of motivation to participate, depression, anxiety and childhood trauma.

Research has similarly identified the characteristics of interventions that are not effective and which should naturally be avoided. The following are noteworthy in this regard. Interventions that aim at greater control over offenders (e.g. various forms of supervision and probation) and which are regarded as by-products of the get-tough-on-crime approach are not effective in reducing recidivism.¹⁵³ Moreover, in the same manner that effective programmes are based on sound theory and empirically-tested methods and interventions, control-inspired interventions appear to be based on “a common-sense-understanding that increasing the pain and/or the surveillance of offenders would make them less likely to commit crimes”.¹⁵⁴

¹⁴⁸ Shrum, H. (2004) No Longer Theory: Correctional Practice that Works, *Journal of Correctional Education*, Vol. 55 No. 4, p. 233.

¹⁴⁹ Muntingh, L. (2005), p. 34.

¹⁵⁰ Cullen, F.T. and Gendreau, P. (2000), p. 147.

¹⁵¹ Lawrence, S. et al (2002) *The Practice and Promise of Prison Programming*, Urban Institute, Washington, p. 9. Cullen, F.T. and Gendreau, P. (2000), p. 147.

¹⁵² Lynch, J.P. and Sabol, W.J. (2001) 'Prisoner Re-entry in Perspective' *Crime Policy Report*, Vol. 3 September 2001, Urban Institute, Washington.

¹⁵³ Cullen, F.T. and Gendreau, P. (2000), p. 154.

¹⁵⁴ Cullen, F.T. and Gendreau, P. (2000), p. 154.

Also ineffective are deterrence-oriented programmes,¹⁵⁵ which in some instances actually increased the recidivism rate.¹⁵⁶ The overall conclusion is that there is no evidence to suggest that greater deterrence or increased punitiveness will result in reduced re-offending; indeed, the opposite was found to be true in a number of evaluations of deterrence-based programmes. With regard to the specific style of a programme, treatment modalities that appear to be ineffective lack general responsivity, rely on an insight-oriented approach and are less structured, self-reflective and verbally interactive.¹⁵⁷

The above four principles are generally accepted in the authoritative literature on imprisonment;¹⁵⁸ other finer points have also been noted by other researchers.¹⁵⁹ For the purpose of the analysis in this thesis, the point has been made that the state needs to render effective service to reduce the risk of re-offending and that scientific research has established the principles for such effective interventions.

3.2.7 Judicial oversight

In a constitutional democracy it is essential that there is judicial oversight over the prison system. The Judicial Inspectorate for Prisons (in 2008 renamed as the Judicial Inspectorate for Correctional Services)¹⁶⁰ was formally established with effect from 1 June 1998 in terms

¹⁵⁵ Examples of such sanctions are ‘Scared Straight’, boot camps, shock probation, fines, and split sentences.

¹⁵⁶ Cullen, F.T. and Gendreau, P. (2000), p. 155. McKenzie, D.L. (1997) *Criminal Justice and Crime Prevention*. In Sherman, L.W. et al *Preventing Crime: What Works, What Doesn't, What's Promising*, National Institute of Justice, Washington: US Department of Justice.

¹⁵⁷ Cullen, F.T. and Gendreau, P. (2000), p.146.

¹⁵⁸ Dünkel, F. and Van Zyl Smit, D. (2001), p. 822.

¹⁵⁹ See Lawrence, S. et al (2002) *The Practice and Promise of Prison Programming*, Urban Institute, Washington, p. 9; Vacca, J.S. (2004) Educated prisoners are less likely to return to prison, *Journal of Correctional Education*, Vol. 55 No. 4, p. 199; Ubah C.B.A. (2002) A critical Examination of Empirical Studies of Offender Rehabilitation-Correctional Education: Lessons for the 21st Century, *Journal of Correctional Education*, Vol. 53 No. 1; Williamson P et al (2003) Assessing Offender Readiness to Change Problems with Anger, *Psychology, Crime and Law*, Vol. 9 No. 4, pp. 295-307.

¹⁶⁰ Act 25 of 2008.

of section 25 of the Correctional Services Act (8 of 1959)¹⁶¹ and is headed by an Inspecting Judge.¹⁶² The lack of transparency of the pre-1994 prison system and the limitations imposed by the 1959 Prisons Act on judicial oversight,¹⁶³ necessitated the creation of a structure that would give prisoners a right of access to complain to an independent body. International research indicates that judicial control over the prison system is even more important in developing countries as it has the power to make additional resources available to the prison system.¹⁶⁴ Notwithstanding certain limitations in the mandate of the Office of the Inspecting Judge (see Chapter 4 section 2.4.3), the Inspecting Judge can still make a number of binding decisions and in principle renders status, independence and impartiality to the external complaints mechanism implemented through the Independent Prison Visitors.¹⁶⁵ After 1990 there has also been an increase in prisoners' rights litigation in respect of a number of substantive issues relating to conditions of detention, access to medical treatment, parole, and the right to vote.¹⁶⁶ They will be dealt with more extensively in Chapters 3 and 5. These developments demonstrate that maintaining and strengthening judicial oversight over the prison system is central to developing a rights-based approach.

3.2.8 Summary of issues

By way of concluding the discussion on the requirements of an underlying philosophy for a prison system in a constitutional democracy, the following are the salient points. The state has an inescapable duty to uphold and promote the rights of all persons in its jurisdiction, and

¹⁶¹ The Correctional Services Act (8 of 1959) was amended to provide for the establishment of the Judicial Inspectorate on 20 February 1997 by proclamation of the Correctional Services Amendment Act (102 of 1997). This legislation was further amended on 19 February 1999 by proclamation of sections 85 to 94 of the Correctional Services Act (111 of 1998).

¹⁶² Office of the Inspecting Judge (2000) *Annual Report of the Judicial Inspectorate of Prisons 1999*. Cape Town: Office of the Inspecting Judge, p. 2.

¹⁶³ The 1959 Act abolished the prescription that prisoners must be visited regularly by judges and boards of visitors. (Van Zyl Smit, D. (1992), p. 31.)

¹⁶⁴ Dünkel, F. and Van Zyl Smit, D. (2001), p. 828.

¹⁶⁵ Jagwanth, S. (2004) *A review of the Judicial Inspectorate of Prisons of South Africa*, CSPRI Research Report No. 7, Bellville, Community Law Centre. Gallinetti, J. (2004) *Report on the evaluation of the Independent Prison Visitors (IPV) system*, CSPRI Research Report No. 5, Bellville, Community Law Centre. Muntingh, L. (2007 b), p. 9.

¹⁶⁶ De Vos, P. (2003) *Prisoners' rights litigation in South Africa since 1994 – a critical evaluation*. CSPRI Research report No. 3. Bellville: Community Law Centre.

because imprisonment inherently poses risks to the rights of prisoners, the state should only use imprisonment as a measure of last resort. This means that the prison system should have a clearly defined role in relation to other institutions of state and constitutional obligations with specified functions pursuing legitimate and justifiable goals and objectives. In the case of South Africa, there is a particular historical mission, namely the design, development and implementation of a prison system which is the antithesis of the one inherited at the start of the constitutional democracy. Furthermore, the constitutional justification for the imposition of a prison sentence is derived from the opportunities and assistance that should be rendered to offenders to better themselves and lead crime-free lives in the future. There are certain absolute minimum standards of detention and treatment – derived from the right to dignity – that are measurable and enforceable through judicial control over the prison system; the state is responsible for ensuring compliance with these standards.

3.3 The recognition of rights requirement

Section 35 of the Constitution (108 of 1996) grants detailed procedural and substantive rights to arrested and detained persons, including prisoners, and must be regarded as a consequence of the excessive use of detention and imprisonment by the apartheid regime. Even if prisoners do not evoke the same sympathy as other vulnerable groups, they are important because they are in “an unusually close relationship with the state”¹⁶⁷ and at the receiving end of the state’s ability to exercise coercion.¹⁶⁸ In this section the rights of prisoners, as afforded by the Constitution, are explored further to unpack constitutionalism within the prison context; a number of examples are used to illustrate individual points. The purpose of this exposition is to show what is indeed required of transformative constitutionalism in South Africa. Emphasis is placed on the right to dignity, the right to freedom and security of the person, the right to life, and the right to freedom from slavery and servitude. It is fortunately the case that a *residuum* principle in respect of prisoners’ rights was established in South African case law nearly a hundred years ago, and it is here that this enquiry will start.

3.3.1 The residuum principle

¹⁶⁷ Lazarus, L. (2004) *Contrasting Prisoners’ Rights*. Oxford: Oxford Monographs on Criminal Law and Justice, p. 35. See also *B v Minister of Correctional Services* 1997 (6) BCLR 789(C) para 52-54.

¹⁶⁸ Muntingh, L. (2007 b), p. 9.

The 1993 decision of *Minister of Justice v Hofmeyr*¹⁶⁹ laid the foundation for subsequent jurisprudence on prisoners' rights and indicated the direction of future decisions by the courts.¹⁷⁰ The Appellate Division, as it was known then, used the opportunity in *Hofmeyr* to cite approvingly two earlier decisions, the 1912 decision in *Whittaker and Morant v. Roos and Bateman*¹⁷¹ and the minority judgment of Corbett JA in the 1979 *Goldberg* case.¹⁷² Citing the Innes *dictum*, from *Whittaker and Morant v. Roos and Bateman*, the Appellate Division, per Hoexter J, affirmed the *residuum* principle and dismissed the appeal with costs:

True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr. Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration. Any such punishment would amount to an *injuria*.¹⁷³

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In the *Goldberg* case Corbett JA, in a minority decision, refers to a “substantial *residuum* of rights”:

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of ‘rights’) are

¹⁶⁹ 1993 (3) SA 131 (A).

¹⁷⁰ Muntingh, L. (2007 b), p. 9.

¹⁷¹ 1912 AD 92.

¹⁷² *Goldberg v Minister of Prisons* 1979(1) SA 14.

¹⁷³ 1993 (3) SA 131 (A), p.9, 1912 AD 92 pp. 122-123.

very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial *residuum* of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress.¹⁷⁴

Even though the *Whittaker* and *Hofmeyr* cases dealt with unsentenced prisoners and *Goldberg* dealt with sentenced prisoners, the court in *Hofmeyr* dealt with this distinction deftly and drew on the earlier decision in *Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others*, concluding that the *residuum* principle had not been questioned by the courts and would therefore apply equally to sentenced and unsentenced prisoners.¹⁷⁵ This approach was subsequently confirmed by the Constitutional Court in *S v Makwanyane* and no distinction was drawn between sentenced and unsentenced prisoners.¹⁷⁶

The *residuum* principle is thus well entrenched in South African prisoners' rights jurisprudence and imprisonment *per se* is not a justification for the further limitation of rights, save for those rights that must of necessity be curtailed in order to implement the sentence (or order) of the court.¹⁷⁷ The retention of this rights status is important to protect, as public opinion often bays for an erosion of this basic position. It has been demonstrated in respect of prisoners' right to vote, a right which forms an important, albeit symbolic, bulwark against the erosion of other rights held by prisoners.¹⁷⁸ It has also been shown in post-1994 decisions, such as those dealing with the right to vote, that attempts by the executive to dilute

¹⁷⁴ 1979(1) SA 14 p. 139.

¹⁷⁵ *Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others* 1982(2) SA 547(C) 'Whether the same approach should be adopted when considering the rights of convicted prisoners (vide *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A), particularly per CORBETT JA at 38 - 41) or of persons detained under other legislation (cf. *Rossouw v Sachs* 1964 (2) SA 551 (A)) does not arise and need not be considered in the present case. In respect of awaiting-trial prisoners, the correctness of the approach stated by INNES J as far back as 1912 has to my knowledge never been questioned.' Page 166 of [1982] 4 All SA 162 (C).

¹⁷⁶ *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94 para 142.

¹⁷⁷ Muntingh, L. (2007 b), p. 10.

¹⁷⁸ Muntingh, L. and Sloth-Nielsen, J. (2009) *The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa*. In Ewald, A.C. and Rottinghaus, B. (eds) *Criminal disenfranchisement in an international perspective*, Cambridge: Cambridge University Press, pp. 221-243.

the *residuum* principle have not been entertained by the Constitutional and other Superior Courts.

3.3.2 The right to dignity

The Constitution, in Section 1, identifies dignity as one of the founding values of the Republic and dignity ranks at least equally with the rights of freedom and equality. Human dignity is therefore the source of a person's innate rights to freedom and to physical integrity from which other rights flow.¹⁷⁹ Then Chief Justice Arthur Chaskalson, in an academic work, concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.¹⁸⁰ He further pointed out that the right to dignity, as a foundational right, must be granted more weight than the other individually enumerated rights.¹⁸¹ The Constitutional Court has also recognised that imprisonment, and any other punishment, encroaches on the dignity of a person:

Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity.¹⁸²

The Constitutional Court also agreed with the US Supreme Court that “even the vilest criminal remains a human being possessed of common human dignity” and the German Federal Constitutional Court’s statement that “respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishment”.¹⁸³ In *S v Williams* the Constitutional Court’s conclusion on punishment was as follows:

The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the

¹⁷⁹ Currie, I. and De Waal, J. (2005) ‘Human dignity’. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, p. 273.

¹⁸⁰ Chaskalson, A. (2002) Human dignity as a Constitutional Value. In Kretzmer, D., and Klien, E. (eds) *The Concept of Human Dignity in the Human Right Discourse*, The Hague: Kluwer Law International, p. 134.

¹⁸¹ See also *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94, paras 144 and 329.

¹⁸² *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94, para 142.

¹⁸³ *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94, para 57 and 59.

Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.¹⁸⁴

While the Constitutional Court has had to deal with the issue of life imprisonment¹⁸⁵ and sentence lengths,¹⁸⁶ it has not yet had to deal with the constitutionality of imprisonment itself. Until a different view on this emerges from the Constitutional Court, it must accepted that prisoners have to tolerate greater limitations on their right to dignity than free persons, provided that such limitations are justifiable in respect of the objectives of their imprisonment, these being their rehabilitation and the prevention of crime.¹⁸⁷ The threshold of tolerance is described in Section 35(2)(e) of the Constitution, which states that prisoners have a right “to conditions of detention that are consistent with human dignity”; this is further described in the Correctional Services Act, which requires that prisoners must be detained in safe custody “whilst ensuring their human dignity”.¹⁸⁸ As noted above, Chapter 2 of the Correctional Services Act then sets out the operational standards for ensuring conditions of human dignity.

Prisoners’ right to dignity found an unlikely route to the Constitutional Court in *August and Another v the Electoral Commission and Others* in 1999 when the Court had to determine if prisoners had a right to vote in national and provincial elections.¹⁸⁹ For Justice Sachs, dignity in the context of imprisonment stretched beyond conditions of detention and extended into civil and political rights:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are

¹⁸⁴ *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995) para 38.

¹⁸⁵ *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94 para 171.

¹⁸⁶ *S v Dodo* Case CCT 1/01 para 27-38.

¹⁸⁷ Currie, I. and De Waal, J. (2005) ‘Human dignity’. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, p. 276.

¹⁸⁸ s 2(b) Correctional Services Act (111 of 1998).

¹⁸⁹ 1999 (3) SA 1; 1999 (4) BCLR 363.

intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.¹⁹⁰

In the *August* case the Constitutional Court provided substantial clarification on the status of prisoners in South Africa, emphasising that they are not second-class citizens and remain, even though deprived of their liberty, members of a democratic society who can participate in elections.¹⁹¹

The right to dignity also places a positive obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.¹⁹² The purpose of a sentence of imprisonment, as alluded to above, renders further expression to the right to dignity by recognising the potential of each sentenced prisoner to contribute to society and be able to lead a “socially responsible and crime-free life”. To fulfil this duty, the state is thus obligated to provide access for sentenced prisoners to such services (e.g. education and therapeutic programmes) to enable them to fulfil their human potential,¹⁹³ as discussed in section 3.2.6. The German Federal Constitutional Court regarded this in a transactional manner: while the state deprives the prisoner of his liberty, the prison administration is required to legitimise the limitations placed on prisoners through the services available to prisoners to enable them to lead socially responsible and crime free lives.¹⁹⁴ The right to dignity in a prison environment should be regarded as an open-ended and expansive value, seeking new normative expressions in the daily regime. In the absence of such an approach and concomitant conditions,

... it is unlikely that prisoners will subscribe to the values of self-worth, respect for others, respect for the rule of law and so forth. Degrading and humiliating treatment and conditions do not create an environment supportive of the rehabilitative ideal; it actively undermines it. The right to dignity therefore lies at the core of prisoners’ rights in a constitutional democracy and should be understood in very tangible terms and

¹⁹⁰ 1999 (3) SA 1; 1999 (4) BCLR 363, para 17.

¹⁹¹ Muntingh, L. (2007 b), p. 10.

¹⁹² s 7(2) Act 108 of 1996.

¹⁹³ Muntingh, L. (2007 b), p. 10.

¹⁹⁴ Lazarus, L. (2004) *Contrasting Prisoners’ Rights*. Oxford: Oxford Monographs on Criminal Law and Justice, p. 44.

emphasising the positive measures undertaken to give effect to personal worth and autonomy.¹⁹⁵

3.3.3 Freedom and security of the person

Under international law, the prohibition of torture carries the enhanced status of a peremptory norm (*ius cogens*) of general international law.¹⁹⁶ The absoluteness of the ban means that it applies regardless of the status of the victim and the circumstances, be it a state of war, siege, emergency, or whatever.¹⁹⁷ The revulsion with which the torturer is regarded is demonstrated by the very strong judicial rebuke, condemning the torturer as someone who has become “like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”,¹⁹⁸ and torture itself as an act of barbarity which “no civilized society condones”,¹⁹⁹ “one of the most evil practices known to man”²⁰⁰ and “an unqualified evil.”²⁰¹

¹⁹⁵ Muntingh, L. (2007 b), p. 11.

¹⁹⁶ As a peremptory norm it ‘enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.’ (*Prosecutor v. Furundzija* ICTY (Trial Chamber) Judgment of 10 December 1998 at para 147-157.) See the House of Lords decision in *A (FC) and others (FC) v. Secretary of State for the Home Department* (2004); *A and others (FC) and others vs Secretary of State for the Home Department* [2005] UKHL 71 para 33. Also *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197-199.

¹⁹⁷ The prohibition of torture is prescribed in Art. 5 of the Universal Declaration of Human Rights (1948) (hereafter UDHR) and a number of international and regional human rights treaties, including ICCPR in Art. 7 and Art.10, ECHR in Art.3, ACHR in Art.5(2), and ACHPR, Art. 5. Several treaties have been developed with the specific aim to combat torture. These are: UN Convention against Torture (UNCAT), the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987 and the Inter-American Convention to Prevent and Punish Torture 1985. The prohibition is furthermore taken up in a number of legally non-binding, but morally authoritative instruments. These include: The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 (1975 Declaration), the Standard Minimum Rules for the Treatment of Prisoners (1955), the Basic Principles for the Treatment of Prisoners (1990), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000).

¹⁹⁸ *Filartiga v. Pena-Irala* [1980] 630 F (2nd Series) 876 US Court of Appeals 2nd Circuit 890.

South Africa's recent socio-political political history made the drafters of the 1993 and 1996 Constitutions alive to the crime of torture and the importance of including the right to be free from torture into the Constitution, and it was thus included into the Interim Constitution²⁰² and the final Constitution²⁰³ under the heading "Freedom and security of the person".²⁰⁴ The right to freedom and security of the person is described in five subsections in the Constitution, two of which are non-derogable: the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way.²⁰⁵ Following from the discussion above on the right to dignity (section 3.3.2), it has been concluded that the right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.²⁰⁶

In the post-1994 era it is important to understand torture in a broader sense and expand its historical association with political opponents of the state to include common law suspects and detainees, prisoners, children in secure care facilities, and all other situations where people are deprived of their liberty and at the mercy of state officials.²⁰⁷ With South Africa's large prison population, the risk of torture and ill-treatment is significant. The former UN Special Rapporteur on Torture (Prof. Nowak) regarded the deprivation of liberty as key to understanding and defining torture: "It is the powerless of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental

¹⁹⁹ *A (FC) and others v. Secretary of State for the Home Department* para 67.

²⁰⁰ *A (FC) and others v. Secretary of State for the Home Department* para 101.

²⁰¹ *A (FC) and others v. Secretary of State for the Home Department* para 160.

²⁰² s 11(2) Act 200 of 1993

²⁰³ s 12(1)(e) Act 108 of 1996

²⁰⁴ Muntingh, L. (2011) *A guide to the UN Convention against Torture in South Africa*. CSPRI Report, Bellville: Community Law Centre, p. 11.

²⁰⁵ s 12(1)(d)-(e)

²⁰⁶ Currie, I. and De Waal, J. (2005) *The Bill of Rights Handbook*, Juta, Cape Town, p. 276. See also *S v Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

²⁰⁷ Muntingh, L. (2008) *Preventing and combating torture in South Africa – a framework for action under CAT and OPCAT*, CSPRI and CSV, Bellville and Johannesburg, p. 4.

pressure”.²⁰⁸ Therefore any mental or physical pressure exerted on a person deprived of his or her liberty must be seen as an interference with the dignity of that person.²⁰⁹

While the Constitution is clear on the right to be free from torture, enabling domestic legislation criminalising torture under domestic law has not been enacted as at December 2011. The absence of legislation criminalising torture gives rise to three immediate problems.²¹⁰ First, the definition of torture in United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) needs to be incorporated into domestic legislation reflecting that: torture inflicts severe mental and physical suffering; it is done intentionally; it is committed by a public official or at the behest of a public official; and excludes pain and suffering inherent in or incidental to lawful actions. Second, common law offences (e.g. assault and attempted murder) are inadequate to prosecute perpetrators of torture. Third, in the absence of a statutory crime, the punishment of perpetrators becomes problematic. UNCAT requires that states parties shall “make these offences punishable by appropriate penalties which take into account their grave nature”.²¹¹ Therefore, legislation criminalising torture needs “to reflect on the punishment of perpetrators of torture to the extent that the punishment should reflect the gravity of the offence and expresses the revulsion of torture”.²¹²

To date, the South African Police Service (SAPS) is the only government department that has developed a policy on the prevention of torture; no other government department, including

²⁰⁸ Nowak, M. and McArthur, E. (2006) ‘The Distinction between torture and cruel, inhuman or degrading treatment’. *Torture*, Vol. 16 No. 3, p. 151.

²⁰⁹ Nowak, M. and McArthur, E. (2006), p. 151.

²¹⁰ Muntingh, L. (2007 b), p. 12. In *General Comment No. 2* the Committee against Torture (CAT) expressed itself as follows on the issue of criminalisation: [para 11]. ‘By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention’s overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence, (b) strengthen the deterrent effect of the prohibition itself, (c) enhance the ability of responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention.’ (CAT/C/GC/2).

²¹¹ Article 4(2).

²¹² Muntingh, L. (2007 b), p. 12.

the DCS, has developed such a policy. It remains the case that the language of the UNCAT and other key texts, such as the General Comments issued by UN Committee against Torture (CAT), has not entered the lexicon of the DCS.²¹³

A further issue to take note of in the discussion on torture is the extent to which the state is responsible for the actions of non-state actors, especially within the context of inter-prisoner violence and specifically sexual violence in prison settings.²¹⁴ From CAT General Comment 2 it is clear that the state's responsibility in respect of safe custody and freedom from torture extends beyond its own officials to include responsibility for the actions of non-state actors, i.e. other prisoners:

The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.²¹⁵

²¹³ Muntingh, L. And Fernandez, L. (2008) 'A review of measures in place to effect the prevention and combating of torture with specific reference to places of detention in South Africa.' *South African Journal on Human Rights*, Vol. 24 No. 1, p. 126. The word 'torture' appears nowhere in the Correctional Services Act, the Regulations to the Act, the White Paper on Corrections in South Africa or the Standing Orders.

²¹⁴ For a detailed discussion on sexual violence in prisons, see Muntingh L. and Satardien, Z. (2011) 'Sexual violence in prisons – Part 1: the duty to provide safe custody and the nature of prison sex'. *South African Journal of Criminal Justice*, Vol. 24 No. 1, pp. 1-18.

²¹⁵ Committee Against Torture, General Comment 2 (CAT/C/GC/2) para 18.

The UN Special Rapporteur on Torture is even more specific in this regard, noting that the Convention

... goes beyond the traditional concept of State responsibility and includes acts which are not directly inflicted by the State officials, but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture.²¹⁶

In summary, three issues are clear. First, the state has a constitutional obligation to promote, protect and uphold the right of prisoners to be free from torture and other ill-treatment. Second, this duty applies not only to the actions of its own officials but also to the actions of non-state actors (e.g. other prisoners) where such acts are committed through action, omission or acquiescence of officials. Third, in the absence of legislation criminalising torture and the lack of measures taken by the state to give effects to its obligations under UNCAT, the protection of the right to freedom and security of the person (and consequently the right to dignity) guaranteed by the Constitution, is substantially weakened in the case of people deprived of their liberty.

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3.3.4 The right to life

The right to life was included in the Interim Constitution²¹⁷ and ultimately in the 1996 Constitution.²¹⁸ The Constitutional Court dealt with the death penalty in *S v Makwanyane* and did so convincingly.²¹⁹ Linking the right to life with the right to dignity, the Constitutional Court found that this linkage, seen together with the risk of arbitrariness and error, as well as

²¹⁶ Report of the Special Rapporteur on Torture Add.5 para 39. Cited in Muntingh L. and Satardien, Z. (2011) 'Sexual violence in prisons – Part 1: the duty to provide safe custody and the nature of prison sex'. *South African Journal of Criminal Justice*. Vol. 24 No. 1, p. 10.

²¹⁷ s 9 of Act 200 of 1993.

²¹⁸ s 11 Act 108 of 1996.

²¹⁹ Currie, I. and De Waal, J. (2005) 'Life'. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, p. 280.

the availability of life imprisonment as an alternative, weighed more than the unproven deterrent value of execution and society's assumed need for retribution.²²⁰ In short, "retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity".²²¹

The death penalty was also the focus of the Constitutional Court in *Mohamed v President of the RSA*,²²² where the court had to deal with the extradition of a terrorism suspect to the USA where he faced the risk of the death penalty. The Court found that the state had failed in its positive duty to protect the right to life by extraditing Mr. Mohammed to the United States where he might receive the death penalty, and more specifically that the state failed to seek assurances from the USA government that Mr. Mohammed would be protected from the death penalty.²²³ By handing Mohamed over to the USA, it was found that the South African immigration authorities failed to respect and protect his constitutional right to life, the right to dignity and the right to be free from cruel, inhuman and degrading punishment.²²⁴ In a September 2011 decision the *Mohammed* case was used to refuse an extradition request by the Botswana government for two murder suspects who would face the death penalty if convicted.²²⁵

The right to life also imposes a duty on the state to protect citizens from life-threatening attacks,²²⁶ a duty which the *Carmichele* case²²⁷ delineates. Consequently, the state also has a duty to protect prisoners against such attacks by both officials and fellow prisoners.²²⁸ The Annual Reports of the DCS and the Judicial Inspectorate for Correctional Services indicate that there are worryingly high numbers of unnatural deaths of prisoners as well as complaints

²²⁰ Muntingh, L. (2007 b), p. 12.

²²¹ *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94, para 145.

²²² *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

²²³ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

²²⁴ Banda, J., Katz, A. and Hübschle, A. (2005) 'Rights versus Justice – issues around extradition and deportation in transnational terrorist cases'. *African Security Review* 14(4), p. 65.

²²⁵ *Tsebe v Minister of Home Affairs* South Gauteng High Court, Case no. 27682/10.

²²⁶ Currie, I. and De Waal, J. (2005) 'Life'. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, pp. 285-286.

²²⁷ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

²²⁸ Muntingh, L. (2007 b), p. 12.

alleging assault.²²⁹ This is discussed in more detail in Chapters 3 and 5. The overall impression remains that South Africa's prisons are extremely unsafe and that life-threatening situations are not uncommon, whether they are the making of prisoners or officials.²³⁰

3.3.5 Right to be free from slavery and servitude

Freedom from slavery and servitude enjoy non-derogable status in the Constitution. Given South Africa's history with prison labour,²³¹ it is necessary to make a number of observations insofar as the issue applies to the post-1994 era, an era in which questions have been raised about the constitutionality of compelling prisoners to perform labour.²³² International law prohibits forced labour²³³ but key instruments make an exception in the case of prison labour. The International Labour Organisation Forced Labour Convention No. 29 (1930) permits the use of forced labour for prisoners serving a sentence, but prohibits the use of prison labour for private enterprises.²³⁴ The International Covenant on Civil Political Rights (ICCPR) does not make a distinction between sentenced and unsentenced prisoners and permits forced labour for prisoners, provided that they are lawfully detained or under a lawful conditional

²²⁹ For 2010/11 the DCS reported a total of 51 such deaths and an estimated total of 5150 complaints of assault. In 2009/10 the Judicial Inspectorate for Correctional Services recorded 3756 complaints regarding assaults of prisoner-on-prisoner, and 2189 assaults of official-on-prisoner. The DCS has in general been tardy in responding to the problem and gang management strategy was reportedly developed and operationalised in the 2010/11 financial year. The influence of the prison gangs is discussed further in Chapter 4 (section 4.1).

²³⁰ *McCullum* case. UN Human Rights Committee, Communication No. 1818/2008. Delivered 2 November 2010.

²³¹ While various forms of forced labour were used during colonial times, the 1959 Prisons Act created a system of release-on-parole for short-term African prisoners on condition that they enter into strict employment agreements with a farmer. The system was open to abuse as a parole violation would result in a return to prison. (Van Zyl Smit, D. (1992), p. 31.)

²³² On 11 August 2010 the Portfolio Committee on Correctional Services held public hearings on the issue of prison labour, and the submission by CSPRI dealt specifically with the constitutionality of prison labour as was requested by the Portfolio Committee. PMG Report on the meeting of the Portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

²³³ International Labour Organisation Forced Labour Convention No. 29 (1930) and the International Labour Organisation Abolition of Forced Labour Convention No. 105 (1957) and ICCPR Art 8.

²³⁴ Art 2(2)(c).

release.²³⁵ The desirability of prisoners performing work appears to derive from common wisdom and a general wish that prisoners should be productive,²³⁶ a notion supported by the UNSMR.²³⁷

While a sentenced prisoner may not be compelled to perform labour as a form of punishment or as a disciplinary measure,²³⁸ the Correctional Services Act reflects the general support for prison labour by stating that labour performed by prisoners is aimed at fostering habits of industry and at assisting with the training of prisoners.²³⁹ It is also a general principle of the correctional system to be, as far as possible, self-sufficient and operate on “business principles”, this being a further justification for using prisoner labour.²⁴⁰ Work opportunities for prisoners should also not be occasional or sporadic but “sufficient work must as far as is practicable be provided to keep prisoners active for a normal working day and a prisoner may be compelled to do such work”.²⁴¹ Sentenced children enjoy additional protection in respect of labour. They may perform labour only for the purposes of training aimed at obtaining skills and for the benefit of their development, and may not perform labour that is inappropriate to their age or which places the child’s educational, physical, mental or social well-being at risk.²⁴²

That prison labour has not been a source of litigation is hardly surprising.²⁴³ Finding work opportunities for prisoners inside the prison system is increasingly difficult due to overriding

²³⁵ De Jonge, G. (1999) Still ‘Slaves of the State’: Prison Labour and International Law. In Van Zyl Smit, D. and Dünkel, F. (eds) *Prison Labour: Salvation or Slavery*, Ashgate: Aldershot, p. 327.

²³⁶ Gibbons, J. and Katzenbach, N. (2006) *Confronting Confinement*. The Commission on Safety and Abuse in America’s Prisons, Vera Institute of Justice, p. 11.

²³⁷ UNSMR Rules 71 to 76.

²³⁸ s 40(5) Correctional Services Act 111 of 1998.

²³⁹ s 37(1) (b) Correctional Services Act 111 of 1998.

²⁴⁰ s 3(2)(b) Correctional Services Act 111 of 1998.

²⁴¹ s 40(1) Correctional Services Act 111 of 1998.

²⁴² s 40(3)(b)-(c) Correctional Services Act 111 of 1998.

²⁴³ Submission by the CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

security concerns.²⁴⁴ In 2007/8 only 10 349 out of approximately 115 000 sentenced prisoners were placed in work opportunities, amounting to less than 10% of the sentenced population.²⁴⁵ The pervasive idleness characterising South African prison life contributes significantly to generally poor conditions of detention (such as being in overcrowded cells for most of the day) and must place a heavy burden on the mental health of prisoners.²⁴⁶ Prison conditions and the treatment of prisoners are discussed extensively in Chapter 5.

In respect of prison labour, three key issues are discussed below: access to work opportunities in prison and the right to work; the legal status of working prisoners and their payment; and meaningful and purposeful work.²⁴⁷ First, it can be assumed safely that the majority of prisoners would prefer to be active through work activities and other means (e.g. formal education, training, recreation and sport).²⁴⁸ However, the high unemployment rate in South Africa and other socio-economic realities militate against a possible claim by sentenced prisoners that they must have access to work. The low number of work opportunities currently available will, in all likelihood, persist for the foreseeable future. A more

²⁴⁴ Most work opportunities are on the terrain of the prison, prison farms or at technical and production workshops. However, prisoners classified as maximum security are excluded from these opportunities. Following the introduction of mandatory minimum sentences and a general increase in sentence tariffs, the proportion of prisoners classified as maximum security increased substantially as the formula used to calculate the classification assigns a heavy weight to the length of the sentence imposed.

²⁴⁵ Department of Correctional Services (2008) *Annual Report 2007/8*, Pretoria: Department of Correctional Service, p.51. It should be noted that the statistics provided for subsequent years, including 2010/11, reflect that there were in excess of 100 000 job opportunities provided. These figures do not accord with the statistics provided in earlier years and in all likelihood count 'work sessions' as opposed to sustained work opportunities, for example, being a cook in a prison kitchen. In view of this it is more likely still to be the case that approximately 10 000 sentenced prisoners are involved in sustained work opportunities.

²⁴⁶ Submission by CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

²⁴⁷ The three issues identified are by and large overlapping with those identified by D. van Zyl Smit and F. Dünkel (1999) 'Conclusion'. In Van Zyl Smit, D. and Dünkel, F. (eds) *Prison Labour: Salvation or Slavery*, Ashgate: Aldershot, p. 335-346.

²⁴⁸ Submission by CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

convincing claim, however, may be the right to access such services and opportunities to prepare them for their release as these are clear requirements in the Correctional Services Act and stand central to the purposes of the correctional system as described in the Act and the 2004 White Paper.²⁴⁹ The Correctional Services Act also makes a clear connection between labour as part of rehabilitation and skills training and labour that would presumably assist prisoners to reintegrate into society once released. While prisoners cannot lay claim to a right to work, there are more grounds for a claim to access services that would prepare them for release and re-entry into society.²⁵⁰

Second, while working prisoners are not employees of the DCS, their legal status remains uncertain due to their exclusion from the Basic Conditions of Employment Act (75 of 1997), Unemployment Insurance Act (63 of 2001) and the Occupational Health and Safety Act (85 of 1993).²⁵¹ If a prisoner suffers an injury during the performance of labour and the injury was not due to the fault or negligence of the prisoner and is of such a nature and extent that it will affect his/her future income-earning ability, an *ex gratia* payment at the discretion of the National Commissioner can be made.²⁵² Prisoners thus find themselves in a situation where they perform labour (e.g. working in a prison kitchen) but are not recognised as workers and excluded from the concomitant protections arising from this status.²⁵³

²⁴⁹ Submission by CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

²⁵⁰ Submission by the CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

²⁵¹ Department of Correctional Services Standing Orders (B-Orders) Order 3 Chapter 4, section 6.

²⁵² Department of Correctional Services Standing Orders (B-Orders) Order 3 Chapter 4, section 6.

²⁵³ Submission by CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

Prisoners who are performing labour do receive a gratuity but this is far removed from what can be accepted as market-related.²⁵⁴ The privatisation of a number of prison kitchens also raises concerns when private operators are generating profits whilst using prison labour in the privatised kitchens, presumably at the same gratuity scales applicable to prisoners performing other non-privatised types of work. This raises not only serious ethical questions about decision-making in DCS, but could amount to a violation of Rule 73(1)²⁵⁵ of the UNSMR²⁵⁶ and ILO Convention No 29 (1930).

Third, international²⁵⁷ and domestic law is clear that work performed by prisoners should be meaningful and have purpose. The DCS provides little information about the exact nature of the work performed by prisoners, but it is known anecdotally that a large proportion of working prisoners are engaged in dull repetitive tasks of an unskilled nature.²⁵⁸ There is thus limited potential that the skills and abilities acquired through such labour will enable released prisoners to find employment in the market where they have to compete with a large pool of unskilled work-seekers. Addressing this will require that skills development in prisons should be aligned to market needs and that the DCS take the necessary steps on a sufficient scale to place released and paroled prisoners in employment positions.²⁵⁹

²⁵⁴ The gratuity (2006) was R87.12 (US\$12.00) per month for the best paid working prisoner. Note that this may have been subject to adjustment.

²⁵⁵ 73. (1) Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.

²⁵⁶ Submission by the CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

²⁵⁷ The European Prison Rules, in line with the UNSMR, also requires that: Prison authorities shall strive to provide sufficient work of a useful nature (Rule 26(2)).

²⁵⁸ Submission by the CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes> Accessed 6 October 2011.

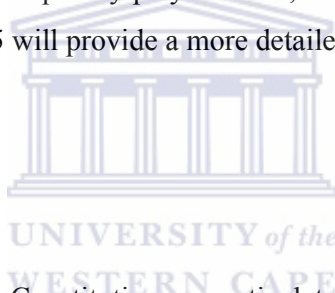
²⁵⁹ Submission by the CSPRI on prison labour to the Portfolio Committee on Correctional Services, 11 August 2010, PMG Report on the meeting of the portfolio Committee on Correctional Services of 11 August 2010, <http://www.pmg.org.za/report/20100811-public-hearings-inmate-labour-social-reintegration-adoption-minutes>. Accessed 6 October 2011.

3.3.6 Summary of issues

Reflecting on the post-1994 period, it should be asked what the relative importance was and is of prisoners' rights, as provided for in the Constitution, in framing, discussing and debating social policy, or the "rights rhetoric".²⁶⁰ The development of social policy can be driven by a number of concerns such as rights, managerialist concerns, or law and order objectives. There is a legitimate expectation that in a constitutional democracy emphasis should be on giving greater effect to rights and protecting citizens' rights. This has, in the case of prisoners, been a fragmented discourse with often competing agendas²⁶¹ and mixed messages. The mandatory minimum sentences legislation²⁶² clearly communicates a punitive approach and does so with limited regard to the individual offender; on the other hand, government is supportive of restorative justice²⁶³ – an approach diametrically opposed to retribution. In respect of prisoners' rights it remains thus cause for concern that this collective of rights, as an expression of constitutionalism, frequently plays second, if not third, fiddle to other strategic and political priorities. Chapter 5 will provide a more detailed analysis in this regard.

3.4 Accountability

3.4.1 Overview



The second broad aim of the Constitution, as articulated in the Preamble, refers to a "democratic and open society in which government is based on the will of the people". From this aim the notions of transparency and accountability can be derived as requirements for a constitutional democracy; they are also the antithesis of the apartheid government and thus central to constitutionalism in South Africa. Although the terms "accountability" and "transparency" are frequently used in a pair, this section will deal only with the former;

²⁶⁰ Lazarus, L. (2004), p. 16.

²⁶¹ Muntingh, L. (2007 b), p. 15.

²⁶² Act 105 of 1997.

²⁶³ The 2003/4 DCS Annual Report states: 'The Department holds a Restorative Justice Week every year in November where the focus is on reparation and restoration. To create awareness amongst personnel, offenders, victims, families and the community, DCS personnel and the community commemorated the 2003 Restorative Justice Week in all six regions. Offenders were encouraged and motivated to reach out to their victims to express their remorse and seek their forgiveness. Chaplains, social workers and other personnel worked together to organize restorative justice events and workshops with offenders and the community at various correctional centres.' (p. 34).

transparency will be discussed in section 3.5 below. Accountability is understood to mean the relationship “between the bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right”.²⁶⁴ This means that a government must be able to and indeed explain how it executed its mandate.²⁶⁵ The point has also been made that the normal features of a democracy (e.g. multi-party elections and universal suffrage) are necessary but not sufficient to ensure healthy accountability between citizens and the government.²⁶⁶ Democratic elections therefore do not make for clean government and new democracies remain haunted by human rights violations, nepotism and corruption, which do not disappear with the advent of democratic elections.²⁶⁷

The construct of accountability can be split into two dimensions: horizontal accountability and vertical accountability. According to Schacter, the state must be willing “to restrain itself by creating and sustaining independent public institutions to oversee its actions, demand explanations, and when circumstances warrant, impose penalties on the government for improper and illegal activity”.²⁶⁸ The accountability that the state imposes on itself and on governments is commonly referred to as horizontal accountability. Vertical accountability refers to the control external institutions exercise over a government, such as the electorate, the media and civil society.²⁶⁹ Accountability to international mechanisms, for example, UN Treaty Bodies, is also included within the vertical accountability relationship.

The fact that a relationship exists between the state and another internal or external body does not automatically result in an effective accountability relationship, and three principles need to be adhered to, namely transparency, answerability, and controllability. Transparency is discussed in the following section (section 3.5) and the focus here is on answerability and controllability. The answerability requirement states that decision-makers must be able to justify their decisions and actions publicly in order to substantiate that they are reasonable,

²⁶⁴ U4 Anti-Corruption Resource Centre *Corruption Glossary* <http://www.u4.no/document/glossary.cfm>

Accessed 6 October 2011.

²⁶⁵ Muntingh, L. (2007 b), p. 16.

²⁶⁶ Schacter, M. (2001) When Accountability Fails – a framework for diagnosis and action, *Isuma* Vol. 2 No. 2, p. 1.

²⁶⁷ Muntingh, L. (2007 b), p. 16.

²⁶⁸ Schacter, M. (2001), p. 2.

²⁶⁹ Schacter, M. (2001), p. 2.

rational and within their mandate.²⁷⁰ Answerability (and transparency) will, however, be meaningless if there are not mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions must therefore be able to exercise control over the institutions that they are overseeing.²⁷¹ Failure to hold government and individuals accountable creates the conditions for impunity to exist.²⁷²

3.4.2 Horizontal accountability

The description below deals with two relevant aspects of horizontal accountability: governance and the treatment of prisoners.

3.4.2.1 Horizontal accountability and governance

The governance of the prison system and the treatment of prisoners are inextricably linked, and this link is aptly described by Tapscott:

[T]he notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected. This relates both to the manner in which offenders are treated in the prison system and the opportunities which they are afforded to re-orientate their lives towards a more constructive future in society.²⁷³

The accountability architecture in respect of the governance of the South African prison system is well-developed. The DCS is accountable by means of its internal auditing and control procedures, internal disciplinary procedures, the Departmental Investigative Unit (tasked with investigating corruption), the Auditor General, the Public Service Commission, Department of Public Service and Administration, Standing Committee on Public Accounts, the Parliamentary Portfolio Committee on Correctional Services and the Standing Committee

²⁷⁰ U4 Anti-corruption Resource Centre, Glossary, <http://www.u4.no/document/glossary.cfm> Accessed 6 October 2011.

²⁷¹ U4 Anti-corruption Resource Centre, Glossary, <http://www.u4.no/document/glossary.cfm> Accessed 6 October 2011.

²⁷² Muntingh, L. (2007 b), p. 16.

²⁷³ Tapscott, C. (2005) *A Study of Best Practice in Prison Governance*, CSPRI Research Report No. 9, Bellville: Community Law Centre, p.3.

on Security and Constitutional Development. There is little unusual or unique in this arrangement, which is similar for all government departments, and these structures serve to hold the DCS accountable in respect of the budget, its strategic direction, management decisions, and to some extent, the behaviour of individual officials.²⁷⁴

Post-1994 the DCS exhibited significant governance problems which ultimately led to the establishment of the Jali Commission in 2001,²⁷⁵ although there were very strong indications as early as 1996 that the state had lost control over the Department.²⁷⁶ In respect of financial accountability the DCS has received qualified audits from the Auditor General since 2000.²⁷⁷ It was also later evident from the Jali Commission's findings that the DCS had not responded, or had responded poorly, to earlier investigations undertaken by other institutions of state such as the Department of Public Service and Administration and the Public Service Commission; in addition, and crucially, it had failed to enforce its own disciplinary code. These and other problems around governance will be discussed further in Chapters 3, 4 and 5. In overview it can be said that a prison system which does not hold its own staff accountable will create the space for impunity to set in, leading to corruption and human rights violations: in effect it undermines in small and insidious ways the rule of law.²⁷⁸

3.4.2.2 *Horizontal accountability and the treatment of prisoners*



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In addition to accountability relating to governance, accountability must also exist in respect of the treatment of prisoners. Generally very little information in this respect is available in either the DCS Annual Reports or the Annual Reports of the Judicial Inspectorate for Correctional Services. This problem is not unique, and researchers from other jurisdictions have remarked that there is in fact very little reporting available in the public domain, be it in informal narrative or formal research, on “what is happening behind the prison walls”.²⁷⁹

²⁷⁴ Muntingh, L. (2007 b), p. 16.

²⁷⁵ Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services (Proclamation No.135 of 2001). Hereafter ‘the Jali Commission’.

²⁷⁶ Muntingh, L. (2007 b), p. 18; PMG Report on the meeting of the Portfolio Committee on Correctional Services of 14 March 2000 <http://www.pmg.org.za/viewminute.php?id=3591> Accessed 22 November 2011.

²⁷⁷ See relevant DCS Annual Reports.

²⁷⁸ Muntingh, L. (2007 b), p. 18.

²⁷⁹ Boin, A., James, O., and Lodge, M. (2005) *New Public Management and Political Control: Comparing three European Correctional Systems*, Paper prepared for the SCANCOR Workshop ‘Autonomization of the State:

In respect of horizontal accountability and the treatment of prisoners, four routes are distinguished. First, there is the internal complaints and requests mechanism of the Department to which prisoners are entitled to have daily access,²⁸⁰ however, concerns have been expressed about its effectiveness in dealing with gross rights violations or other sensitive matters.²⁸¹ Second, the Correctional Services Act (111 of 1998) (Chapters 9 and 10) provides for the Judicial Inspectorate for Correctional Services and the appointment of Independent Visitors assigned to each prison in South Africa. The task of the Inspectorate is to “facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and conditions in prisons”.²⁸² The Inspecting Judge “inspects or arranges for the inspection of prisons in order to report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons”.²⁸³ The Inspectorate has not been without criticism, especially from the Jali Commission, and these matters will be examined in Chapters 4 and 6. The third layer in the accountability structure relating to the treatment of prisoners is made up of the so-called Chapter 9 institutions,²⁸⁴ which have broad mandates that could include the treatment of prisoners; any of these institutions can deal with prisoner issues insofar as it relates to their focus area. Whilst the South African Human Rights Commission (SAHRC) has a stronger association with the treatment of prisoners than other Chapter 9 institutions,²⁸⁵ it appears that since the establishment of the Judicial Inspectorate for Correctional Services all prisoner-related complaints received by the SAHRC are referred to the Inspectorate.²⁸⁶ In a limited sense the

From integrated administrative models to single purpose organizations’, Stanford University, 1-2 April 2005, p. 10.

²⁸⁰ s 21 Act 111 of 1998.

²⁸¹ Law Society of South Africa, (2004) *Prison Report 2003*, p.6; Muntingh, L. (2007 b), p. 18.

²⁸² s 85(2).

²⁸³ s 90.

²⁸⁴ These are the institutions created by the Constitution (in Chapter 9) designed to ensure transparency and accountability.

²⁸⁵ Chapter 9 of the Constitution establishes ‘state institutions supporting constitutional democracy’ and they are the Public Protector; South African Human Rights Commission; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality; Auditor General; Electoral Commission; and Independent Authority to Regulate Broadcasting (ss 182-192 of Act 108 of 1996).

²⁸⁶ Dissel, A. (2003) *A Review of Civilian Oversight over Correctional Services in the Last Decade*. CSPRI Research Report No. 4. Bellville: Community Law Centre, p. 53.

South African Police Services (SAPS) also serves an accountability function in respect of the treatment of prisoners as it is obliged to investigate all charges laid by prisoners, including charges laid against prison officials.²⁸⁷ Fourth, after 1990 there has been an increase in the use of litigation to address the treatment of prisoners, their access to health care services, the right to vote and the administration of the parole system.²⁸⁸

In respect of the treatment of prisoners, an effective accountability structure would need to meet two basic requirements. First, it must be able to conduct effective investigations and thus have the necessary independence, impartiality and capacity (skills, authority and person-power) to do so without interference and manipulation from the target(s) of the investigation. Second, such a mechanism needs to be able to make binding decisions that are enforced. The extent to which designated oversight structures have been effective in holding the DCS accountable, as measured against Constitutional and other statutory requirements, is discussed in detail in Chapters 4 and 5 with specific reference to Parliament and the Judicial Inspectorate for Correctional Services.

Horizontal accountability mechanisms are provided for in the Constitution (and subordinate legislation) and are hence fundamental to constitutionalism in South Africa. With regard to the prison system, the duty is therefore one of overseeing whether constitutional values and precepts find expression and are complied with.

3.4.3 Vertical accountability

In respect of the state's accountability relationship to external institutions, four categories of institutions are distinguished: the electorate, the media, civil society, and international treaty monitoring bodies.

3.4.3.1 The electorate

²⁸⁷ Muntingh, L. (2007 b), p. 19.

²⁸⁸ De Vos, P. (2004) *Prisoner's rights litigation in South Africa since 1994: A critical evaluation*, CSPRI Research Report No. 3, Community Law Centre, Bellville; Mujuzi, J. (2009) 'Releasing Terminally Ill Prisoners on Medical Parole in South Africa', *South African Journal of Bioethics and Law*, Vol. 2; Mujuzi, J.D. (2011) Unpacking the law and practice relating to parole in South Africa, *Potchefstroom Electronic Law Journal*, Vol. 14 No. 5.

While elections and the electorate are central to the democratic order, elections are a fairly blunt instrument of control in the hands of the voter.²⁸⁹ Political accountability exercised by the electorate is problematic for a number of reasons: it is not very discerning in pinpointing the source of the electorate's dissatisfaction; it does not articulate what the electorate would prefer; and it may be misinterpreted by political actors.²⁹⁰ Moreover, prisoners not only form a small constituency, but their issues and problems do not evoke the same political support, for example, as access to education and health care. In view of these observations it must be conceded that the fate of prisoners is unlikely to be determined at the ballot box.²⁹¹

3.4.3.2 The media

The role of the media in post-1994 in placing prison reform issues on the agenda has been substantial, and a more detailed assessment is given in Chapter 6 (section 2.2.4). Numerous media reports about corruption, rights violations and prison overcrowding have played an important role in educating the general public about what is happening in the prison system. In addition, other publications²⁹² and art works,²⁹³ a secretly-made video by prisoners at Grootvlei prison recording corrupt and other practices,²⁹⁴ as well as the extensive media coverage of the Jali Commission's public hearings, all served to educate the public about the South African prison system.

Nonetheless, the media had not been consistent in its portrayal of prisoners, and three stereotypes emerged post-1994.²⁹⁵ The first, related to the high violent crime rate, portrays prisoners as “dangerous criminals that deserve all possible punishments and [who] are

²⁸⁹ Stanley, R. (2005) Controlling the Police in Buenos Aires – a case study of horizontal and social accountability. *Bulletin of Latin American Research*, 24 No. 1, p. 275.

²⁹⁰ Muntingh, L. (2007 b), p. 20.

²⁹¹ Muntingh, L. (2007 b), p. 20.

²⁹² In 2004 Jonny Steinberg published *The Number*, providing a detailed description of the inner workings of the prison gangs in South Africa. The book received wide recognition domestically and internationally.

²⁹³ A series of photographs about life at Pollsmoor prison by Cape Town photographer Mikhael Sobotsky attracted wide media attention, giving the public a rare glimpse of life inside. The photographs are accessible at <http://www.subotzkystudio.com/die-vier-hoeke/> Accessed 15 October 2011.

²⁹⁴ ‘Grootvlei prison head won't be moved’ *Mail and Guardian*, 1 January 2002, <http://mg.co.za/article/2002-01-01-grootvlei-prison-head-wont-be-moved>, Accessed 15 October 2011.

²⁹⁵ Muntingh, L. (2007 b), p. 21.

incorrigible - they are indeed the personification of South Africa's crime problem".²⁹⁶ The media portrayal of violent criminals would play an important role after 1994 in shaping the response to crime. In contrast to this stereotype, a more sympathetic stereotype depicts prisoners as victims of the injustices of the prison system, especially its overcrowding. A third stereotypical portrayal is the rehabilitated prisoner – the prisoner who has used his opportunities and bettered himself. The stereotypes are important because in many ways they shape not only public opinion but the views of policy-makers and other influential stakeholders. These conflicting views of prisoners, and the prison system in general, should not be ignored in understanding how the contours of prison reform were shaped after 1994.

Nonetheless, media reporting on the prison system after 1994 remains sporadic and scandal-driven with few investigative reports. Reporting on prison-related issues is largely incident-driven; it seldom contextualises these incidents within the broader reform challenges facing the prison system. This results in an “atrophied reflection” where many individualised facts are presented²⁹⁷ but where few reports delve beyond immediate epiphenomena to engage critically and in-depth with persistent systemic issues.²⁹⁸

3.4.3.3 Civil society

Public participation in the workings of government and the legislature is core to the South African constitutional order²⁹⁹ and inherited from a strong tradition of “protest politics” that contributed to the dismantling of apartheid. Civil society, in all its myriad of forms, has played, and continues to play, an important role in political and rights discourses. In respect of prisons and the rights discourse, this involvement would typically refer to rights-focused NGOs, faith-based organisations, service-delivery NGOs, the private sector and organised labour.³⁰⁰ While civil society organisations have indeed become more vocal about prison reform issues, especially since 2003 (see Chapter 6), it remains a fragmented and segmented

²⁹⁶ Muntingh, L. (2007 b), p. 21.

²⁹⁷ Filho, A. (2005) *The Role of the media in the civilian oversight of the police in Brazil*. Conference on Police Accountability and the Quality of Oversight, 19-21 October 2005, Ministry of Foreign Affairs, The Hague, pp. 3-4.

²⁹⁸ Muntingh, L. (2007 b), p. 21.

²⁹⁹ Muntingh, L. (2011) *The state of civil society participation in Parliament*, Bellville: Community Law Centre.

³⁰⁰ Muntingh, L. (2008) *A Societal Responsibility The role of civil society organisations in prisoner support, rehabilitation and reintegration*, Pretoria: Community Law Centre and Institute for Security Studies.

sector. This is, however, not unique to the prison system and other sectors exhibit similar traits.

Immediately after 1994, however, there was greater coherence, which led in early 1995 to the establishment of an inter-sectoral structure, the Transformation Forum on Correctional Services (TFCS), comprising of representatives from NGOs, Parliament, the DCS and the Ministry³⁰¹ But the TFCS did not enjoy the support of the then Minister of Correctional Services (Mzimela), and by September 1996 it had dissolved.³⁰² The TFCS is discussed in more detail in Chapter 6 (section 3.1).

Even though the TFCS failed in the mid-1990s to provide an acceptable forum for inter-sectoral dialogue, this does not negate the need for such a forum. Whether the approach taken by the TFCS was the correct one is debatable, but the need remains for civil society, the DCS and other stakeholders to engage on substantive strategic policy issues.³⁰³ Furthermore, there remains a need for a more inclusive and possibly consensus-building discourse in civil society on prison reform, whereby organisations representing a range of constituencies (e.g. children, health care and women) also become involved in prison reform.³⁰⁴ Lastly, whilst there has been a significant increase in the research out-put on prisons and prison reform since 2003,³⁰⁵ substantive areas continue to under-researched. The dissemination of reliable information is a “key function of civil society and serves to counter the often emotive or poorly informed responses encountered in the current discourse”.³⁰⁶

3.4.3.4 Treaty bodies

The Constitution, in section 39(1)(b), requires that when interpreting the Bill Rights, a court, tribunal or forum “must” consider international law and this the Constitutional Court has

³⁰¹ Giffard, C. (1997) *Out of Step? The Transformation process in the South African Department of Correctional Services*. Dissertation submitted in partial fulfilment of the degree of Master of Science in Criminal Justice Studies, Scarman Centre for the Study of Public Order, University of Leicester, pp. 33-34.

³⁰² Giffard, C. (1997), pp. 33-34.

³⁰³ Muntingh, L. (2007 b), p. 23.

³⁰⁴ Muntingh, L. (2007 b), p. 21.

³⁰⁵ Sloth-Nielsen, J. (2007) The state of the nation’s prisons. In Buhlungu, S., Daniel, J., Southall, R., Latchman, J. *The State of the Nation 2007*. Cape Town: HSRC Press.

³⁰⁶ Muntingh, L. (2007 b), p. 21.

done regularly,³⁰⁷ as have other courts in the South African judicial hierarchy.³⁰⁸ Within the prisons discourse three binding international treaties are of particular significance: the UN Convention on the Rights of the Child (CRC), UNCAT, and the Optional Protocol to the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT).³⁰⁹ In addition to these international instruments, there is also a host of other instruments in the form of guidelines, minimum standards and principles relevant to people deprived of their liberty.³¹⁰ After re-entering the international community, South Africa

³⁰⁷ For example in *S v Makwanyane* 1995 6 BCLR 665 CCT/3/94.

³⁰⁸ For example in *Mthembu v S* [2008] ZASCA 51 (10 April 2008).

³⁰⁹ Muntingh, L. (2007 b), p. 21.

³¹⁰ Resolution on Guidelines and measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or degrading Treatment or Punishment in Africa (Robben Island Guidelines on Torture – 2002), African Charter on Human and Peoples’ Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. Declaration on the Protection of All Persons from Enforced Disappearance, Adopted by General Assembly resolution 47/133 of 18 December 1992. Guidelines for Action on Children in the Criminal Justice System, Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997. Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 37/194 of 18 December 1982. Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary

ratified the CRC and UNCAT but has failed to meet its reporting obligations, indicating that government has not prioritised reporting on measures taken to give effect to obligations under these two treaties.³¹¹

Particularly important in relation to the treatment of prisoners is OPCAT, which South Africa signed in September 2006 but by December 2011 had not yet ratified. OPCAT makes provision for two unique procedures in international law. First, states parties are subject to unannounced visits and unrestricted access by the international Sub-Committee on the Prevention of Torture (SPT) to any place of detention in the jurisdiction of signatories to the Protocol. Second, the Protocol obliges states parties to establish a National Preventive Mechanism (NPM) with essentially the same powers.³¹² In the development of human rights law, this is indeed a revolutionary procedure which could have significant implications for the South African prison system.

Executions Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989. Safeguards guaranteeing protection of the rights of those facing the death penalty; Code of Conduct for Law Enforcement Officials, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984. UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000. United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990. United Nations Standard Minimum Rule for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Adopted by General Assembly resolution 40/33 of 29 November 1985, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Adopted by General Assembly Resolution 65/229 on 21 December 2010.

³¹¹ In the case of the CRC the first report was due in 1998 and submitted in 2000. The next report was due in 2003 and is yet to be submitted. In the case of UNCAT, the first report was due in 1999 but an Initial Report covering the period 1999 to 2002 was submitted in 2005.

³¹² Long, D. and Boeglin Naumovic, N. (2004) *Optional Protocol to the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment*. San Jose and Geneva: APT and Inter-American institute for Human Rights.

The South African government's response in respect of the CRC and UNCAT has been less than encouraging and the impact of international law has not been felt in any significant way in the prison system.³¹³ The only noticeable engagement on the topic from the state has been the establishment of thematic committee on torture by the SAHRC.³¹⁴ Civil society organisations, however, have shown more interest in using international law and engaging with the international treaty monitoring bodies; this is discussed in Chapter 6 (section 3.5).³¹⁵ Nonetheless, there appears to be limited awareness and knowledge of the international instruments and binding international law amongst officials in the South African prison system.³¹⁶ This is discussed further in Chapter 5 (section 4).

3.5 Transparency

Nineteenth-century Europe saw the disappearance of public floggings, torture and executions, and the spectacle of punishment was removed from the public's gaze and hidden behind prison walls as imprisonment replaced the physical excesses on the body of the offender.³¹⁷ However, the emergence of the prison as punitive institution also came with certain costs to democratic values, as punishment became an increasingly hidden part of the criminal justice system³¹⁸ and has been characterised as opaque to outsiders, run by bureaucrats and more concerned with efficiency and technicalities than with justice.³¹⁹ It is possibly a function of their purpose (detainment) and emphasis on security that prison systems have a natural tendency to gravitate away from a culture of transparency and openness; it is perhaps also because they have seldom had experience of the benefits of openness and transparency.³²⁰

³¹³ Muntingh, L. (2007 b), p. 24.

³¹⁴ SA Human Rights Commission (2010) *Annual Report 2009/10*. Johannesburg: SA Human Rights Commission, p. 48.

³¹⁵ Muntingh, L. (2008) 'The betrayal of Steve Biko – South Africa's initial report to the UN Committee against Torture and the response of civil society'. *Law, Democracy & Development*. Vol. 12 No. 1.

³¹⁶ Muntingh, L. (2007 b), p. 24.

³¹⁷ Foucault, M. (1977) *Discipline and Punish – the birth of the prison*, London: Penguin, p. 14.

³¹⁸ Muntingh, L. (2007 b), p. 25.

³¹⁹ Bibas, S. (2005) Transparency and Participation in Criminal Procedure. *New York University Law Review*, Vol. 86 No. 3, p. 912.

³²⁰ Muntingh, L. (2007 b), p. 26.

The apartheid government made sure that as little as possible was known about what was happening in South Africa's prisons. For example, the 1959 Prisons Act made it an offence to publish any false information about prisons or prisoners and placed a heavy onus on commentators (e.g. journalists) to verify information with the authorities prior to publication.³²¹ Failure to abide by this requirement could have resulted in criminal sanction. The combined effect of the DCS being a militarised prison service and the previous regime's state security legislation made a transparent prison system impossible as it was deliberately kept from public view.³²² Nonetheless, the democratisation of South Africa did not see a rapid reversal of this situation, and even the Jali Commission, in its final report, was left exasperated at the culture of silence and secrecy.³²³

With regard to interpreting the Bill of Rights, the Constitution emphasises "the values that underlie an open and democratic society".³²⁴ This is given further specificity with reference to the principles of co-operative government, which require "effective, transparent, accountable and coherent government".³²⁵ It is from this requirement that it is demanded from a constitutional democracy that the prison system must function in a transparent manner. In very blunt terms it means that officials in the prison system have a duty to act visibly, predictably and understandably.³²⁶ More specifically, the actions of officials must be predictable in that they should be guided by policy, legislation, regulations, standing orders and good practice. When called to account, officials must be able to motivate their decisions and actions in a manner that is rational and justifiable. In sum, it needs to be known what

³²¹ Van Zyl Smit, D. (1992), pp. 341-343.

³²² The Department's senior officials later adopted a deliberate strategy of aligning the Department with those sections of Government that made up the 'securocracy' as opposed to those providing social services. The reason for this was that there was an opportunity to secure an increased budget and possibly gain full Departmental status if, given the 'prevailing political climate', it were seen as a Department protecting the security of the State. Indeed, in 1959, the Department became a full State department when the Prisons Act No. 8 of 1959 was promulgated. This alignment with the 'securocracy', however, encouraged a culture of secrecy in the way the Department performed its functions, and this has carried over into the post-1994 period. The culture had, and continues to have, a bearing on the extent of corruption and maladministration in the Department with the general public being oblivious to its existence (Jali Commission (2006), pp. 43-44).

³²³ Jali Commission, pp. 944-945.

³²⁴ s 39(1)(a) Act 108 of 1996.

³²⁵ s 41(1)(c) Act 108 of 1996.

³²⁶ Transparency International 'What is transparency?'

http://www.transparency.org/news_room/faq/corruption_faq

officials are doing, and when asked, they must be able to provide an understandable and predictable answer.³²⁷ However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.³²⁸

Effective transparency also requires that information of a particular depth and quality must be available to oversight structures and the public. Issuing evasive statements such as “a thorough investigation was conducted” or “appropriate action was taken” without actually presenting the detailed facts does little to inform the public or oversight structure if an investigation was actually conducted or any action indeed taken.³²⁹ Even close observers and oversight bodies often find it difficult to penetrate the fog of the prison system, as has been demonstrated by the Jali Commission.³³⁰ Frustrated and incomplete investigations or explanations increase the tension and suspicion between the officials inside the system and those on the outside of the system by widening the knowledge divide.³³¹

In the prison environment effective investigations into rights violations and corruption are of particular importance because they serve three purposes.³³² The first is to clarify the facts and the acknowledgement of state and individual responsibility; second, to identify measures to prevent torture and ill-treatment of detainees; third, to facilitate the prosecution and disciplining of perpetrators, as well to ensure as full reparation and redress for victims. In addition, investigations should be conducted by impartial, independent and competent authorities promptly and be open, inclusive and participatory in manner.³³³ For investigations to enjoy legitimacy, they need to address the concerns, perspectives, and contributions of

³²⁷ Muntingh, L. (2007 b), p. 25.

³²⁸ De Maria, W. (2001) Commercial-in-Confidence: An obituary to transparency? *Australian Journal of Public Administration*, Vol. 60 No. 4, p. 92; Hammarberg, T. (2001) Searching the truth – the need to monitor human rights with relevant and reliable means. *Statistical Journal of the United Nations*, ECE 18, pp. 131-140.

³²⁹ Gennaco, M. (2006) Towards Increased Transparency in the Jails and Prisons: Some Optimistic Signs. *Journal of Law and Policy*, Vol. 22, p. 197.

³³⁰ ‘Whenever the investigators got close to penetrating a problem, a shroud of silence was drawn around the person or the issue that was being investigated’ (Jali Commission, p. 35.).

³³¹ Bibas, S. (2005) Transparency and Participation in Criminal Procedure. *New York University Law Review*, Vol. 86 No. 3, p. 912.

³³² *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading treatment or Punishment*, Recommended by General Assembly resolution 55/89 of 4 December 2000. See Principle 1

³³³ Gennaco, M. (2006), p. 196. UNCAT Article 13.

outside agencies; the results also need to be made public as they serve to educate officials and the public about what is happening inside prisons and thereby promote transparency.³³⁴ Reporting on measures taken to address human rights violations are of central importance in establishing a human rights-based regime in the prison system. As such, Article 19 of UNCAT expressly requires reporting on “the measures taken to give effect to [the state party’s] undertakings under this Convention” and this should be seen as distinct from creating a legislative framework aimed at promoting the protection of human rights.³³⁵

4. Conclusion

This chapter presented a number of key concepts to be used in the thesis and sketched the four fundamental requirements of a prison system in a constitutional democracy. As such, these can also be understood to articulate the expectations of transformative constitutionalism in South Africa. Purposefully the chapter used examples to illustrate particular issues, since the Constitution is indeed aimed at changing the nature of South African society as well as the institutions of state. In the subsequent chapters the analysis will draw on these in order to give an account of prison reform after 1994.

Four key points have been made so far. The first is that reform through crisis is an acknowledged construct and that the reform-crisis thesis fits the events that unfolded in the prison system after 1994. These are described in Chapters 3-6. How the DCS responded to the crises would very much shape the history of prison reform after 1994. The new democratic order placed radically different demands on an organisation that was highly institutionalised, preserving and conservative in outlook and not responsive to external influences. In responding to crises, it was noted that organisations also have their own constraints which may aggravate the situation if not dealt with.

Second, searching for, establishing and sustaining legitimacy is fundamental to prison reform. Prisons suffer from an inherent legitimacy deficit which can be addressed only by aspiring to and giving tangible and sustained expression to the values and precepts of the Constitution. It was thus argued that there are certain basic requirements of a prison system in a

³³⁴ Gennaco, M. (2006), pp. 197-198. Muntingh, L. (2006 b) *Approaches to investigating prison corruption*. CSPRI Research Report No. 12, Bellville: Community Law Centre, pp. 46-48.

³³⁵ CAT/C/ZAF/CO/1.

constitutional democracy. An underlying philosophy (and knowledge) must create the anchor points for justifying and using imprisonment. Furthermore, there should be a clear and full recognition of prisoners' rights and this should be experienced in practice. Accountability and transparency are mutually reinforcing as key requirements for the democratic order – their absence leaves the recognition of rights and the underlying philosophy without substance and meaning. With reference to the research question, constitutionalism in South African prison reform can thus be understood to encompass these four requirements, namely an underlying philosophical and knowledge base, the recognition of rights, accountability of the executive, and transparency.

Third, effective policy-making producing good policies is a carefully managed process that is highly reliant on knowledge and information. When faced by crisis, policy-makers must not only act with haste but develop effective policies. Poorly institutionalised organisations will struggle to implement reforms. Reform by crisis is not without challenges because of the fluidity of the situation. Effective policy-making and the re-institutionalisation of the organisation are thus key to bringing about stability and enabling meaningful reform that sees the intended fundamental change of the policy sector.

Fourth, imprisonment and prison regimes impose rights limitations on prisoners and these limitations and the depth of limitations require rigorous monitoring and oversight on multiple levels. Prison systems generally lack transparency, and it is for this reason that effective and potent oversight is an inherent requirement of prison reform. The failure of oversight creates the risk that it will be “business as usual”, or worse, that perverse results, enabled by a crisis situation, may ensue.

In the subsequent chapters it will be argued that the new constitutional order placed two broad demands on the post-1994 prisons system: adherence to good governance principles and compliance with human rights standards. While the expectation was that the Constitution would compel widespread and penetrative reform in respect of governance and human rights, in actuality a more complex history emerged.

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Chapter 3 The crises in the prison system

1. Introduction

This chapter defines and describes the crisis situation in the prison system as it unfolded after 1994. In Chapter 2 it was argued that the South African prison system faced two crises after 1994, the first being the demands placed on the prison system by the new constitutional and democratic order, and the second, the collapse of order and discipline, or rather the failure of governance. This found particular expression in the form of widespread corruption and violations of prisoners' rights. Many of the dimensions of the crises of governance still exist, but the period 1994 to 2004 was definitive in this regard. Coming to grips with prison reform after 1994 requires a thorough appreciation of the nature of the crisis in the prison system as it unfolded during this period.

In the first part of the chapter, the relationship between governance and crisis is explored in the light of the theoretical discussion in Chapter 2. The next section takes stock of the prison system which the new, democratically elected government inherited in 1994, and it will be argued that much of the crisis can be traced back to the structure, functioning and thinking present in the apartheid-era prison system as it existed in 1994. The section thereafter describes the features of the failure of governance as uncovered by various investigations into the affairs of the DCS. While corruption is prominent among those features, inadequate policy development as well as leadership instability also affected the state of governance. The chapter concludes with a number of observations about governance and corruption in the prison system.

2. Good governance

The crisis that developed in the DCS after 1994 should be seen against the constitutional requirements for good governance in the public service, which, as outlined in Chapter 1 (section 3), is understood in this analysis as a key component of constitutionalism. In this section, the requirement is explored and augmented with further explanation from the literature. The aim is to establish a working definition of good governance principles against which to assess the failures of governance in DCS and the way in which they developed into

a crisis. Furthermore, it is argued that, especially in times of crisis, adherence to the principles of good governance is essential for ensuring the most constructive outcome from crisis-induced reform.

2.1 Good governance is a constitutional requirement

Good governance is a requirement of the Constitution. Section 195 of the 1996 Constitution improved substantially on the principles for a public service set out in the Interim Constitution.¹ The 1996 Constitution sets out the basic values and principles to govern public administration derived from the democratic values and principles enshrined in the Constitution.² A high standard of professional ethics must be promoted and maintained in the public service. Resources must be used in an efficient, economic and effective manner. The approach to public service and nature of services rendered should be development-oriented. There may be no discrimination, and services must be provided impartially, fairly, equitably and without bias.³ The public service should respond to people's needs and the public must be encouraged to participate in policy-making. The public service must be accountable and transparent through the timely and accessible provision of accurate information. Human resource management in the public service should enable career-development practices. The public service should be broadly representative of the South African population, with employment and management practices based on ability, objectivity and fairness, and aimed at addressing the imbalances of the past in order to achieve broad representation.

It is furthermore a requirement of the Constitution that national legislation, such as the Correctional Services Act (111 of 1998), must ensure the promotion of the values and principles described above.⁴ The Public Service Act (Proclamation No. 103 of 1994) requires that the National Commissioner of Correctional Services, as is the case with other heads of departments, shall be responsible “for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State

¹ s 212(2) Act 200 of 1993.

² s 195(1) Act 108 of 1996.

³ s 195(1) (c-d) Act 108 of 1996. For a more detailed discussion, see Bolton, P. (2005) *The legal regulation of government procurement in South Africa*, Thesis submitted in (partial) fulfilment of the requirements for the degree Doctor Legum, Faculty of Law of the University of the Western Cape, pp. 102-106.

⁴ s 195(3) Act 108 of 1996.

property, and he or she shall perform the functions that may be prescribed”.⁵ The fiduciary duties of the accounting officer (i.e. National Commissioner in DCS) are set out in the Public Finance Management Act (1 of 1999) and emphasise efficiency, effectiveness, accountability and transparency.⁶ The Prevention of Corrupt Activities Act (12 of 2004) provides guidance to ensure that suspected corruption is reported to the police.⁷

The Correctional Services Act (111 of 1998) adds to these standards by requiring that the DCS should fulfil the purposes of the correctional system, be self-sufficient as far as practicable, operate according to business principles, and perform all work necessary for its effective management.⁸ Chapter 11 of the Correctional Services Act also stipulates requirements in respect of compliance monitoring, and obliges the National Commissioner to assess at regular intervals on all levels of the DCS the extent of compliance with regard to: the effectiveness of operations; the reliability of financial, operational and management information; the protection and safeguarding of assets and interests; the effective utilisation of human and other resources; and the degree to which programme objectives are being achieved.⁹ The powers of the National Commissioner to promote good governance are further enhanced by the Departmental Investigation Unit (DIU)¹⁰ and the Code Enforcement Unit (CEU).¹¹ The DIU’s aim is to investigate theft, fraud, corruption and maladministration, while the CEU deals with disciplinary matters. The National Commissioner is also required to include in the Department’s annual report a report on compliance monitoring, investigations conducted by the DIU and disciplinary actions undertaken by the CEU.¹²

⁵ s 7(3)(b) Public Service Act (Proclamation No. 103 of 1994).

⁶ ss 38 – 43.

⁷ The Act requires that persons in positions of authority (i.e. the National Commissioner of Correctional Services) who know or suspect that a corrupt act (as set out in the legislation) has been committed or that theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 [US\$14 500] or more has occurred, must report this to the police (s 34, Prevention of Corrupt Activities Act (12 of 2004)).

⁸ s 3(2) of Act 111 of 1998, coming into force on 25 February 2000.

⁹ s 95(2) Act 111 of 1998, coming into force on 19 February 1999.

¹⁰ s 95A of Act 111 of 1998 inserted by s 70 of Act 25 of 2008.

¹¹ s 95B of Act 111 of 1998 inserted by s 70 of Act 25 of 2008.

¹² s 95C of Act 111 of 1998 inserted by s 70 of Act 25 of 2008.

The 2004 White Paper, in Chapter 14, sets out the governance and administration aims of the DCS, including the duties of the National Commissioner.¹³ As accounting officer the National Commissioner is responsible for ensuring: good governance; service evaluation against set targets; the implementation of anti-corruption and anti-fraud strategies; compliance with the Public Finance Management Act; and that the DCS functions on the basis of a clear code of conduct, professional ethics and an enforceable disciplinary code.

When assessing the state of governance in the DCS now, it is apparent that there exists a legal and policy framework to guide the Department's operations and that this framework is derived from the principles for the public service set out in the 1996 Constitution, with the Interim Constitution as precursor. The current legal and policy framework, however, evolved over time and much of the national legislation referred to above was developed and came into force after 1999. Following the Jali Commission and other investigations, the DCS developed some internal capacity to address governance concerns (see Chapter 4 section 2.3). Moreover, efforts by external players (e.g. Public Service Commission-PSC and the Department of Public Service and Administration-DPSA) and the development of appropriate legislation have been important in shaping the Department's response to corruption as one of the governance problems. However, the policy and legislative shortcomings that existed prior to 1999 had a material effect on governance in the DCS, as was the case in other sectors of the public service.

2.2 Dimensions of good governance

The analysis here will focus on governance in the public sector. As noted above, the Constitution requires that the public service must operate in a manner that is to the benefit of all the people of South Africa. Governance is therefore not about institutions or the ends of government but about the quality of processes of government¹⁴ and thus the manner in which power is exercised.¹⁵

¹³ Department of Correctional Services (2004 b) *White Paper on Corrections in South Africa*. Pretoria: Department of Correctional Services, pp. 188-189.

¹⁴ Abdellatif, A.M. (2003) *Good governance and its relationship to democracy and economic development*. Paper delivered at the Global Forum III on fighting corruption and safeguarding Integrity, Seoul, 20-31 May 2003, p. 3; Rothstein, B. and Teorell, J. (2008) What is quality of government? A theory of impartial

2.2.1 Definition of good governance

The United Nations Development Programme (UNDP) regards governance as “the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.”¹⁶ With its emphasis on human development, UNDP regards the following as definitive qualities of good governance: it is participatory, transparent and accountable; furthermore, it is effective, equitable and promotes the rule of law. As such, good governance ensures that “political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.”¹⁷ Good governance principles are thus particularly relevant to the prison system since prisoners are especially vulnerable to rights violations and other deprivations.

The World Bank defines governance as the traditions and institutions by which authority in a country is exercised.¹⁸ More specifically, this includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.¹⁹ The World Bank also identifies six dimensions of governance: (1) Voice and Accountability – measuring perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media. (2) Political

government institutions. *Governance: An International Journal of Policy, Administration and Institutions*, Vol. 21 No. 2, pp. 165-190.

¹⁵ Goran, H. and Dele, O. (2000) *African perspectives on governance*, Africa World Press, p. 6 cited in Abdellatif, A.M. (2003), p. 3.

¹⁶ UNDP (1997) *Governance for sustainable human development - A UNDP policy document*, Good governance - and sustainable human development. <http://mirror.undp.org/magnet/policy/chapter1.htm#b> Accessed 28 October 2011.

¹⁷ UNDP (1997)

¹⁸ Kaufmann, D., Kraay, A. and Mastruzzi, M. (2008) *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007*. Policy Research Working Paper 4654, Washington: The World Bank Development Research Group Macroeconomics and Growth Team & World Bank Institute Global Governance Program, p. 7.

¹⁹ Kaufmann, D., Kraay, A. and Mastruzzi, M. (2008), p. 7.

Stability and Absence of Violence – measuring perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism. (3) Government Effectiveness – measuring perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies. (4) Regulatory Quality – measuring perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development. (5) Rule of Law – measuring perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. (6) Control of Corruption – measuring perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.²⁰

At the conceptual level, Rothstein and Teorell argue that impartiality is the core value underpinning good governance (which they refer to as quality of government).²¹ The selective or uneven implementation of policies (e.g. staff appointments based on concerns other than merit) are transgressions of the impartiality principle. The principle of impartiality is also a requirement in the 1996 Constitution, and is read together with the requirements that services must be rendered fairly, equitably and without bias.²² In its essence good governance requires that the state must exercise its powers in an impartial manner.

2.2.2 Good governance and human rights

If it is accepted that good governance is essentially about the processes of government and how power is exercised, it follows that it is indivisible from, and an essential element in, the realisation of human rights. Within the context of prison reform this is critically important. In a 2000 resolution the then UN Human Rights Commission recognised that “transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a

²⁰ Kaufmann, D., Kraay, A. and Mastruzzi, M. (2008), p. 7.

²¹ Rothstein, B. and Teorell, J. (2008), pp. 165-190.

²² s 195(1)(d).

foundation is a *sine qua non* for the promotion of human rights”.²³ This link has been confirmed in subsequent resolutions by the Human Rights Commission (and its successor, the Human Rights Council)²⁴ and also reflected in the Millennium Development Goals. It is indeed difficult to conceive of a situation where human rights are upheld and even flourish that is not characterised by a substantive measure of compliance with good governance principles. Good governance and human rights are mutually reinforcing since human rights standards provide a set of values to guide government in its work and a set of standards for performance against which government can be held accountable. Human rights principles also inform the substance of efforts aimed at improving good governance, such as the development of legislative frameworks, policies, programmes, budgetary allocations and other measures.²⁵

Good governance and human rights are consequently linked in four ways.²⁶ First, good governance reforms of democratic institutions enable formal and informal public participation in policy-development, decision-making and service delivery. Second, good governance reforms advance human rights when they improve the state’s capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights. In particular this is advanced through improved transparency and accountability. Third, good governance reforms aimed at strengthening the rule of law afford better protection to citizens and increase the capacity of oversight institutions. Fourth, good governance reforms aimed at combating corruption rely on the principles of transparency and accountability to ensure that people are treated fairly and that state resources are used effectively and efficiently to promote a rights-based development agenda. Good governance and human rights converge through aspirations of legitimacy, transparency, accountability, adherence to the rule of law and the allocation and utilisation of resources to advance people’s development and quality of life.

As noted in Chapter 2, Tapscott sees good governance in the prison system as requiring performance that goes beyond mere financial probity and administrative efficiency, but

²³ E/CN.4/RES/2000/64 para 1.

²⁴ E/CN.4/RES/2005/68, A/HRC/RES/7/11.

²⁵ Office of the United Nations High Commissioner for Human Rights (2008) *Good governance practices for the protection of human rights*. United Nations: New York, pp. 1-2.

²⁶ Office of the United Nations High Commissioner for Human Rights (2008), pp. 1-2.

encompasses the extent to which prisoners' rights are recognised and the system able to deliver on its mandate.²⁷ It is in this sense that one can refer to the nexus between human rights and governance.

This understanding of good governance emphasises the fact that, in the prison context, governance means adherence to human rights standards and compliance with legislative requirements, and that deviations from these have a direct impact on how prisoners experience imprisonment on a daily basis. Moreover, it requires from management a particular ambition to adhere to enumerated rights and legal prescripts and to achieve the best possible outcome for released offenders. The aim of good governance in the prison system therefore reaches beyond the prison walls into the community.

2.2.3 Governance and crisis

In Chapter 2 (sections 2.1 and 2.2) the link between reform and crisis has been described, and it was pointed out that a crisis presents a unique opportunity for reform as it unfetters policy-makers to find new and creative solutions. Furthermore, an institutional crisis occurs when the institutional structure of a policy sector “experiences a relatively strong decline in (followed by unusually low levels of) legitimacy”.²⁸ It is such a crisis that developed in the South African prison system. Establishing or re-establishing standards and practices adhering to good governance principles are thus required to respond to a crisis in a manner that holds the most potential for a positive outcome.

²⁷ ‘Good prison governance is to a large extent determined by the existence of an enabling policy framework, necessary resources and the extent to which prison management has the ability to implement these policies on a day-to-day basis in a transparent, accountable and ethical manner. [In the context of this research, however,] the notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected. This relates both to the manner in which offenders are treated in the prison system and the opportunities which they are afforded to re-orientate their lives towards a more constructive future in society.’ (Tapscott, C. (2005) *A Study of Best Practice in Prison Governance*, CSPRI Research Paper No. 9, Bellville: Community Law Centre, p. 3.)

²⁸ Boin, A. and T’Hart, P. (2000) Institutional crises and reforms in policy sectors. In Wagenaar, H. (ed) *Government institutions – effects, changes and normative foundations*. Dordrecht: Kluwer Academic Publishers, p. 13.

The first point to be made in respect of governance and crisis is that compliance with good governance principles is effective in preventing a crisis. The risk of a crisis is significantly reduced if an institution adheres to good governance requirements. Reforms can therefore be undertaken in a controlled and incremental manner. While structural conditions, such as large-scale societal reform, may place all institutions at risk of crisis, it may indeed be management's decisions that enable a crisis to develop, or what Habib describes as a "dialectical relationship between structural variables and agential behaviour".²⁹ How the leadership responds to the risk is critically important, for it is their intervention, or lack thereof, that will increase or decrease the risk of crisis in a particular situation.

Second, the failure of governance may not only create a crisis but also exacerbate it, resulting in a malaise of successive problems and a deepening crisis. While a crisis has the potential to provide the impetus for reform, this is an optimistic view of a crisis situation and the opposite could indeed occur.³⁰ Targeting one or a too narrow range of problems for reform may ignore others and result in unintended consequences, even creating new problems by solving the wrong problem.³¹ Equally, launching too many reforms on multiple fronts but lacking the political mandate and broad-based support (especially from operational functionaries) may further deepen the crisis.³² Left unattended, the result may indeed be worse than a crisis, namely a "mess" – a system of problems that are highly interactive and strongly coupled.³³ A mess is not merely the sum of the individual problems themselves but rather the result of the interactions among the problems that constitute it. Moreover, the constituent problems of a mess are complex systems themselves which in turn are part of other complex systems, and so forth. For example, prison overcrowding in South Africa is both a symptom of systemic problems in the criminal justice system and a driver of problems in the prison system and elsewhere.³⁴

²⁹ Habib, A. (2001) The institutional crisis of the University of Transkei, *Politikon*, Vol. 28 No. 2, p. 173.

³⁰ Boin, A. and Otten, M. (1996) Beyond the crisis window for reform – some ramifications for implementation, *Journal of Contingencies and Crisis Management*, Vol. 4 No. 3, p. 153.

³¹ Mitroff, I.I., Alpaslan, M.C. and Green, S.E. (2004) Crises as ill structured messes, *International Studies Review*, Vol. 6, p. 178.

³² Cheung, A. (2005) Hong Kong's Post-1997 institutional crisis: problems of governance and institutional incompatibility. *Journal of East Asian Studies*, Vol. 5, p. 149.

³³ Mitroff, I.I., Alpaslan, M.C. and Green, S.E. (2004), p. 175.

³⁴ For example, prison overcrowding increases the risk for TB infection that may be transmitted by released prisoners into the general population; it thus incurs risks and costs for the national health care system.

Third, the decisions made by management during a crisis affect the trajectory of the institution. As such, managers should not see a crisis as a short-term event with particular start- and end-dates, but rather take a long-term view and be prepared to face problems that may manifest themselves in the form of “crisis after crisis” emanating from the original crisis.³⁵ Such a long-term view requires a sense of managerial and political perseverance “to reinvigorate the basic institutions of governance and to reconfigure their interrelationships so as to create a new and viable basis of legitimacy, accountability, integration, and coordination, which in turn can facilitate and sustain performance”.³⁶

Fourth, crisis research has also shown there is an expectation from juniors in an organisation that “management will take charge”, resulting in the centralisation of decision-making.³⁷ However, the centralisation of decision-making may also have negative consequences. Decision-making may focus on short-term results important to the decision-makers to the detriment of long-term concerns. Furthermore, because organisational solidarity is rare in a crisis, centralised decision-making may indeed alienate management from operational functionaries in the organisation since a crisis may create the opportunity for existing and latent tensions to rise to the surface.³⁸ This was particularly the case in South Africa, where racial divisions came to fore in the DCS after 1990. Operational functionaries may also hold a substantially different perspective on the crisis situation, and indeed dispute whether the institution is actually in a crisis. The width of this “appreciative gap” will be crucial in determining the extent to which management decisions are perceived to be legitimate and implemented.³⁹ A divergence of opinions between senior management and implementing officials on the nature of the crisis, if it is a crisis indeed, will by and large de-legitimize senior management’s policy decisions. This will consequently manifest itself as passive or active resistance from staff to reform efforts and policy decisions.

Overcrowded conditions also place staff working at such prisons at risk of infection and hence their families too. Prison overcrowding is, however, caused not only by the inadequate capacity of the prison infrastructure but by external factors such as the number of suspects arrested and the time lapse before trials commence and the cases are adjudicated. The rate at which police officers arrest suspects may be related to crime trends and also to certain performance targets. Each of these presents a complex set of problems.

³⁵ Boin, A. (2004) Lessons from crisis research, *International Studies Review*, Vol. 6, p. 172.

³⁶ Cheung, A. (2005), p. 162.

³⁷ Boin, A. and Otten, M. (1996), p. 151.

³⁸ Boin, A. and Otten, M. (1996), p. 153.

³⁹ Boin, A. and Otten, M. (1996), p. 152.

Fifth, a prerequisite for responding to a crisis is the recognition of a crisis. Managers may have to decide whether they are dealing with the initial phase of a crisis or if they are already amidst the crisis.⁴⁰ It is an ontological question, but one that must be answered when information is characteristically lacking and there is pressure to make decisions quickly and act accordingly. Discord between the definition of the situation and its actual major attributes will undermine the response.⁴¹ Even when a crisis is recognised as such, it should, furthermore, not be assumed that crisis management will ensue:⁴² it is not a logical consequence. Managers may, for example, not be equipped and skilled to crisis-manage.

Strong adherence by managers and politicians, even in a crisis situation, to good governance principles and practices should enable them to avoid a cycle of ensuing crises that feed on each other and result in institutional collapse,⁴³ or a mess.

2.3 Summary of issues

Reflecting on the South African context in the years immediately after 1994, a few observations are necessary following from the discussion above. There was large-scale structural and societal change as a result of democratisation, and this placed all public service institutions at risk of crisis. Constitutionalism demanded reforms across the public sector to transform the existing institutions of state to embody democratic principles in an accountable and transparent manner. The above discussion on governance described in more detail the nature of good governance, but also pointed to the importance of good governance in relation to human rights. Given the transformative nature of the South African Constitution, it is difficult to see how its aims can be achieved in a situation of poor governance.

The manner in which the DCS management responded to the structural risks flowing from the new constitutional order (as is described in more detail in section 3 below) placed the Department on a particular trajectory which resulted in more problems and, ultimately, in a mess. Poor decision-making at an early stage, coupled with lack of appreciation for the fact that the prison system was already in a crisis, have had long-term consequences. Failure by the DCS leadership to use the basic managerial and administrative tools at their disposal to

⁴⁰ Boin, A. (2004), p. 172.

⁴¹ Boin, A. (2004), p. 171.

⁴² Mitroff, I.I., Alpaslan, M.C. and Green, S.E. (2004), p. 179; Boin, A. (2004), p. 171.

⁴³ Habib, A. (2001), p. 172.

ensure accountability had the consequence that the Head Office lost control over the constituent parts of the Department and its staff. The most immediate result was that good governance failed because accountability failed.⁴⁴

3. The system inherited

In Chapter 2 the point was made that the task set for post-1994 government (the Government of National Unity – GNU) was to design, develop and establish a prison system that would be the antithesis of the inherited system. This was, and remains, a daunting task, further complicated by South Africa's large prison population which ranked in the top ten globally.⁴⁵ Expectations were also high that under a democratic dispensation, led by a large contingent of former political prisoners, prison reform would indeed be rapid and comprehensive. In 1994 the GNU inherited a prison system formed by a regime renowned for its formidable capacity to create bureaucracies. Against this background it is necessary to describe more closely what this inheritance was. Four areas are discussed: the structure and functioning of the Department; the staff corps; the prison population; and the performance of the prison system. The intention is to reflect briefly on some of the inherent traits of the DCS as it existed in April 1994 and to lay the basis for a discussion on how these would influence prison reform.

3.1 Structure and functioning

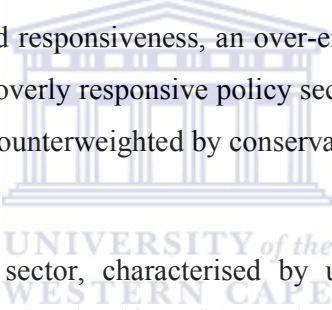
From the Annual Reports for the period 1989 to 1994 it is difficult to ascertain if the Department had defined a strategic direction for itself. Mention of a strategic plan is made in the annual reports, but the content of the strategic plan is not disclosed. The Annual Reports of this period are extremely brief, and scant information is presented on how the imminent democratisation of South Africa was impacting on the Department and the steps taken to facilitate transition. Noticeable, too, is that the Annual Reports for the period 1989 to 1994

⁴⁴ Schacter, M. (2000) *When accountability fails – a framework for diagnosis and action*, Policy Brief No. 9, Ottawa: Institute on governance, p. 2.

⁴⁵ International Centre for Prisons Studies, World Prison Brief, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal Accessed 2 November 2011. Luyt, W.F.M. (2008) Contemporary corrections in South Africa after more than a decade of transformation. *Acta Criminologica*, Vol. 21 No. 2, p. 176.

are virtual copies of each other, reporting in formulaic manner on the activities of the Department. The Department was indeed not forthcoming with information on what was happening; even developments that attracted significant media attention at the time (e.g. industrial action by DCS officials) received only brief factual mentions in the Annual Reports. If the senior management were problematising and deliberating on the socio-political events of the time, it was not apparent in the Annual Reports. The conclusion must therefore be drawn that the staff and stakeholders of the Department were relying on other, probably informal, sources of information to gain the views of the senior management of DCS.

In Chapter 2 (section 2.2.2.) it was argued that a policy sector's response to a problem stems from the inherent tension between preservation (preserving existing values, traditional ways and adhering to institutional rules) and responsiveness (the ability to absorb new developments and adapt);⁴⁶ furthermore, while it is desirable to have a healthy, constructive tension between preservation and responsiveness, an over-emphasis on preservation leads to institutional rigidity whereas an overly responsive policy sector may see integrity eroded and the desire for change no longer counterweighted by conservatism. Left unchecked, this would result in



an under-institutionalised sector, characterised by unstable coalitions, constant ad hocery, and lack of professional self-confidence by officials working in the sector. Everything flows, controversies abound, and there is not even a minimal set of shared beliefs guiding the policy agenda and problem-solving strategies. Trial and error becomes the order of the day; policy-making is exclusively reactive, and driven by incidents, mistakes and scandal. Consequently, overly responsive policy sectors are constantly in the grip of conflicts over their *raison d'être*, and are characterised by a sense of insecurity and value trade-offs.⁴⁷

In the remainder of this chapter, it will be argued that in the period 1990 to mid-1996 the DCS can be characterised as a highly institutionalised, conservative and preserving organisation. The result was that the senior management failed to respond to the changing environment and found itself in a crisis borne of rigidity and ignorance. From mid-1996 onwards the pendulum swung to the other extreme. The Department lost its well-

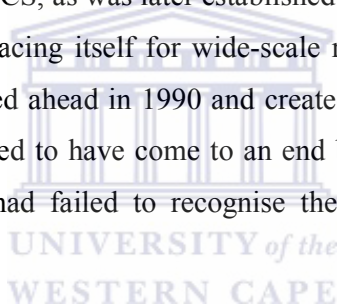
⁴⁶ Boin, A. and T'Hart, P. (2000), p. 14.

⁴⁷ Boin, A. and T'Hart, P. (2000). p. 15.

institutionalised structures and procedures, there was little in the form of policy or leadership to steer the change process, and discipline and order collapsed.

3.1.1 The KwaZulu Prison Service

On 2 February 1990, then President F.W. De Klerk announced the unbanning of liberation organisations, the release of political prisoners and the commencement of inclusive negotiations for a transition to a democratic order, thereby proclaiming the formal end and dismantling of the apartheid state.⁴⁸ With this dramatic speech still echoing in the ears of South Africans, and Nelson Mandela having been released from prison for little more than a month, the prison function in KwaZulu was, in full pursuit of grand segregationist apartheid policies, handed over to the self-governing territory of KwaZulu⁴⁹ on 1 April 1990.⁵⁰ While this move was reversed a little more than four years later, the KwaZulu-Natal area would remain problematic within the DCS, as was later established by the Jali Commission.⁵¹ While the rest of South Africa was bracing itself for wide-scale reform and transformation under democratic rule, the DCS pressed ahead in 1990 and created for itself a little relic of an era that had been formally announced to have come to an end by then President De Klerk. The leadership of the Department had failed to recognise the changing environment and act



⁴⁸ Address by President F.W. De Klerk to the Parliament of the Republic of South Africa, 2 February 1990.

⁴⁹ The KwaZulu self-governing territory (or homeland) was formally created in 1972. Situated in the then province of Natal, it consisted of a smattering of unconnected geographical enclaves within the Natal province where Black people would, under apartheid grand policies, have the right to exercise political self-determination. After 1994 the self-governing territories were dismantled and a new province, KwaZulu-Natal, was created.

⁵⁰ South African Prison Service (1990) *Annual Report 1989/90*, Pretoria: South African Prison Service p. 17.

⁵¹ Three of the nine management areas that the Jali Commission would focus on in its investigation into corruption and maladministration were indeed located in KwaZulu-Natal: Pietermaritzburg, Durban-Westville and Ncome. From the Jali Commission's report it is evident that the situation in the KwaZulu-Natal management areas presented a notable problem. Although the Commission emphasised the role of POPCRU (Police and Prisons Civil Rights Union), the root causes were probably overlaid with the political divisions and tribal factionalism that characterises the province. (Jali Commission pp. 54-76.)

accordingly, and persisted with handing over of the prison service⁵² to a “homeland” government.⁵³

3.1.2 A new department

On 28 November 1990 the De Klerk government announced that the Prison Service,⁵⁴ which until then had been part of the Department of Justice, would become a Ministry and Department in its own right, a development which took effect on 21 December 1990.⁵⁵ The separation was prompted, as is generally accepted, by the need to move the much-disliked Minister of Law and Order in the De Klerk Cabinet, Adriaan Vlok, from that portfolio to another. The Ministry and Department of Correctional Services were created with Vlok as the first Minister of Correctional Services. Prior to this there is no evidence from the Annual Reports that the Prison Service had any aspirations to become its own Ministry and Department. The unpopular Vlok would remain the Minister of Correctional Services until 1994, when he was replaced by Sipo Mzimela (Inkatha Freedom Party - IFP) in May that year in the Mandela Cabinet. The appointment of apartheid-era hardliner Adriaan Vlok as Minister of Correctional Services did not elevate the new portfolio of Correctional Services to the appropriate status and was probably to its detriment. Moreover, it was a political decision not motivated by any justification from a public service management perspective.

In April 1994 the GNU inherited a prison service still structured according to grand apartheid principles and the notion that “homelands” (or Bantustans) have their own prison services. There was, however, one exception relating to the internal organisation of prisons. Through a series of amendments to regulations, commencing in 1988, all references to race were

⁵² The prisons affected were Kandasput, Ingwavuma, Mapumulo, Nkandla and Nongoma (South African Prison Service (1990), p. 17).

⁵³ Created under the apartheid regime, Transkei, Bophuthatswana, Venda and Ciskei were homelands designated for Black South Africans.

⁵⁴ The Prison Service, as it was known then, was established following the unification of South Africa as the Union of South Africa in 1910 and, shortly thereafter, the adoption on 1 October 1911 of the Act on Prisons and Rehabilitation Centres, Act 13 of 1911. Institutionally, the Prison Service existed as part of the Department of Justice. (Van Zyl Smit, D. (1992) *South African Prison Law and Practice*. Durban: Butterworth Publishers, p. 25-26).

⁵⁵ Department of Correctional Services (1991) *Annual Report 1990/1*, Pretoria: Department of Correctional Services, p. 1.

expunged from the regulations.⁵⁶ After having being the case for more than a century, it was no longer required that white prisoners be detained separately from “non-white” prisoners or that a white official should automatically outrank a “non-white” official.⁵⁷ This transition took place with relative ease and is not even mentioned in the 1988/89 Annual Report of the Department. The racial integration of prisoners happened with surprising rapidity and harmony, contrary to what would have been expected then in volatile South Africa. There are indeed no official or media reports of any racial conflict whatsoever amongst prisoners at the time, despite ongoing racial segregation outside the prison walls.

The undoing of the apartheid prison system’s structural and institutional arrangements was completed by 1 July 1994. It was described as a “rationalisation process” for establishing one national Department of Correctional Services, the DCS, from the five homeland prison services.⁵⁸ The new DCS reorganised itself according to the nine provinces and command areas in each province, with the Head Office (in Pretoria) responsible for policy directives and “supervision over the maintenance of uniform norms and standards countrywide”.⁵⁹

While the DCS management could not ignore the changes taking place in broader society, the Department’s highly institutionalised nature and its conservative, preservational culture (introduced conceptually in Chapter 2) restricted the way in which it could respond to these changes and their attendant problems. For example, when officials of the DCS embarked on industrial action in 1990 (the first time this had happened in the history of the Department), the response from management was to suspend 635 officials involved in the action. Citing unspecified guidelines from the International Labour Organisation and Prison Regulations (Reg. 71(i)(ii)(jj) and (kk)),⁶⁰ management held the view that it was simply illegal for DCS members to embark on industrial action. Ultimately it took political intervention by the then Minister and Deputy Minister to lift the suspensions and, albeit temporarily, resolve the situation. A further indication of how the senior management responded to the socio-political developments was the release in 1991/2 of “a Motto, a Credo, a Code of Honour, a Code of

⁵⁶ Van Zyl Smit, D. (1992), p. 39.

⁵⁷ Van Zyl Smit, D. (1992), p. 39.

⁵⁸ This was required by the Interim Constitution: s 237(3). Luyt, W.F.M. (2001) The transformation of corrections in the new South Africa. *Acta Criminologica*, Vol. 14 No. 3 p. 26.

⁵⁹ Department of Correctional Services (1995) *Annual Report 1994*, Pretoria, Department of Correctional Services, p. 1.

⁶⁰ South African Prison Service (1990), p.53.

Conduct and an Anthem” in an effort to inculcate a common culture in the Department.⁶¹ This was a naïve, if not romantic, attempt at developing unity and solidarity amongst the staff corps despite the deep fault lines that were already visible as early as 1990 in the industrial action discussed above. The impression one gains is that in the period 1990-1994, the DCS senior management failed to grasp that laying the foundations for successful prison reform would require more than the ritual invocation of politically correct phrases such as “non-racialism”, “non-sexism” and “community involvement”.

3.1.3 A militarised prison service

In 1994 the DCS was a militarised prison service with highly centralised decision-making, uniforms, military ranks, parades and the accompanying military ceremony and protocols. Centralised decision-making made it difficult for outsiders, especially non-governmental organisations (NGOs), to engage with the Department, and placed significant restrictions on efforts to make it more transparent and accountable. For civil society organisations, the militarised structure and functioning were unacceptable in the face of demands for a rights-based prison system.⁶² When calls were made for its demilitarisation, the Department was very cautious about such a possibility, warning that it “is a sensitive issue which cannot be dealt with high-handedly or overnight”.⁶³ The Department argued for the retention of the military structure by referring to the appeal that the military character and traditions had for the existing staff as well as for prospective recruits. What this response failed to interrogate was the critical question of whether or not a militarised prison structure was compatible with a constitutional democracy. By 1994, it appears, there were fundamental differences of opinion amongst the staff corps about demilitarisation and the achievability of a civilian prison service. Resistance by senior managers in the Department presented significant obstacles to demilitarisation.⁶⁴

⁶¹ Department of Correctional Services (1992) *Annual Report 1991/2*, Pretoria, Department of Correctional Services, p. 30.

⁶² Penal Reform Lobby Group (1995) *An Alternative White Paper on Correctional Services*. Johannesburg: Lawyers for Human Rights, p. 68-69; Luyt, W.F.M. (2001), p. 26.

⁶³ Department of Correctional Services (1994 b) *White Paper on the Policy of the Department of Correctional Services in the new South Africa*, Pretoria: Department of Correctional Services, p. 22.

⁶⁴ Department of Correctional Services (2004 b), p. 52.

There were, however, some concerns with the centralised decision-making processes within the DCS. Already in the 1989/90 Annual Report it was noted that “an investigation was launched into the development of a model for greater managerial autonomy and the management of the SA Prison Service according to commercial principles”.⁶⁵ An example of devolution was the establishment of de-centralised staff appointment centres in each of the provinces from 1 August 1992.⁶⁶ Although senior management did recognise the problems with centralised decision-making, it remained hesitant to address the demilitarisation of the Department, and at that stage there was insufficient pressure on the DCS to make it question its own paradigm.

3.1.4 Greater transparency

There are some indications that between 1990 and 1994 the Department attempted to engage with democratisation. Examples were the establishment of Correctional Boards⁶⁷ for every prison and the institution of a National Advisory Board on Corrections⁶⁸ in the 1991/2 financial year to facilitate greater community involvement in the prison system.⁶⁹ The media were also allowed greater access to prisons following the scrapping of section 44(f) of the 1959 Act, which had placed severe restrictions on their ability to report on prisons and prisoners.⁷⁰ In addition, in 1991 correctional supervision⁷¹ was instituted as a sentence option in an effort to address prison overcrowding.⁷² The DCS also expressed deep concern about the high number of children in prison, which indicates some awareness of rights issues.⁷³ Moreover, in the period 1990 to 1994 the Department engaged increasingly with international

⁶⁵ South African Prison Service (1990), p.1.

⁶⁶ Department of Correctional Services (1992), p. 26.

⁶⁷ Although provided for in law, few of these were ever established (Van Zyl Smit, D. (1992), p. 137).

⁶⁸ The National Advisory Board was established to advise the Minister on key issues.

⁶⁹ Department of Correctional Services (1992), p.1; Van Zyl Smit, D. (1992), p. 133.

⁷⁰ Department of Correctional Services (1992), p. 1; Van Zyl Smit, D. (1992), p. 31.

⁷¹ Correctional supervision is a community-based sentence requiring conditions such as house arrest, performing community service, attendance of programmes, and so forth. The Criminal Procedure Act (51 of 1977) and the Correctional Services Act make provision for a flexible range of options and combinations in respect of the conditions to be imposed and whether or not part of the sentence will be served in prison. Offenders placed under correctional supervision are monitored by the DCS.

⁷² Department of Correctional Services (1992), p.1; Luyt, W.F.M. (2001), p. 28.

⁷³ Department of Correctional Services (1992), p.1.

stakeholders and prison services in other countries.⁷⁴ Some measures to improve transparency took effect, and in 1992 an agreement was signed with the International Committee of the Red Cross granting it access to visit prisons.⁷⁵ The frequency of visits by judges and magistrates to prisons increased slightly in the period 1990 to 1994,⁷⁶ indicating a renewed judicial interest in the prison system. The lifting of the state of emergency by President De Klerk in February 1990⁷⁷ also enabled greater access to prisons, since the state of emergency regulations imposed strong restrictions on access to prisons.⁷⁸ In summary, it can be said that there was some recognition that transparency is part and parcel of democracy; for all that, though, the Department remained less than forthcoming about gross rights violations. It was carefully, if not cosmetically, adapting its habits and practices without changing key aspects of the institution.

3.1.5 Legislative reform

A number of legislative amendments were also pushed through between 1990 and 1994. Most notable among them were: the removal of any references to racial discrimination, which thus abolished de jure apartheid in the prison system in 1990 (as noted above in section 3.1.2); the renaming of the Prison Service to the Department of Correctional Services, and the Prisons Act to the Correctional Services Act; the introduction of legislative provisions on correctional supervision; the establishment of correctional boards; and a relaxation of the use of prison labour in order to enhance commercial activities.⁷⁹

In general, these various amendments to the Correctional Service Act were highly specific in nature and made in order to enable particular operational changes; conversely, there is no evidence in the relevant Annual Reports that a need was identified to draft entirely new legislation. Given the general uncertainty and fluidity of the political landscape in the period

⁷⁴ For example, in 1989/90 the Department of Correctional Services had contact with only the Swaziland Prison Service. By 1994 the Department of Correctional Services had visited, and received visits from, several African prison services.

⁷⁵ Department of Correctional Services (1992), p.1.

⁷⁶ See relevant Annual Reports of the Department of Correctional Services 1990 to 1994.

⁷⁷ The state of emergency was maintained in the then Natal province to deal with the violent conflict there between IFP and ANC factions. (South African History On-line <http://www.sahistory.org.za/dated-event/state-emergency-lifted-natal> Accessed 2 November 2011).

⁷⁸ Van Zyl Smit, D. (1992), p. 277-279.

⁷⁹ Van Zyl Smit, D. (1992), p. 42.

February 1990 to April 1994, this is not entirely surprising. The net result was that the Department was trying to tweak the 1959 Correctional Services Act to meet the requirements of the emerging democratic order. The need for new and comprehensive legislation was acknowledged only after the 1994 elections, in the Introduction to the 1994 White Paper by the National Commissioner, General H. Bruyn.⁸⁰ What is perhaps indicative of the overall uncertainty about strategic direction is the fact that the 1994 Annual Report of the DCS does not contain vision and mission statements, whereas both the preceding reports, dating back to 1990, and the subsequent ones invariably do.⁸¹

3.1.6 Lack of problem analysis

The preserving and inward-looking approach of the DCS senior management was also manifested in the absence of a basic analysis of the problems facing the DCS and an assessment of the internal constraints it would need to overcome in order to address them. The Annual Reports and 1994 White Paper presented opportunities for this self-reckoning but they were not utilised. Indeed, the 1994 White Paper was a hasty and limited response to the need for prison reform.⁸² After submissions from the public were invited in early July 1994, the final version was released on 21 October 1994.⁸³ By contrast, the 2004 White Paper is remarkably honest about the internal challenges facing the DCS.⁸⁴ A further indication of the lack of realism was that in the 1994 White Paper the Department associated itself with three “challenges of correctional systems the world over”, namely, overcrowding, soaring crime rates, and unrealistic expectations from the public as to what a prison system can achieve.⁸⁵ It failed to individualise and take ownership of the problems it was facing or, more specifically, recognise that South Africa of the 1990s was a special situation – it was not the “world over”.

⁸⁰ Department of Correctional Services (1994), p. 2.

⁸¹ In the years to come, the vision and mission statements would frequently change, often subtly, but change nonetheless; the longest period in which the vision and mission statement remained entirely unchanged was between 2003/4 and 2007/8 (see relevant Annual Reports).

⁸² Van Zyl Smit, D. (2004) Swimming against the tide. In Dixon, B. and Van der Spuy, E. *Justice gained – crime and crime control in South Africa’s transition*, Devon: Willan Publishing, p. 231.

⁸³ Department of Correctional Services (1994), p. 30.

⁸⁴ Sloth-Nielsen, J. (2007) The state of South Africa’s prisons. In S. Buhlungu, J. Daniel, R. Southall & Lutchman, J. *State of the Nation – South Africa 2007*, HSRC Press, Cape Town, p. 393; Department of Correctional Services (2004 b), pp. 57-62 and 109-110.

⁸⁵ Department of Correctional Services (1994 b), p. 1.

The 1994 White Paper said little about corruption, gross human rights violations and the prison sub-culture created amongst both prisoners and staff under the apartheid regime. It preferred to speak in vague terms of “respect for human rights” and having a “professional staff corps”, but added that management will not hesitate to maintain discipline and order.⁸⁶ Fundamentally, but erroneously, it was assumed that there existed a unified prison service operating in solidarity. In the absence of a thorough problem analysis, the 1994 White Paper offered two solutions: (1) a smaller prison service in order to fund it properly, or (2) a re-assessment of the prison system “in the national economy in relation to other services and backlogs in the country”.⁸⁷ The emphasis remained very much on managerial and operational effectiveness and efficiency, and purported ignorance of wider political changes. In effect the DCS was asking for an increased budget without which the requisite standards could not be met in conducting business as usual. It was a simplistic and inadequate assessment of the situation.

With the economy stagnant at the time,⁸⁸ the emphasis on budgetary constraints was not altogether surprising. The Department proposed in the 1994 White Paper to respond to these in a number of ways: through a series of planned and existing programmes that would result in increased productivity; training of staff; increased self-sufficiency; performance audits; computerisation to increase efficiency; cost-effective prison architecture; and effective community corrections.⁸⁹ These measures were derived from the policy requirement in the 1994 White Paper that the Department would be run according to business principles.⁹⁰ The DCS made the proposals with some confidence, given that in 1992 it had received a Certificate of Merit in the National Productivity Award Competition⁹¹ and was thus playing to its strengths. Against a backdrop of competing demands on the national budget, the DCS management virtuously proposed efficiency-increasing measures to improve on what they were doing already with limited resources. However, they failed to recognise and engage with the critical questions that were mounting up against their prevailing paradigm.

⁸⁶ Department of Correctional Services (1994 b), p. 2.

⁸⁷ Department of Correctional Services (1994 b), p. 1.

⁸⁸ Picard, L.A. (2005) *The state of the state – institutional transformation, capacity and political change in South Africa*. Johannesburg: P&DM Wits University Press, p. 17.

⁸⁹ Department of Correctional Services (1994 b), p. 2.

⁹⁰ Van Zyl Smit, D. (1992), p. 42.

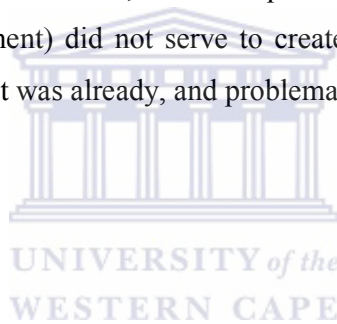
⁹¹ Department of Correctional Services (1992), p. 1.

3.1.7 Summary

Essentially, the DCS management in the period 1990 – 1994 did not realise it was in the midst of a crisis that would require it to examine critically the foundational assumptions, goals, procedures and practices of the prison system in order to comply with the requirements of a constitutional democracy. There is little doubt that the process of rationalisation and the establishment of a new department took up a considerable amount of senior management's time and energy.⁹² Moreover, both of these processes directed the focus of senior management inwardly and placed the emphasis on institution-building rather on developing a new institution aligned to the demands of the environment. In this respect, it was the pre-1994 Prison Service that was taken up as the model for the new national Department of Correctional Services – a Service which lacked transparency and displayed imperviousness to external and critical views. As a result, the two processes (of rationalisation and the establishment of a new department) did not serve to create a reformed institution; instead, they replicated and fortified what was already, and problematically, in existence.

3.2 Staff corps

3.2.1 Failure to engage



By 1994 the DCS had a staff establishment of 29 701 for a daily average prison population of 113 856.⁹³ Racial transformation of the staff corps and human rights issues became increasingly important between 1990 and 1994, as evidenced by staff of the Department being involved in various incidents of industrial action in which the trade union POPCRU (Police and Prisons Civil Rights Union) was frequently at the forefront.⁹⁴ Some early

⁹² Presidential Review Commission of the Public Service (1998) *Developing a culture of good governance report of the presidential review commission on the reform and transformation of the public service in South Africa*. Pretoria: Government of the Republic of South Africa, para 2.5.2.

⁹³ Department of Correctional Services (1995) *Annual Report 1994*, Pretoria: Department of Correctional Services, Table 8.

⁹⁴ See, for example: 'POPCRU claims sit-in 3 are being denied facilities'. *The Daily Mail*, 8 August 1990; '3 fired, 174 suspended after warder strike'. *The Citizen*, 20 March 1990; 'Prison Crisis'. *The New Nation*, 14 June 1990; 'Sipiere los saakoorskoring'. *Die Burger*, 5 June 1990. [Warders drop case over suspension]; 'Robben Island warders ease crisis'. *The Weekly Mail*, 4 April 1990; 'POPCRU children's picket broken up'. *The Argus*, 18 April 1990.

advances were made to remove the most offensive discriminatory practices. Shortly after 1990, following industrial action, some reforms were introduced and black officials could include their families on their medical aid; a better than expected salary increase was given; night shift was no longer the preserve of black officials and subsequently shared with white officials; black staff could also fill administrative posts and promotions were open to all.⁹⁵ Despite these advances, the DCS management failed, in the period 1990 to 1994, to engage with POPCRU constructively and instead tightened up legislation to prohibit DCS officials from participating in industrial action or even showing sympathy with trade unions.⁹⁶ POPCRU would eventually become a formidable and destructive force in the DCS, as is described further in this chapter (section 4.3).

3.2.2 Lack of racial transformation and low staff morale

In respect of transforming the racial profile of the DCS staff corps, the DCS senior management was cautious, appearing virtually to ignore the writing on the wall. The 1994 Annual Report acknowledges that there were fears around job security but that “most personnel members would not like to be branded as having been promoted in view of affirmative action”.⁹⁷ This view was quite contrary to the affirmative-action approach increasingly acceptable to the ANC-led government in 1994.⁹⁸

The earliest reliable figures on the race and gender profile of the DCS staff corps is for 1996 and presented in Table 1 below. These are assumed to reflect by and large the situation as it existed in 1994.⁹⁹ In 1996 the three-member Executive Council of the Department (the most senior decision-making body in the Department) was an all white male structure and the 21-member Management Board contained 14 white males.¹⁰⁰ In short, while white males constituted 31.8% of total staff in 1996, they dominated the senior management. Even two years into the GNU there was little visible change in the top echelon of the DCS.

⁹⁵ Mtshelwane, Z. (1993) Recognize POPCRU, *SA Labour Bulletin*, Vol. 17 No. 6, p. 71.

⁹⁶ Van Zyl Smit, D. (1992), p. 41; Mtshelwane, Z. (1993), p. 70; Gillespie, K. (2007) Caught between union and state – warders’ place in transforming prisons, *SA Labour Bulletin*, Vol. 31 No. 1.

⁹⁷ Department of Correctional Services (1995), p. 2.

⁹⁸ Picard, L.A. (2005), p. 17.

⁹⁹ Department of Correctional Services (1998) *Annual Report 1997*, Pretoria: Department of Correctional Services, Table 51.

¹⁰⁰ Department of Correctional Services (1998), Tables 52 and 53.

Table 1 Race and gender profile of DCS staff, 1996.

	Male	Female	Total
White	31.8	6.1	37.9
Black	43.8	3.6	47.4
Coloured	12.2	1.0	13.3
Asian	1.3	0.1	1.3
Total	89.2	10.8	100.0

Negative sentiment and lack of confidence in the Department as an employer was also reflected in resignation figures. In 1990 a total of 1573 officials resigned, an increase of 21.6% on the previous year.¹⁰¹ In the four years between 1990 and 1994, the Department lost 3807 officials due to resignations, of whom 37% were officers and non-commissioned officers.¹⁰² There is little doubt that the loss of experienced and more senior staff had a negative impact on operational performance. Also reflective of staff morale is termination of employment due to medical boarding, a figure that increased from 60 in 1990 to 179 in 1994.¹⁰³

By 1994 deep divisions within the staff of DCS were visible, but with the “old guard” remaining very much in control. Moreover, an acrimonious relationship had developed between the DCS management and the union POPCRU, resulting in several incidents of industrial action. POPCRU’s political agitation in support of prisoners’ rights between 1990 and 1994¹⁰⁴ was a thorn in the flesh of the Department and must have been regarded as an act of betrayal by senior management. The Department eventually signed a recognition agreement with POPCRU on 6 October 1994 and joined the Public Servants Association (PSA) and the SA Nursing Council (SANC) in the Departmental Negotiating Chamber.¹⁰⁵

¹⁰¹ South African Prison Service (1990) Annual Report 1990, Pretoria: South African Prison Service, p. 53.

¹⁰² South African Prison Service Annual Reports for relevant years.

¹⁰³ South African Prison Service Annual Reports for relevant years.

¹⁰⁴ Final Report of the Commission of Inquiry into unrest in prisons (1995) (hereafter Kriegler Commission), p. 40. Gillespie, K. (2007).

¹⁰⁵ Department of Correctional Services (1995), p. 45.

3.3 Prison population and system performance

3.3.1 Overcrowding and releases

Overcrowding at South African prisons dates back as far as 1965 and is not a new phenomenon.¹⁰⁶ By 1994 the occupancy level was comparatively favourable at 118%.¹⁰⁷ The reduction in occupation from 130% in 1989/90¹⁰⁸ to 118% by 1994 was the result of two factors: first, a number of special remissions and amnesties were granted between 1990 and 1994;¹⁰⁹ second, the incorporation of the homeland prisons which were not overcrowded¹¹⁰ led to more favourable national statistics. It was only from 1997 onwards that overcrowding would reach unprecedented levels.¹¹¹

After 1990, and against the backdrop of an increasing violent crime rate, the release policy of the Department came under severe criticism from judicial officers and the public because it was perceived as being too lenient and undermining sentences imposed by the courts.¹¹² For example, it was reportedly the practice that prisoners sentenced to less than six months were released within 48 hours.¹¹³ In response, a new policy was developed and published as a White Paper, coming into effect on 1 March 1994¹¹⁴ after being signed into law.¹¹⁵ This did away with the automatic remission of sentence and provided that a prisoner must serve the

¹⁰⁶ Office of the Inspecting Judge (2006) *Annual Report of the Judicial Inspectorate for Correctional Services 2005/6*. Cape Town: Office of the Inspecting Judge, p. 24.

¹⁰⁷ Department of Correctional Services (1995) Graph 2.

¹⁰⁸ Department of Correctional Services (1995) Graph 2.

¹⁰⁹ On 10 December 1990, 30 179 prisoners were released in an amnesty of seasonal goodwill; on 30 April 1991 a six-month amnesty and one-third amnesty for first offenders on 1 July 1991 saw the release of 25 467 and 9237 prisoners respectively (Kriegler Commission, p. 72).

¹¹⁰ Department of Correctional Services (1995), p.3.

¹¹¹ Office of the Inspecting Judge (2006), p. 24.

¹¹² Lidovho, G.J. (2003) A critical look at the past and current release policy of the Department of Correctional services, *SA Journal for Criminal Justice*, Vol. 16, pp. 163-177; Van Zyl Smit, D. (2004), p. 235.

¹¹³ Van Zyl Smit, D. (2004), p. 235.

¹¹⁴ Department of Correctional Services (1994 a) *Annual Report 1993*, Pretoria: Department of Correctional Services, p. 2.

¹¹⁵ Correctional Services Amendment Act No. 68 of 1993.

entire sentence although part of it may be served in the community.¹¹⁶ However, a prisoner could be considered for earlier release on parole and that date could be moved forward through the earning of credits, granting relief for up to a maximum of one half of the sentence.¹¹⁷ In the case of prisoners serving sentences of six months or less, it was assumed that the prisoner has earned the maximum number of credits unless the Institutional Committee¹¹⁸ had determined differently.¹¹⁹ The new release policy did not appear to have a noticeable effect on the size of the prison population as it was indeed the unsentenced population that showed the most rapid increase. For example, at the end of 1993 there were 21 540 unsentenced prisoners, and by 1999 this figure had increased to 58 231, an increase of 170%.¹²⁰ There was evidently no overarching strategy or policy, as changes to the release policy were made in an ad hoc manner.

3.3.2 The erosion of security

Security was, however, an increasing concern, and from 1989/90 to 1994 the number of annual escapes increased by 184%.¹²¹ Expressed as a ratio per 100 000 of the prison population, there were 79 escapes per 100 000 prisoners in 1989/90, but by 1994 this had increased to 110 per 100 000 prisoners.¹²² An increase in escapes from prison in South Africa can be correlated with large-scale socio-political upheaval as a similar trend was observed in

¹¹⁶ Department of Correctional Services (1994 a), p. 2.

¹¹⁷ s 9 Correctional Services Amendment Act No. 68 of 1993.

¹¹⁸ The Institutional Committees, located at each prison, were created by the 1959 Prisons Act and had wide ranging functions relating to, amongst others, the security classification of prisoners, transfer of prisoners to other prisons, work allocation, gratuities paid, appointment of monitors, isolation of prisoners, the remission of sentence, release dates and release on medical grounds. In most instances the Committee did not make final decisions but referred recommendations to other officials or structures, such as the Head of Prison (Van Zyl Smit, D. (1992), p. 134.)

¹¹⁹ s 9 Correctional Services Amendment Act No. 68 of 1993.

¹²⁰ Muntingh, L. (2005) Surveying the prisons landscape – what the numbers tell us, *Law, Democracy and Development*, Vol. 9 No. 1, p. 32

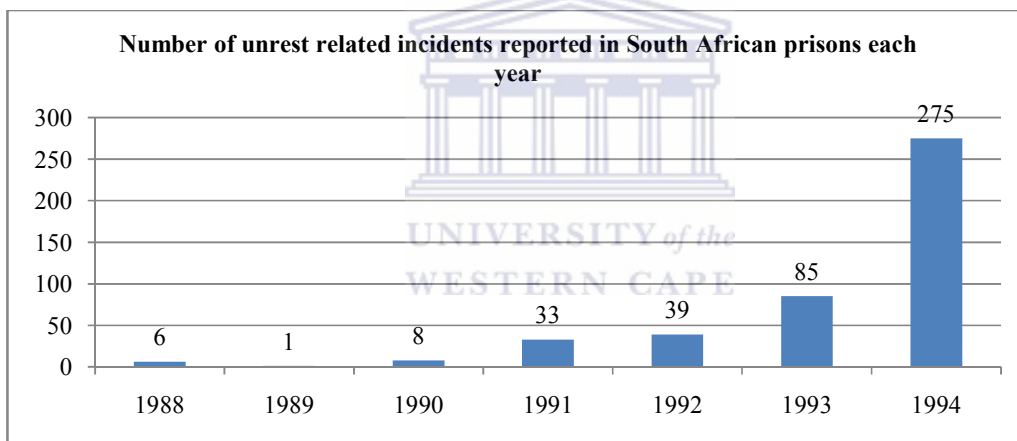
¹²¹ From 1989/90 to 1994 the number of escapes annually was 663, 746, 1126, 1 171 and 1 218 (see relevant Annual Reports).

¹²² See relevant Department of Correctional Services, Annual Reports 1989/90 to 1994.

1975/6¹²³ and 23 36 escapes were recorded in that year.¹²⁴ The erosion of the strict security procedures, a deepening legitimacy crisis of the prison system, and political militancy amongst both prisoners¹²⁵ and black staff (aligned to POPCRU) are regarded as core reasons for the increase in escapes. A growing awareness of human rights by prisoners, uncertainty about prisoners' participation in the 1994 election and the expectation by prisoners that there would be a general amnesty after the election, made the situation in the prisons extremely volatile by 1994.¹²⁶

The volatility of the situation is demonstrated by the sharp increase in the number of unrest-related incidents in prisons recorded between 1988 and 1994 (up to 8 November 1994), as shown in Figure 1 below.¹²⁷

Figure 1 Number of unrest related incidents reported in South African prisons 1988-1994



The underlying tensions and strains came to the fore during the period February 1994 to June 1994 in the run-up to, and aftermath of, the first democratic election in April 1994. Between February 1994 and June 1994, there were 71 incidents of unrest at 53 prisons housing 77% of the total prison population, resulting in injuries to 750 prisoners and 145 DCS officials, as

¹²³ In 1976 Black youths engaged in widespread protests across South Africa against the apartheid government, particularly against the policies of Bantu education; the protests are now known as the Soweto riots, after the township west of Johannesburg where they started.

¹²⁴ Department of Correctional Services (1992), p. 7.

¹²⁵ Kriegler Commission, p. 39

¹²⁶ Kriegler Commission, p. 20.

¹²⁷ Kriegler Commission, p. 20.

well as the death of 37 prisoners.¹²⁸ Nearly a quarter of the country's prisons experienced unrest and violence. In response to these events, President Mandela appointed a Commission of Inquiry headed by Judge Kriegler (hereafter the Kriegler Commission) to investigate the causes of the unrest in prisons and make recommendations to prevent a repeat of such a tragedy.

In the run-up to the 1994 elections it was in question whether prisoners would be enabled or allowed to participate in the historic event. This gave rise to uncertainty and anxiety amongst prisoners, culminating in protest actions,¹²⁹ ultimately, all prisoners were made eligible to participate in the elections. In their aftermath, there was an expectation among sentenced prisoners that a general amnesty would be granted by the new government,¹³⁰ and, in his inaugural address on 10 May 1994, President Mandela did indeed create grounds for this optimism.¹³¹ However, the newly elected government did not provide clarity on the issue and left prisoners in the lurch. Tensions thus continued to build up, and erupted in widespread unrest in prisons. It was only on 10 June 1994 that the government announced a six-month remission of sentence, but many sentenced prisoners saw it as a slap in the face and it only "acted as a trigger" for further unrest.¹³² It was the view of many prisoners, one with which the Kriegler Commission agreed, that a six-month remission of sentence did not reflect the historical significance of the transition to democracy.¹³³

The events between February and June 1994 were unprecedented and brought to the surface the deep-seated problems in the Department amongst both staff and prisoners as well as the broader community. If there were ever any doubt about it, it was by now clear that the prison system was in crisis. While the granting of amnesties and extending the franchise to prisoners

¹²⁸ Kriegler Commission, p. 26.

¹²⁹ Muntingh, L. and Sloth-Nielsen, J. (2009) *The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa*. In Ewald, A.C. and Rottinghaus, B. (eds) *Criminal disenfranchisement in an international perspective*, Cambridge: Cambridge University Press, p. 230; Kriegler Commission, p. 19-21.

¹³⁰ Van Zyl Smit, D. (2004), p. 237.

¹³¹ 'As a token of its commitment to the renewal of our country, the new Interim Government of National Unity will, as a matter of urgency, address the issue of amnesty for various categories of our people who are currently serving terms of imprisonment.' (Statement of the President of the African National Congress, Nelson Mandela, at his Inauguration as President of the Democratic Republic of South Africa, Union Buildings, Pretoria, 10 May 1994.)

¹³² Kriegler Commission, p. 75.

¹³³ Kriegler Commission, pp. 99-100.

did not lie within the discretion of the DCS, it was nevertheless clear that fundamental legitimacy problems required urgent attention. As Van Zyl Smit has pointed out, the Kriegler Commission had the opportunity to conduct a thorough investigation and make far-reaching recommendations (as the British Woolf Commission of 1991 did in response to riots at Strangeways prison) but failed to rise to the occasion.¹³⁴ The Kriegler Commission was able to identify various problems underlying the unrest (e.g. the nature of accommodation, treatment of prisoners, conditions of detention and a sense of injustice), but it held back on making weightier recommendations about the challenges facing the DCS and the appropriate responses to them. The Kriegler Commission should therefore be regarded as something of a missed opportunity.

3.3.3 Improved self-sufficiency

One often-neglected feature of the prison system at the time gives a good indication of senior management's inward focus: the DCS's advanced level of self-sufficiency. Essentially this refers to the ability of the Department to meet its own needs in respect of consumables (e.g. food and clothing) and non-consumables (e.g. furniture). The aim of greatest possible self-sufficiency existed for the prison system before and after 1994, and was ultimately included as a goal in the 1998 Correctional Services Act. By 1993/4 the Department reported that it was able to meet more than 60% of its own needs in respect of vegetables, fruit, red meat, and pork.¹³⁵ Closer analysis of the reported production figures indicates that self-sufficiency was indeed on the increase between 1988 and 1994,¹³⁶ but in the years to follow it would stagnate and, in some instance, decline.¹³⁷ The prison farms would also become the focus of investigation by the Special Investigations Unit into corruption.

3.3.4 Summary of issues

By 1994 the internal performance of the prison system had been severely weakened in respect of staff-management relations and security. The prison population and Black officials had also become more politically aware and assertive, challenging the old regime and its vestiges. It was the case, too, that certain functions (e.g. agricultural production) remained intact,

¹³⁴ Van Zyl Smit, D. (2004), p. 237.

¹³⁵ Department of Correctional Services (1994 a), p. 22.

¹³⁶ See relevant Annual Reports of the Department of Correctional Services.

¹³⁷ See relevant Annual Reports of the Department of Correctional Services 1994 to 2009/10.

which is regarded as a consequence of senior management's overt emphasis on improving efficiency and minimising further strain on the national budget. However, this also points to the inward-looking and preserving approach of the Department's leadership at the time. The DCS senior management maintained its focus on that with which it was familiar, and resisted being drawn into the political changes shaping South Africa at the time. The entrenched bureaucratic system developed under apartheid produced officials who worked within tightly defined procedural and regulatory frameworks; there was little room for deviation from procedure because apartheid policies had to be implemented without question.¹³⁸ The prison system, by 1994, showed an increasing number of fault lines created, on the one hand, by the need and calls for reform, and, on the other, by the lack of strategic vision from the senior management, which remained rigidly stuck in the prevailing institutional culture.

4. The nature of the crises in DCS

This section provides a closer description of the nature of the crisis in the prison system after 1994. Two issues are important in this regard. First, the DCS was not unique in facing problems of corruption and maladministration, as these were also experienced in other public service institutions (see Chapter 6 section 2.1). Second, when President Mbeki appointed the Jali Commission this was not the first time the DCS was investigated: to name but a few, there had been earlier investigations by the DPSA, Public Service Commission (PSC) and the Auditor General.¹³⁹ The DCS was, however, substantially different from other public institutions in two ways. First, it was part of the justice and security cluster¹⁴⁰ and thus important to the state's ability to maintain law and order. Second, the state had patently lost control of the DCS, a development reported as such to Parliament in 2000.¹⁴¹

¹³⁸ McLennan, A. (2009) The delivery paradox. In McLennan, A. and Munslow, B. (eds) *The politics of service delivery*, Johannesburg: Wits P&DM Governance Series, p.25.

¹³⁹ The Jali Commission noted that there had been 20 earlier investigations into the DCS. (Jali Commission, p. 885). Unfortunately, the Jali Commission does not in its final report indicate the time period over which these investigations were undertaken, but it can be assumed that they were relatively recent.

¹⁴⁰ DCS, Department of Justice and Constitutional Development and the South African Police Services.

¹⁴¹ 'Staat het allebeheer oor DKD verloor, sê DG'. *Die Burger*, 15 April 2000. [State has lost all control over DCS, says DG (Director General) - own translation.]; PMG Report of the meeting of the Portfolio Committee on Correctional Services of 14 April 2000, <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services> accessed 18 December 2011.

This section will primarily focus on the period 1994 to 2004, and will do so for a number of reasons. First, much of the Jali Commission's investigations focused on it, and its final report presents a comprehensive description of developments during this period. Second, in March 2004 the DCS adopted the White Paper on Corrections in South Africa, setting out a new policy framework and strategic direction for the prison system. Third, by October 2004 the full Correctional Services Act (111 of 1998) was brought into force,¹⁴² thus providing the prison system with a legal framework aligned to the Constitution. This historical differentiation should not be interpreted to mean that the crisis in the DCS was resolved by 2004, but rather that a turning point was reached through institutional, legislative and policy developments. Policy and legislative clarity and certainty were and remain important requirements for prison reform. It is definitely the case that some of the problems manifested during the period 1994 to 2004 remain in existence. It is also the case that, especially since 2004, DCS senior management and other government structures are engaging with these challenges in a manner that should, at least at face value, be considered as sincere and aimed at bringing about a prison system free from corruption and maladministration.

The scope and extent of the collapse of discipline and order in the DCS after 1994 is only truly appreciated when a more detailed description is provided of how this crisis manifested itself. Merely stating that there was “a collapse of order and discipline” or that “corruption was rife” does not fully convey the seriousness of the situation, nor does it give insight into the persistent reform challenges with which the Department continues to struggle. The crisis manifested itself on various levels involving individuals, organised labour and the senior management. The remainder of this section sets out the dimensions of the crisis, paying special attention to: failures at strategy and policy levels; leadership instability; the actions of organised labour; the manipulation of service benefits; the use of violence and coercion by certain factions in the staff corps; and rights violations perpetrated against prisoners. An important failure was the seeming directionlessness of policy initiatives: this is addressed in the following section.

4.1 Strategy and policy development

¹⁴² Some parts came into force in July 2004 and the remainder, in October 2004.

In Chapter 2 it was noted that during a crisis, policy sectors with low levels of institutionalisation lack the capacity to implement and consolidate reforms, with the result that the sector experiences coordination problems, “zig-zag policies and inter-organisational friction”.¹⁴³ Policy development in DCS after 1994 until 2004 can indeed be described as zigzag – there was little coherence, a central vision was lacking and policy developments were detached from the then applicable core policy document, the 1994 White Paper.¹⁴⁴ It was indeed as Sloth-Nielsen observed: “[P]olicy changes that have in fact occurred during the eight years subsequent to the release of the [1994] White Paper cannot for the most part be linked in any way to it.”¹⁴⁵ As previously noted, the 1994 White Paper was an inadequate response to the situation at the time as it failed to deal with the fundamental issues of transformation in the new democratic and constitutional order. It consequently failed to seize the opportunity to reinvent the prison system as an institution founded on fundamental human rights, the rule of law, transparency and accountability.

The policy initiatives that emerged thereafter were not necessarily inherently flawed, but it can be safely assumed that, since they were detached from a coherent policy framework, they created confusion and frustration among the staff and the public. What appeared was a range of initiatives that were not always clear in their purpose and long-term goals; the initiatives also blurred management’s focus by frequently making promises and raising expectations beyond what could be delivered. Moreover, in the course of having senior management embark on so many different policy initiatives with so few results, confidence in their leadership abilities came to wane.

The policy initiatives should also be seen against the backdrop of chronic overcrowding experienced by the prison system from 1994 onwards,¹⁴⁶ which was frequently used as a convenient scapegoat for the prevailing problems as well as for providing an all-too handy excuse for not implementing recommendations.

¹⁴³ Boin, A. and T’Hart, P. (2000), p. 17, citing Kouzmin, A. and Jarman, A. (1989) ‘Crisis decision making – towards a contingent decision path perspective’. In Rosenthal, U., Charles, M.T. and T’Hart, P. (eds) *Coping with crises: the management of disasters, riots and terrorism*. Springfield: Charles C. Thomas, pp. 397-435.

¹⁴⁴ Sloth-Nielsen, J. (2003) *Overview of Policy Developments in South African Correctional Services*. CSPRI Research report No. 1, Bellville: Community Law Centre, p. 5.

¹⁴⁵ Sloth-Nielsen, J. (2003), p. 5.

¹⁴⁶ Pete, S. (2000) ‘The good the bad and the warehoused’: The politics of imprisonment during the run-up to South Africa’s second democratic election, *SA Journal for Criminal Justice*, Vol. 13, p. 2.

4.1.1 Unit management

The concept of unit management first appeared in the Annual Report of 1997 after a DCS delegation visited the US on a study tour to investigate unit management in January 1997.¹⁴⁷ Unit management would see prisoners accommodated in smaller units (of less than 60 prisoners) to facilitate direct supervision, custody and control, and to contribute to rehabilitation.¹⁴⁸ The central aim was to move away from the warehousing of prisoners in large communal cells and enable direct and active supervision of prisoners so as to facilitate an integrated mode of service delivery. In 2000, the then Minister of Correctional Services, Ben Skosana (IFP), saw unit management as key to the Department's transformation:

This new system [unit management] of prison management is a fundamental transformation of our prison system, in line with international best practice, to move away from the prison-focused management approach to a prisoner-focused management method. The new system provides for the management of prisoners in smaller units, with greater interaction between correctional officials and prisoners. Extensive training workshops are currently under way in the various provinces to prepare prison staff for unit management. It is envisaged that the system will be implemented in 27 prisons around the country during the course of this year. All the recently built prisons have been designed along the lines of unit management.¹⁴⁹

The Department would spend significant time and resources to promote unit management,¹⁵⁰ and by 2002 reported that it had been implemented at 42% of prisons (an estimated 100 prisons).¹⁵¹ A point frequently raised by commentators was that unit management required particular prison architecture to enable the accommodation of prisoners in smaller units but that the overwhelming majority of South Africa's prisons were instead designed to warehouse people in large communal cells. Slowly, more accurate information about the implementation

¹⁴⁷ Department of Correctional Services (1998), p. 55.

¹⁴⁸ Dissel, A. and Ellis, S. (2002) *Reform and Stasis: Transformation in South African Prisons*, Johannesburg: Centre for the Study of Violence and Reconciliation, p. 5.

¹⁴⁹ Minister of Correctional Services (Hon. Skosana), *Proceedings of the National Assembly*, 12 May 2000, p. 109.

¹⁵⁰ Sloth-Nielsen, J. (2003), p. 14.

¹⁵¹ Department of Correctional Services (2003) *Annual Report 2002/3*, Pretoria: Department of Correctional Services, p. 123.

of unit management emerged. In 2004 it was reported that a training manual for unit management had been developed¹⁵² and that it would be tested at 36 so-called Centres of Excellence.¹⁵³ In other words, four years after this innovation had been announced in 2000 and reportedly implemented at 42% of prisons, the Department revealed that it had developed a training manual on unit management; it is consequently unclear what training Minister Skosana had been referring to in 2000. In 2007 it was reported that unit management had been implemented at the 36 Centres of Excellence, but that there were “challenges with regard to adherence to national norms and standards”, and that it had been implemented at 50% of other prisons to “varying degrees”.¹⁵⁴ The “challenges” and “varying degrees” of implementation are not explained in official publications, but it can be assumed that it is an understatement of the problem and that the roll-out was far less extensive than had been optimistically forecast.

At a time when the prison system was severely overcrowded and facing serious governance and leadership problems as well as allegations of rights violations, as is described in more detail below, unit management was an attempt to solve the wrong problem. It did not address the fundamental nature of the prison system but rather attempted to import a prison-management model from abroad. The focus should have been more modest, such as meeting the minimum standards of humane detention.

4.1.2 Super-maximum prisons

South Africa has two super-maximum security prisons, C-Max Pretoria¹⁵⁵ and Ebongweni in Kokstad (KwaZulu-Natal), both established in the 1994 – 2002 period. Both prisons were designed to be “escape-proof” and house the “worst of the worst”. It was envisaged that prisoners detained there would be subject to an extremely harsh regime, and this was widely condemned by human rights groups¹⁵⁶ and later the Jali Commission.¹⁵⁷ C-Max is the former

¹⁵² Department of Correctional Services (2005) *Annual Report 2004/5*, Pretoria: Department of Correctional Services, p. 41.

¹⁵³ Following the adoption of the 2004 White Paper, the DCS identified 36 prisons that would be the vanguard to implement the 2004 White Paper; these are known as Centres of Excellence.

¹⁵⁴ Department of Correctional Services (2007) *Annual Report, 2006/7*, Pretoria: Department of Correctional Services, p. 18.

¹⁵⁵ C-Max stands for Closed Maximum Security.

¹⁵⁶ Pete, S. (2000), p. 5-6.

death row cells at the Pretoria Central Prison that were converted after the abolition of the death penalty in 1994. It now has capacity for 281 prisoners under C-Max conditions of detention. Ebongweni, built over a period of four years, has space for 1 440 inmates and became operational in 2002.

The need for super-maximum facilities in the South African prison system was substantially overestimated and both prisons remain underutilised. For example, in February 2011 C-Max was 45% full and Ebongweni a mere 37% full.¹⁵⁸ Super-maximum prisons were also not part of the 1994 White Paper.¹⁵⁹ C-Max was an initiative from inside the DCS (Gauteng region) as a specific response to the high level of violence experienced in the prisons of that province.¹⁶⁰ Ebongweni was, however, the brainchild of then Minister of Correctional Services, Sipo Mzimela (1994-1998), and his advisors.¹⁶¹ Planning of Ebongweni commenced prior to planning for the conversion of death row into C-Max, but C-Max was completed well before Ebongweni. Not only was the need for Ebongweni misguided, but the location of the facility in the remote town of Kokstad and its specific locality there compounded problems. This resulted in significant construction delays and additional costs. Ultimately, Ebongweni prison would only be partly functional.¹⁶² Costing R450 million to build, 194% over budget, Ebongweni did little to address any of the problems the DCS was experiencing.¹⁶³

An important reason forwarded for the construction of super-maximum facilities was the high number of escapes, as discussed above in section 3.3.2. For example, in 1994 a total of 1218

¹⁵⁷ Jali Commission, pp. 351-368.

¹⁵⁸ Department of Correctional Services Management Information System (MIS)

¹⁵⁹ Sloth-Nielsen, J. (2003), p. 14.

¹⁶⁰ Buntman, F. and Muntingh, L. (2012 forthcoming) Super-maximum prisons in South Africa, In Ross J (ed) *Globalization of Supermax Prison*, Chapel Hill: Rutgers University Press.

¹⁶¹ Buntman, F. and Muntingh, L. (2012 forthcoming).

¹⁶² The physical structure and terrain of Ebongweni presented numerous difficulties that were not properly investigated and assessed, and to date the prison is beset with practical and logistical problems. Amongst others, poor ventilation at Ebongweni has resulted in a situation where large parts of the prison cannot be used (Sloth-Nielsen, J. (2003), p. 21. Report of the Portfolio Committee on Correctional Services on its 2-6 August 2010 oversight visits to the Leeuwkop, Pretoria Female, Rustenburg, New Kimberley, Durban Westville and Ebongweni correctional centres - dated 26 January 2011.

<http://www.pmg.org.za/docs/2011/comreports/110201pccorrectreport.htm>)

¹⁶³ Sloth-Nielsen (2003, p. 21) reflects the construction cost of Ebongweni as R360 million, but the DCS website notes the final cost as R450 million (DCS website "Ebongweni Centre of Excellence, <http://www.dcs.gov.za/AboutUs/COE/centre/KZN/EbongweniMaxCC.aspx> Accessed 16 December 2011).

prisoners escaped from custody.¹⁶⁴ Escapes attracted significant negative media attention directed at the DCS and added to public insecurity. However, a closer analysis of escape statistics indicate a decline by the time C-Max opened (1997) and these had already stabilised at much lower levels by the time Ebongweni admitted its first prisoners in 2002.¹⁶⁵ There is thus little reason to believe that the creation of super-maximum facilities reduced escapes. The main reason for escapes was, according to the Jali Commission, not the inadequate infrastructure, but rather collusion between officials and prisoners and/or negligence by officials to adhere to security procedures.¹⁶⁶ The DCS by its own admission acknowledged that negligence was the major cause of escapes and that in some instances officials assisted escapes.¹⁶⁷ The policy decision that saw the creation of super-maximum security prisons to reduce escapes was not only misdirected but also resulted in wasteful and fruitless expenditure. Moreover, it directed resources towards the wrong solution and distracted the Department from the real challenges that were thwarting reform of the prison system.

4.1.3 Privatisation

Privately operated prisons were also not featured in the 1994 White Paper and must be seen as a consequence of the national government's policy decision to see wider private sector involvement in public service procurement as a means to improve the economic position and influence of black citizens.¹⁶⁸ It was also the case that Minister Mzimela favoured private sector involvement in the prison system. Following a trip in 1997 to the US and UK, Mzimela observed: "Wherever the private sector got involved, they have delivered a better service, and have done it at less cost to the taxpayer."¹⁶⁹ There appears to have been very little debate about the principle of private sector involvement in the prison system.¹⁷⁰ Support for private

¹⁶⁴ Department of Correctional Services (1995).

¹⁶⁵ Buntman, F. and Muntingh, L. (2012 forthcoming).

¹⁶⁶ Jali Commission, pp. 365.

¹⁶⁷ Department of Correctional Services (2002) *Annual Report 2001/2*, Pretoria: Department of Correctional Services, pp. 64-65; Department of Correctional Services (2003), p. 44; Jali Commission, pp. 275-389.

¹⁶⁸ Picard, L.A. (2005), p. 333.

¹⁶⁹ Goyer, K.C. (2001) *Prison privatisation in South Africa - issues, challenges and opportunities*. Monograph 64, Pretoria: Institute for Security Studies, p. 38.

¹⁷⁰ Cavadino, M. and Dignan, J. (2006) *Penal systems – a comparative approach*, London: Sage Publications, p. 320.

sector involvement in the prison system was also found in his successor, Ben Skosana (IFP), who signed the agreements in 2000 for two privately designed, developed, built and operated prisons, known as Apops (Asset Procurement and Operating Partnership System) and with each housing nearly 3 000 prisoners.¹⁷¹ The terms of the contracts were extremely favourable to the contractors: not only were they signed for a 25-year term but guaranteed profits (25% and 29%, respectively) linked to inflation were built in.¹⁷² Numerous other problems have also been noted in respect of the manner in which the contracts were awarded,¹⁷³ including corruption. However, in an address to the National Assembly in 2000 Minister Skosana makes a number of astonishing admissions:

It is important to mention that in order to provide for the financing of Apops projects within the MTEF [Medium Term Expenditure Framework] budgetary allocations, financed posts of 4 404 and 1 424 will be frozen in budgetary terms in the 2001-02 and 2002-03 financial years respectively. This will result in a declining financed personnel establishment of 39 534, 35 936 and 34 512 from those financial years respectively. This freezing of posts will result in a very high correctional official-prisoner ratio which will adversely affect the management of the department in the following specific areas: Firstly, the implementation of the new unit management system; secondly, the prevention of escapes by prisoners, which will impact on the safety of the community; thirdly, the security of correctional officials and prisoners; and, fourthly, service delivery.¹⁷⁴

Knowingly, the DCS had entered into an agreement that would be to its direct and immediate detriment at a time when overcrowding and security were in a critical state. The anticipated consequences of the Apops agreements Minister Skosana cites, are indicative rather of the reasons **not** to enter into the agreements. The two privately operated prisons would remain a

¹⁷¹ Minister of Correctional Services (Hon. Skosana), *Proceedings of the National Assembly*, 12 May 2000, p. 110.

¹⁷² Sloth-Nielsen, J. (2003), p. 18.

¹⁷³ Sloth-Nielsen, J. (2003), pp. 16-19; Goyer, K.C. (2001); Berg, J. (2001) Private prisons: The International Debate and its relation to South Africa, *Acta Criminologica*, Vol. 14 No. 3.

¹⁷⁴ Minister of Correctional Services (Hon. Skosana), *Proceedings of the National Assembly*, 12 May 2000, p. 111.

contentious issue in the DCS because of the costs involved;¹⁷⁵ attempts at renegotiating the contracts to terms more favourable to the partners also failed (see Chapter 5 section 4.4). Apart from this manifestly poor decision-making, the Apops contracts also raised numerous questions about the integrity of the contracting process and whether there were corrupt influences and manipulation when the contracts were awarded. This has never been confirmed, but the entire episode added to the poor image of the DCS and its senior leadership. While the two private prisons may showcase superior standards in service delivery,¹⁷⁶ it remains doubtful if they produced any benefits for the wider system and may indeed have been detrimental due to the costs involved and the controversy created. The two private prisons remain as somewhat unwanted, but irremovable, appendices to the prison system.

4.1.4 Electronic monitoring

Electronic monitoring of parolees was not mentioned in the 1994 White Paper and is another example of ad hoc planning. Presumably electronic monitoring of parolees is a cost-effective and efficient way to keep track of offenders placed in the community. Using a transmitter, it enables remote monitoring of offenders to verify that they are abiding by their conditions of release, such as house arrest. Electronic monitoring therefore, its proponents argue, reduces the need for officials physically to visit offenders on parole to monitor compliance with their conditions of release from prison, specifically house arrest. To verify the cost-effectiveness of electronic monitoring, the DCS conducted a pilot project from September 1997 to August 1998 in Pretoria.¹⁷⁷ The results were reportedly so encouraging that it was decided to roll out electronic monitoring to the rest of the country. This would, apparently, have enabled electronic monitoring of 10 000 parolees and probationers, with savings amounting to R100 million (US\$14.7 million). The main benefit of electronic monitoring would, according to the DCS, be that more prisoners could be placed on parole and correctional supervision and thus

¹⁷⁵ By 2004/5 the DCS was spending more than 6% of the total budget on 3% of the prison population accommodated in the two private prisons (National Treasury (2004) *National Medium Term Expenditure Estimates: Vote 21 Correctional Services*).

¹⁷⁶ Cavadino, M. and Dignan, J. (2006), p. 321.

¹⁷⁷ Department of Correctional Services (1998), p. 17.

alleviate prison overcrowding by reducing the demand for prison space.¹⁷⁸ On 31 March 1999 Cabinet approved the national roll-out of electronic monitoring.¹⁷⁹ Nearly two years later, in January 2001, a tender was advertised for the implementation of electronic monitoring in the DCS, but a month later the tender was withdrawn due to some confusing phrases in the tender document.¹⁸⁰

The project was, however, fatally flawed from the start as the technology used was not suitable for South African conditions. The technology tested in the pilot project was landline-based and dependent on electricity. Access to both a telephone landline and electricity remains the preserve of the small South African middle class. This was even more so the case in the late 1990s. Effectively, the poor, people living in rural areas, and people in the informal settlements surrounding South African cities would be excluded from electronic monitoring. However, it is indeed poor and Black South Africans that make up the overwhelming majority of the prison population.

The inappropriateness of the technology was ultimately acknowledged in 2002: “The electronic monitoring system should be effective in both the underprivileged and privileged communities. A system that will only be operational in areas that have access to electricity and telephone connections is not acceptable.”¹⁸¹ The last mention of electronic monitoring of parolees and probationers is in the 2002/3 Annual Report, noting that a feasibility study needs to be undertaken.¹⁸² In June 2003 the DCS reported to the Portfolio Committee that there had been a reassessment of electronic monitoring and that, first, the tendering process did not comply with Public Private Partnership process and, second, it was found that such monitoring was effective in only 26% of urban areas and 19% of rural areas.¹⁸³

¹⁷⁸ Department of Correctional Services (1998), p. 17.

¹⁷⁹ Department of Correctional Services (2000) *Annual Report 1999*, Pretoria: Department of Correctional Services, p. 45.

¹⁸⁰ Department of Correctional Services (2001) *Annual Report 2000/1*, Pretoria: Department of Correctional Services, p. 111.

¹⁸¹ Department of Correctional Services (2002), p. 82.

¹⁸² Department of Correctional Services (2003), p. 62.

¹⁸³ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 17 June 2003, <http://www.pmg.org.za/minutes/20030616-legislation-implementation-parole-board-hivaids-rehabilitation-policy-formulation-c> Accessed 14 November 2011.

After five years of testing, investigating and singing its praises, electronic monitoring of parolees and probationers appears to have been shelved. The limitations of the technology were evident from the start and would thus have rendered it inappropriate to the majority of South African parolees and probationers at the outset, yet the Department persisted with further investigations and testing, presumably at some cost.

4.1.5 Accommodation for prisoners

With the prison population rising rapidly from 1994 onwards, overcrowding soon took on crisis proportions and solutions had to be found. One proposal that was briefly floated in 1997 was that disused ships could be converted into prisons, and in October 1997 Minister Mzimela announced that negotiations to this end were well underway.¹⁸⁴ In the end this retrogressive idea never materialised.

Conditions of detention deteriorated rapidly, with some prisons being more than 200 per cent full.¹⁸⁵ In the late 1990s two new prisons were completed (Malmesbury and Goodwood), but the construction costs were extremely high.¹⁸⁶ In August 2002 Minister Skosana unveiled his plan for the construction of ten 3 000-bed prisons that would cost half as much to construct as conventional prisons.¹⁸⁷ These so-called New Generation prisons would not only reduce construction costs by relying on low-technology solutions but would also require less staff to operate as a result of innovative design features, according to the architect, Mr. Paul Silver.¹⁸⁸ Less than a month after the Minister announced the New Generation prisons, the DCS presented the prototype design to the Portfolio Committee on Correctional Services.¹⁸⁹

¹⁸⁴ Pete, S. (2000), p. 22.

¹⁸⁵ Pete, S. (2000), pp.9-14.

¹⁸⁶ Malmesbury was built for R139 million (US\$ 20.4 million) to accommodate 1 692 prisoners, or R82 000 per bed space (Pete, S. (2000), p. 9)

¹⁸⁷ *Tronke het in 3j.plek vir 30 000 méér'. Die Burger*, 24 August 2002. [Prisons to have space for 30 000 more in three years – own translation.]

¹⁸⁸ *Tronke het in 3j.plek vir 30 000 méér'. Die Burger*, 24 August 2002. [Prisons to have space for 30 000 more in three years – own translation.]

¹⁸⁹ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 17 September 2002, <http://www.pmg.org.za/minutes/20020916-new-generation-prisons> Accessed 13 November 2011.

The prototype design presented to the Committee sounded like a panacea to the problems of the Department: it was cheap to build and operate; rehabilitation would be possible; it adhered to unit management principles; and the construction process created employment for small local contractors (to name a few). Notwithstanding these benefits, the proposal immediately ran into resistance from the Portfolio Committee, which questioned the integrity of the Department. Some members of the Committee dismissed the Department's proposal as "simply another marketing strategy" whilst others questioned the need for new prisons since overcrowding was, as they explained, the result of the growing awaiting trial population, indicating systemic problems in the criminal justice system. After the initial excitement about New Generation prisons, the issue seems to disappear.

However, in 2003/4 the Department announced that four sites (Leeuwkop, Klerksdorp, Kimberley and Nigel) had been identified for the new prisons and that the tender process was being finalised.¹⁹⁰ Yet progress was slow, and in 2006 it became apparent that the low construction costs claimed by the architect Paul Silver in 2002 had little basis in reality. When the Department briefed the Portfolio Committee in 2006 on the planned four new prisons, the focus was on a procurement methodology.¹⁹¹ Two of the three methodologies¹⁹² that were proposed involved co-financing by the private sector, indicating that the state did not have sufficient funds to build the prisons. In the following five years there would be numerous debates on the prison construction programme and, more specifically, about private sector involvement.¹⁹³ The Department would frequently change its position and the Portfolio Committee would remain sceptical on the issue. Ultimately in 2011, the proposed four public

¹⁹⁰ Department of Correctional Services (2004) *Annual Report 2003/4*, Pretoria: Department of Correctional Services, p. 17.

¹⁹¹ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 6 June 2006. <http://www.pmg.org.za/minutes/20060605-procurement-methodology-new-generation-prisons-briefing-department> Accessed 13 November 2011.

¹⁹² (1) A conventional procurement by DCS more commonly known as a Public Sector Comparator procurement; (2) A complete Public Private Partnership with full services required rendered by the private partner; and (3) A project finance model (partial Public Private Partnership) where specific core functions will be provided by DCS and the balance by the private partner. (PMG Report of the meeting of the Portfolio Committee on Correctional Services of 6 June 2006. <http://www.pmg.org.za/minutes/20060605-procurement-methodology-new-generation-prisons-briefing-department> Accessed 13 November 2011)

¹⁹³ Muntingh, L. (2010) 'Love Me, Love Me Not' – *Public Private Partnerships in the Department of Correctional Services*, Paper delivered at seminar hosted by Institute for Security Studies, Cape Town, 28 July 2010.

private partnerships prisons which had already been placed out on tender would be scrapped,¹⁹⁴ to the ire of the bidders who had submitted costly bids. The only prison that was ultimately built from this nearly decade-long saga was Kimberley's new prison, for which the budget was R250 million (US\$ 36.7 million) but which ended up costing R857 million (US\$ 126 million), that is, 243% over budget.¹⁹⁵

The prison construction debacle demonstrated the Department's difficulties in following through on policy decisions and executive orders. Even though the construction of eight new prisons was approved, funds made available and announced by President Mbeki in his 2005 and 2006 State of the Nation Addresses,¹⁹⁶ the DCS was unable to deliver on these.

4.1.6 The policy gaps

The preceding discussion outlined the generally misdirected and frequently poorly executed policy responses of the Department to the problems it was facing after 1994. Notwithstanding the shortcomings of these policy initiatives, it is also notable that the Department failed to respond to a number of critically important problems it was facing in the period 1994 to 2001. In this regard, three proverbial elephants were standing in the room: prisoners' rights, HIV and AIDS, and corruption. From the perspective of the Constitution, these were fundamental problems requiring urgent and comprehensive action. Failure to address them would mean a material failing on the transformative aspiration of the Constitution.

4.1.6.1 Human rights

In 1998 the DCS launched a human rights training programme aimed at re-training DCS officials to inculcate a culture of human rights in the prison system. The training programme (run by two NGOs and a tertiary education institution)¹⁹⁷ was piloted at four prisons, namely Rustenburg, Kroonstad, Nylstroom and Krugersdorp, and it is reported that “[i]f the results

¹⁹⁴ ‘Plan to build prisons sacked’. IOL, 27 October 2011, <http://www.iol.co.za/dailynews/news/plan-to-build-prisons-sacked-1.1166283> Accessed 13 November 2011.

¹⁹⁵ ‘Kimberley prison cost R600m more’. Beeld, 10 Feb 2010, <http://www.property24.com/articles/kimberley-prison-cost-r600m-more/11152> Accessed 13 November 2011.

¹⁹⁶ Address of the President of South Africa, Thabo Mbeki, at the Second Joint sitting of the third Democratic Parliament, Cape Town, 11 February 2005. State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 3 February 2006.

¹⁹⁷ Centre for the Study of Violence and Reconciliation, Lawyers for Human Rights and Technikon RSA.

prove to be satisfactory, the project will be implemented at all prisons”.¹⁹⁸ However, in the following year no mention is made of it in the Annual Report, and it appears that the initiative came to an end.¹⁹⁹ While successive Annual Reports abound with phrases such as “upholding the fundamental rights of offenders”, there is little evidence that the DCS was taking any meaningful and targeted steps to train its staff on prisoners’ rights, prevent rights violations and hold perpetrators accountable. In the new democratic order where prisoners are afforded detailed rights by the Constitution,²⁰⁰ the DCS did little, save in rhetoric, to see that its officials are trained on prisoners’ rights and that the necessary structures are set up to monitor and respond to rights violations. Even after the Judicial Inspectorate for Prisons became operational in 2000 and raised numerous problems about the treatment of prisoners, the Department generally failed to respond. The role of the Judicial Inspectorate is discussed further in Chapters 4 and 6.

There is equally little to indicate that the DCS paid any real heed to the international human rights law instruments pertaining to prisoners such as the UN Standard Minimum Rules for

¹⁹⁸ Department of Correctional Services (1999) Annual Report 1998, Pretoria: Department of Correctional Services, p. 52.

¹⁹⁹ According to Ms Amanda Dissel, then based at the Centre for the Study of Violence and Reconciliation (CSVR) and intimately involved with the training programme, 20 000 copies of a human rights training manual were printed and given to the DCS, but she could not confirm if these were in fact distributed and supported with training (telephonic interview, 17 November 2011).

²⁰⁰ Section 35(2) ‘Everyone who is detained, including every sentenced prisoner, has the right

- a. to be informed promptly of the reason for being detained;
- b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- f. to communicate with, and be visited by, that person's
 - i. spouse or partner;
 - ii. next of kin;
 - iii. chosen religious counsellor; and
 - iv. chosen medical practitioner.’

the Treatment of Prisoners and the UN Convention Against Torture. It remains the situation that the DCS still does not have a policy on the prevention and eradication of torture.²⁰¹ The results of this policy gap would manifest itself in continued assaults on prisoners as well as significant numbers of unnatural deaths in prisons, discussed below in section 4.14.

4.1.6.2 HIV and AIDS

After 1994 the mortality rate of prisoners increased from 1.65 per 1000 in 1995 to 9.2 per 1000 in 2005, a near six-fold increase.²⁰² It was commonly accepted that this was as a result of AIDS. Moreover, it was well known that coerced sex is common amongst prisoners and forms part and parcel of the prison gang culture (see Chapter 4 section 4.1), yet a policy response to sexual violence remained lacking. In respect of HIV and AIDS, policies and practices of the Department frequently fell short of desired standards in the past 17 years.²⁰³ The first HIV and AIDS policy, formulated in 1992, required that HIV-positive and high-risk prisoners be segregated from the general population, but this changed two years later to bring it into line with World Health Organisation guidelines; the segregation of prisoners was removed from the DCS policy.²⁰⁴ A policy amendment was issued in 1996 to provide for a number of specific programmes, one of which was the establishment of Sexually Transmitted Diseases (including HIV and AIDS) clinics at all prison hospitals. The clinics would be run by nursing staff who would provide testing, counselling, treatment, and information about STDs.²⁰⁵ An additional policy prescribed condom distribution, which required that condoms would be distributed on request and following the prisoner receiving information and/or counselling from a nurse trained as an AIDS counsellor regarding the use of condoms and high-risk behaviour.²⁰⁶ Having to request condoms obviously created a substantial barrier due

²⁰¹ Muntingh, L. and Fernandez, L. (2008) A review of measures in place to effect the prevention and combating of torture with specific reference to places of detention in South Africa, *South African Journal on Human Rights*, Vol. 24 No. 1, p. 126.

²⁰² Muntingh, L. and Tapscott, C. (2009) HIV/Aids and the prison system, In Rohleder, P. et al *HIV/AIDS in South Africa 25 years on*. New York: Springer, p. 315.

²⁰³ Muntingh, L. and Tapscott, C. (2009), p. 314.

²⁰⁴ Goyer, K.C. and Gow, J. (2001) Confronting HIV/AIDS in South African prisons, *Politikon*, Vol. 28 No. 2, pp.195–206.

²⁰⁵ Goyer, K.C. and Gow, J. (2001), pp.195–206.

²⁰⁶ Goyer, K.C. and Gow, J. (2001), pp.195–206.

to the stigma associated with male-on-male sex in prison. Notwithstanding the aims of this policy, the mortality rate of prisoners accelerated. The 1996 policy remained in place until the *Framework for the Implementation of Comprehensive HIV and AIDS Programmes and Services for Offenders and Personnel 2007-2011* was adopted in 2007.

Prisoners' access to antiretroviral medication (ARV) remained elusive, and it was only after a group of prisoners at Durban Westville prison in KwaZulu-Natal embarked on litigation in 2005²⁰⁷ that the situation changed.²⁰⁸ Even when the KwaZulu-Natal High Court ordered the Department to provide deserving prisoners with access to ARV, the Department appealed the decision and wanted the order already granted suspended until the appeal was heard. The request was not granted and after much foot-dragging the DCS commenced with setting up accredited antiretroviral therapy (ART) centres. DCS staff was also not spared the effects of HIV and AIDS, and the mortality rate of officials increased from 3/1000 in 1995 to 6.1/1000 by 2001.²⁰⁹ Despite the attrition of staff²¹⁰ there is little evidence that the DCS responded to the situation in any meaningful way. It was only in the 2007 Policy Framework that both staff and prisoners are targeted.²¹¹

By 2000 HIV and AIDS had become a highly politicised issue domestically and internationally. The DCS had in its care a segment of the population known globally to have a higher HIV prevalence rate than the general population,²¹² and since 1995 the mortality rate of prisoners had climbed sharply. With an estimated 350 000 people moving through the prison system annually,²¹³ the Department had an important task to fulfil as prisons are recognised vectors for HIV, AIDS and TB.²¹⁴ Their responsibility was not only to the people

²⁰⁷ *EN and Others v Government of the RSA and Others* (2007) (1) BCLR 84 (SAHC Durban 2006).

²⁰⁸ Muntingh, L. and Tapscott, C. (2009), pp. 306-307.

²⁰⁹ Muntingh, L. and Tapscott, C. (2009), pp. 315.

²¹⁰ A DCS-commissioned survey found, for example, that 23% of officials in KwaZulu-Natal were HIV-positive (Muntingh, L. and Tapscott, C. (2009), pp. 315).

²¹¹ Muntingh, L. and Tapscott, C. (2009), pp. 314.

²¹² World Health Organisation (1993) *WHO guidelines on HIV infection and AIDS in prisons*, New York: UNAIDS. UNODC (2007) *HIV and Prisons in sub-Saharan Africa: Opportunities for Action*, Vienna: UNODC.

²¹³ Office of the Inspecting Judge (2006) *Annual Report of the Judicial Inspectorate for Prisons 2005/6*, Cape Town: Office of the Inspecting Judge, pp. 12-13.

²¹⁴ UNODC (2006) *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings A Framework for an Effective National Response*, New York: United Nations.

inside prison but to the broader community. Later research would establish that the prevalence rate amongst male sentenced prisoners in South Africa is just below 20%, or roughly one in five sentenced prisoners.²¹⁵ Moreover, coerced sex between male prisoners was a known phenomenon and strongly linked to the prisons gangs (see section 4.13 and Chapter 5 section 7). Addressing HIV and AIDS in prisons was critically important, yet the Department did little to prevent transmission and it was only after litigation that it commenced with more tangible steps by providing access to ARV.

4.1.6.3 Corruption

In July 1996 the DCS established its own internal Anti-Corruption Unit (ACU) following a Cabinet Committee decision requiring cooperation between different security agencies to combat corruption.²¹⁶ The ACU would report directly to the Commissioner and its main purpose was to investigate corruption. When the DCS briefed the Portfolio Committee on Correctional Service on the performance of the ACU in 1998, it was already evident that it was encountering significant problems, but most importantly it noted that “[m]anagers are in some instances reluctant to act against transgressors”.²¹⁷ This should have been a clear indication that the maintenance of discipline and order was in a poor state. The results reported on were paltry: 28 officials were subjected to departmental disciplinary action and six to criminal prosecutions. The results from 1999 looked slightly better, with 366 cases reported, 202 being investigated and 30 cases referred to the police for investigation.²¹⁸ Yet the DCS proclaimed that the “prevention and eradication of corruption is a priority for the

²¹⁵ Lim’Uvune Consulting (2007) *DCS HIV prevalence survey 2006*, Unpublished report, Pretoria.

²¹⁶ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 13 May 1998, <http://www.pmg.org.za/minutes/19980512-inspecting-judge-overcrowding-and-anti-corruption-unit-briefing-0> Accessed 13 November 2011.

²¹⁷ PMG Report of the meeting of the Portfolio Committee on Correctional Services of 13 May 1998, <http://www.pmg.org.za/minutes/19980512-inspecting-judge-overcrowding-and-anti-corruption-unit-briefing-0> Accessed 13 November 2011. Other problems noted were: ‘Not sure that all corruption related matters are being reported to the ACU (Anti-Corruption Unit); People withhold information; Personnel as well as prisoners are afraid of being victimised; People are reluctant to give evidence at disciplinary hearings and court cases and therefore prefer to stay anonymous; Some cases take time to investigate as it requires monitoring and surveillance; Disciplinary steps are not always taken timeously.’

²¹⁸ Department of Correctional Services (2000), p. 83.

Department.”²¹⁹ By 2000 the ACU had been reduced to five investigators for a department employing more than 32 000 officials.²²⁰ It was evident that the Department’s rhetoric about the prevention and eradication of corruption was at odds with reality.

External investigations into DCS would uncover widespread corruption, and notwithstanding it being known to senior management that corruption was a problem by the late 1990s, the overwhelming impression is that little more was done than establishing the ACU and then assigning it so few resources that it was by and large rendered ineffective. Senior management failed to address at policy level the biggest challenge that the Department was facing, yet it was dabbling in other distractions such as unit management and electronic monitoring.

4.2 Leadership instability

Instability at the most senior level of the Department severely undermined the functioning of the Department and consequently prison reform. From 1994 to 2011 the DCS has had eleven National Commissioners, of which seven were permanent appointments and the others acting National Commissioners, as shown in Table 2 below.

Table 2

Name	Status	Start	End	Duration
General Henk Bruyn	Permanent	April 1994	? 1996	2 years
Mr. Khulekani Sithole	Permanent	?1996	Nov 1999	2 ½ years
Mr.Thami Nxumalo	Acting	Nov 1999	May 2000	7 months
Rev. Lulamile Mbetse	Permanent	May 2000	March 2001	10 months
Mr. Watson Tshivase	Acting	April 2001	July 2001	3 months
Mr. Linda Mti	Permanent	Aug 2001	May 2007	6 years and 9 months
Ms Jabu Sishuba	Acting	May 2007	May 2007	1 month
Mr. Vernon Petersen	Permanent	May 2007	Oct 2008	1 year and 5 months
Ms Xoliswa Sibeko	Permanent	Oct 2008	Feb 2010	9 months active. She was suspended in mid-July 2009 and remained suspended until her contract was terminated in February 2010.

²¹⁹ Department of Correctional Services (2000), p. 83.

²²⁰ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 3 October 2000, <http://www.pmg.org.za/report/20001003-overcrowding-prisons-release-prisoners-escapes-anti-corruption>

Accessed 13 November 2011.

Name	Status	Start	End	Duration
Ms Jenny Schreiner	Acting	Feb 2010	May 2010	3 months
Mr. Tom Moyane	Permanent	May 2010	Present	

The longest serving National Commissioner was Linda Mti, a former Member of Parliament (ANC) and coordinator of the National Intelligence Co-ordinating Committee. He was appointed shortly before the Jali Commission was established. Under Mti, the first comprehensive strategic plan of the Department (known as Mvelaphanda) was developed in 2001 and the 2004 White Paper also published under his watch. Mti would, however, after his departure from the DCS, be implicated in corruption indulged in whilst he was National Commissioner (see Chapter 4 section 4.2).²²¹

The period 1994 to 2001 saw DCS sinking deeper into crisis. This can be ascribed at least in part be to the high turnover of National Commissioners: five in seven years, of whom two were acting in that capacity. Of particular significance during this period was Khulekani Sithole. Prior to joining the DCS in the early 1990s, he was an inspector with the Free State Department of Education and one of the first external appointments to the Department. He was rapidly promoted from director level and subsequently appointed as National Commissioner.²²² Sithole would ultimately resign amidst allegations of financial mismanagement and corruption, and was called unfit for public office by Parliament's Standing Committee on Public Accounts (SCOPA).²²³ The DPSA would also be extremely critical of Sithole and placed the blame on him for the chaotic state of human resources management of the Department. Sithole is perhaps best remembered for his proposals that disused mines be converted into prisons in order to alleviate overcrowding.²²⁴ The proposals alienated him from human rights groups.²²⁵

²²¹ 'The SIU's case against Linda Mti'. *City Press*, 20 March 2011, <http://www.citypress.co.za/SouthAfrica/The-SIUs-case-against-Linda-Mti-20110320> Accessed 13 November 2011. See Chapter 5 for a fuller description.

²²² Telephonic interview with Mr. Gideon Morris, former employee of the DCS and erstwhile secretary to Mr. Sithole (17 November 2011).

²²³ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 10 November 1999, <http://www.pmg.org.za/minutes/19991109-closure-sitole-matter-overseas-trip> Accessed 13 November 2011.

²²⁴ 'Mine-shaft prisons slammed: African bishops shocked by plan to lock up "animal" prisoners in underground jail'. *Anglican Journal*, April 1997, http://findarticles.com/p/articles/mi_7042/is_4_123/ai_n28700589/ Accessed 13 November 2011. 'There are criminals within our system who have made it clear that they are not prepared to conform to the norms of a democratic society ... People like murderers, rapists, armed robbers who

Leadership instability was not restricted to the National Commissioner's position. Senior officials in the Head Office and Regional Commissioners would frequently be in acting positions, or being transferred from one position to another. Moreover, persons in senior positions frequently lacked the skills and experience to deal with the problems the Department was facing between 1996 and 2001. Leadership instability continues to be a problem in DCS, and following Mti's departure in 2007 and at the time of writing (December 2011), there have again been three permanently appointed National Commissioners in four years while four of the seven Regional Commissioners were acting in that position.²²⁶

4.3 Operation Quiet Storm, Operation Thula and CORE

4.3.1 The Department of Public Service and Administration investigation

The decision taken by the Minister of Public Service and Administration in 1999 to have a management audit conducted of the DCS was in part motivated by events in KwaZulu-Natal. The audit team's final report describes these as follows:

Comments by the CCMA²²⁷ arbitrator in the case [of] *Bhengu v Department of Corrections*: " ... (the documentation) reads like something reminiscent of the goings on in the most basic of banana republics. It is quite clear that in the Province of KwaZulu-Natal from the beginning of December 1998 until February 1999 the situation amongst top level management could only be described as absolutely chaotic ... on its own version. The respondent has shown a clear inability to properly manage itself in

repeatedly transgress, they are animals. They must never see sunlight again.' – Department of Correctional Services commissioner Khulekani Sithole, suggesting that dangerous criminals should be thrown down disused mine shafts. ('The words of wisdom, the wit, the bloopers'. *Mail and Guardian*, 23 December 1997, <http://mg.co.za/article/1997-12-23-the-words-of-wisdom-the-wit-the-bloopers> Accessed 13 November 2011)

²²⁵ Pete, S. (2000), p. 22.

²²⁶ Department of Correctional Services (2011) *Annual Report 2010/11*, Pretoria: Department of Correctional Services, p. 4.

²²⁷ Commission for Conciliation Mediation and Arbitration. It is a statutory mechanism established by the Labour Relations Act to deal with disputes between employers and employees.

KwaZulu-Natal.... Management at both national and provincial levels had simply ceased to function effectively....²²⁸

There were thus early signs that in respect of human resources management, serious governance problems had developed in the DCS and it was unable to manage its human resource function according to the applicable policies and procedures. The DPSA management audit traced the timeline of causation back to the appointment of National Commissioner Khulekani Sithole (from mid-1996). He set, according to the DPSA, a particularly poor example as the most senior official of the Department:

The beginnings of a breakdown of proper procedures in HR [human resources] matters appear to coincide with the appointment of Commissioner Sithole. From the outset of his tenure of office the new Commissioner apparently took full advantage of all the powers of his office to the extreme in a campaign to surround himself with “place men”. It is alleged that, with scant regard for the published criteria contained in advertisements for posts, short lists were doctored and panel recommendations were ignored or manipulated to select the “preferred” candidates.²²⁹

The DPSA observed further that he used his authority to transfer staff to punish those who opposed him to ensure that he was surrounded by his “favourites”. When this attracted attention from investigators, records were altered to frustrate inquiries into the audit trail of staff movements, appointments and promotions. The situation was aggravated by the collusion between union elements and senior managers who were former office bearers, or even still holding office, in the same unions and who remained union members.²³⁰ Evidence was also found of properly appointed officials being physically removed from their offices and inspectors of the DCS refused permission to enter prisons to fulfil their official duties. It was ultimately the assassination of a whistleblower that prompted the appointment of the Jali Commission.

4.3.2 The Jali Investigation

²²⁸ Department of Public Service and Administration (1999) *Management Audit of the Department of Correctional Services*, Department of Public Service and Administration, Presented to the Portfolio Committee on Correctional Services, 19 April 2000, p. 3.

²²⁹ Department of Public Service and Administration (1999), p. 15.

²³⁰ Department of Public Service and Administration (1999), p. 15-16.

When the Jali Commission started its investigations some two and half years after the DPSA, it found that in almost all the management areas investigated, including the Head Office, that:

[r]ecruitment drives, appointments, promotions and merit awards are constantly tainted with allegations of malpractices, irregularities, nepotism and even corruption. The common feature of these allegations is the manipulation of the processes by senior officials in the employ of the Department.²³¹

In the Jali Commission's investigations it became clear that the manipulation of appointments and promotions was not being done in an ad hoc manner by individuals or small groups of uncoordinated individuals.²³² Evidence was submitted that the labour union POPCRU planned to fast-track affirmative action in KwaZulu-Natal by removing "reactionary forces" from senior positions and replacing them with "progressive people".²³³ A meeting to develop such a plan was held in 1996²³⁴ and attended by POPCRU members from KwaZulu-Natal and surrounding regions as well as a representative from the POPCRU National Office. At this meeting a plan was developed and code-named "Operation Quiet Storm". A former office bearer of POPCRU in KwaZulu-Natal, Mr. P. Ntuli, described Operation Quiet Storm as follows to the Jali Commission:

In essence, 'Operation Quiet Storm' entailed the forcible removal of 'reactionary forces' from their positions of power. This aim was to be achieved in stages, which followed one another rapidly. Certain strategic and influential posts were to be targeted. Once the incumbents were removed, our choice would be deployed to the vacant post. In order to ensure the speedy implementation of 'Operation Quiet Storm', among the strategies which would be employed were the following:

8.1 We would engage in long and arduous meetings with management – making certain demands. The idea was to frustrate management to the point where they would simply cave into our demands.

8.2 In certain instances, we would take management personnel as hostages – refusing to allow them to leave the rooms in which we would detain them.

²³¹ Jali Commission, p. 189 and p. 249.

²³² Jali Commission, pp.56-98.

²³³ The Jali Commission interpreted 'progressive people' to mean POPCRU members.

²³⁴ The Commission estimated that it was held before October 1996, but a precise date was not established.

8.3 In other instances, we would prevent management from entering their offices: we would lock the doors and ban entry by the use of doorstoppers.

8.4 We would embark on protest action and go-slows.

8.5 Some members would woo the secretaries of senior officers so that we would gather inside information.²³⁵

Operation Quiet Storm primarily affected management areas in KwaZulu-Natal,²³⁶ but was also rolled out to the Eastern Cape, Free State and Gauteng Provinces.²³⁷ This was evidenced by similar unrest in the management areas of Upington, Bloemfontein, St Albans, Johannesburg, Modderbee, and Krugersdorp.²³⁸ A similar operation was launched in the Eastern Cape, known as Operation Thula.²³⁹ Operation Thula²⁴⁰ was to achieve its objectives by making the prisons ungovernable and would be achieved by: ignoring instructions from senior management; proliferating the conveyance of contraband into the prisons; ignoring escapes; organising members to take leave simultaneously to make it difficult to run the prison; and turning the prison into a “G Hostel” (a filthy institution).²⁴¹

The Commission reported on numerous instances where POPCRU manipulated the appointment of staff. At secret meetings the fate of officials would be decided and POPCRU members then appointed into strategic positions in the DCS. Also on the agenda at these secret meetings was the identification of persons perceived to be stumbling blocks to “transformation” and therefore in need of removal.²⁴²

The Jali Commission conceded that a trade union may have campaigns or programmes of action, but it was concerned about the criminal nature of Operation Quiet Storm.²⁴³ In essence it blamed Operation Quiet Storm (and thus POPCRU and its leadership) for introducing a culture of lawlessness in the Department as “it became the norm for unwanted members to be

²³⁵ Jali Commission, p. 57.

²³⁶ Pietermaritzburg, Ncome, Eshowe, Durban Westville, Sevontein, Waterval, Empangeni and Stanger.

²³⁷ Jali Commission, p. 73.

²³⁸ Jali Commission, p. 75.

²³⁹ Jali Commission, p. 76.

²⁴⁰ Thula is isiXhosa for “keep quiet”.

²⁴¹ Jali Commission, p. 76.

²⁴² Jali Commission, p. 249.

²⁴³ Jali Commission, p. 62.

forcibly removed from their positions and for unlawful actions to occur with impunity. This culture spilled over to other provinces.”²⁴⁴ Operation Quiet Storm deliberately and flagrantly ignored legal prescripts and established procedures for employer-employee negotiations and the appointment of staff.

4.3.3 CORE

The manipulation of appointments and promotions were, however, not limited to the regions and management areas of DCS. From evidence presented to the Jali Commission it was apparent that since 1997 there had existed a small and secret group of senior officials in the Head Office who would effectively control the Department, especially where this concerned staff appointments at senior level.²⁴⁵ The group became known as CORE, referring to a core of officials who would oversee and advance racial transformation in the DCS. The Jali Commission could not establish the identity of CORE’s leader but evidence pointed to three DCS officials, one of whom was the National Commissioner at the time, Khulekani Sithole. By the time the Jali Commission concluded its work in 2006, it pondered whether CORE was still in existence and observed that while it may have changed membership, it was more than likely still in existence. Evidence about CORE is sketchy, as many witnesses were not willing to disclose their identities for fear of workplace victimisation or being murdered. CORE wanted to see the appropriate persons appointed and had the power to do so since they were operating at the most senior level of the Department. It held its meetings in secret, and since there was no legal basis for such a structure within the management of the Department, no minutes were kept. The Jali Commission described it as follows:

Thus began a process in which key appointments, promotions and removals were determined at these secret meetings. Invariably, the CORE leaders refused to restrict themselves to existing posts and positions. To the extent that it was necessary to promote their ends, they created and abolished posts as well.

Implementing such decisions was not difficult since one of the CORE members headed the work-study section in the Department and would act in terms of the resolutions

²⁴⁴ Jali Commission, p. 73.

²⁴⁵ Jali Commission, pp.82-92.

taken at these secret meetings. Not only were the members of CORE intelligent, they were also scheming and ruthless.²⁴⁶

In a very short period, from 1996 to 1998, POCRU had introduced a culture of lawlessness into the Department. Secret and criminal programmes of action, covert meetings, violence, intimidation and ultimately murder had become the trademark of staff appointments in the DCS. Prison reform and reinventing the prison system on the basis of constitutional values was by then entirely impossible.

4.4 Manipulation of appointments, promotions and merit awards

Against the background of Operation Quiet Storm and the culture of lawlessness thereby introduced, interference and manipulation in the appointment of staff were essentially motivated by four objectives:²⁴⁷ first, to secure employment for friends and family to positions in the DCS;²⁴⁸ second, to see the appointment of union-aligned staff to key human resource management positions which would then enable further manipulated appointments;²⁴⁹ third, to reward corrupt officials for corrupt acts through promotions;²⁵⁰ and



²⁴⁶ Jali Commission, pp. 85-86

²⁴⁷ Muntingh, L. (2006) *Corruption in the prison context*, CSPRI Research Paper, Bellville: Community Law Centre, p. 32., Jali Commission Chapter 5

²⁴⁸ Jali Commission, p. 251. An example in this regard is the following. M.Kosana, former head of Personnel Provision in the Free State DCS, supervised the employment of two relatives and other people close to him, the Jali Commission heard. He allegedly refused to recuse himself from the recruitment drive. His ex-wife, common law wife, sister and another relative were appointed as candidate warders, according to evidence leader Vas Soni. In a further recruitment drive, his brother was short-listed although he did not have a matriculation certificate, which is a minimum requirement. Provincial Commissioner Willem Damons conceded that the problem was not dealt with effectively when allegations of nepotism involving Kosana surfaced. ('Nepotism in Grootvlei – testimony', News24.com, 25 July 2002, <http://www.news24.com/xArchive/Archive/Nepotism-in-Grootvlei-testimony-20020725> Accessed 9 November 2011, Muntingh, L. (2006), p. 34.)

²⁴⁹ Jali Commission, p. 251. An example in this regard is the following. T Matshoko (a former POPCRU shop steward) testified before the Jali Commission that former Eastern Cape Personnel Head, Meshack Mpemva, then Deputy President of POPCRU, and St Alban's Assistant Head, Erik Nweba, led the coup in the province that resulted in MrsTseane's (Regional Commissioner) ousting and enabled them 'to treble their salaries from lowly warders'. Mpemva allegedly told a (secret) house meeting that he had to be appointed as head of personnel so

fourth, to receive personal (monetary or sexual) gratification from the corrupt appointment.²⁵¹ These appointments were effected through the manipulation of shortlists for vacancies; manipulation of selection committees (decisions and members); presentation of fraudulent qualifications; payment of bribes to secure appointments; and granting of sexual favours in exchange for appointments.²⁵²

In its investigations into the DCS, which concluded in August 2000, the Public Service Commission (PSC) found evidence of 427 officials being appointed without the necessary qualifications or when holding fraudulent qualifications.²⁵³ The Department failed to follow up on the submission of qualifications by new appointees and did not authenticate qualification certificates proactively. In response, the PSC made extensive short-term and long-term recommendations. The critical failure was a departure from established and well-defined procedures for appointments in the public service.

The issue of merit awards came to the fore in 1999 when the Portfolio Committee on Correctional Services asked the then National Commissioner, Sithole, to explain the merit awards he had given to himself and a group of selected officials.²⁵⁴ Whilst not of such high monetary value, the awards had significance because of the seniority of the officials concerned. Sithole explained that he had sought legal advice on the matter and the advice he received allowed him to grant merit awards. However, a second opinion from the state law advisor came forth after the awards had been made, and he realised that the awards were

that he could influence the appointment of POPCRU members. (*The Sunday Times*, 15 September 2002; Muntingh, L. (2006), p. 34)

²⁵⁰ An example in this regard is the following. T Matshoka, a former POPCRU shop steward, testified before the Jali Commission that Mdantsane Prison's assistant head was appointed to the post in exchange for assistance rendered in the ousting of Eastern Cape Provincial Commissioner, Mrs Tseane. ('Jali told of "jobs for favours"', News24.com, 18 September 2002, <http://www.news24.com/xArchive/Archive/Jali-told-of-jobs-for-favours-20020918>, Accessed 9 November 2011; Muntingh, L. (2006), p. 34).

²⁵¹ Ex-POPCRU shop steward, T Matshoko, testified before the Jali Commission that personnel officer Louis Tshatsu granted people jobs in exchange for sex. He also said that Tshatsu sold jobs to the public. For example, a woman was sent to him with R1000.00 so that he could secure her a job. ('Jobs at prison sold for sex and money'. *The Herald*, 11 September 2002)

²⁵² Muntingh, L. (2006), p. 32.

²⁵³ Jali Commission, pp. 196-197.

²⁵⁴ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 10 November 1999, <http://www.pmg.org.za/minutes/19991109-closure-sitole-matter-overseas-trip>

unlawful. Sithole explained that all monies were paid back on the day he had appeared before SCOPA. It was, however, at that meeting that SCOPA concluded he was unfit for public office and asked for his removal; he resigned shortly thereafter. Despite this debacle, it appears that nothing was done at the time to rectify the situation with regard to the granting of merit awards.

The Jali Commission concluded that the granting of merit awards was a problem in all the management areas it investigated.²⁵⁵ As was the case with the recruitment of staff, established policies were not adhered to and controls were not in place. Results of these failures were manifested in officials who did not qualify for merit awards receiving them; nepotism and favouritism influenced decision-making; no records of assessments were kept; moderation committees were unlawfully constituted; and recommendations made by the PSC were not implemented.

4.5 Management and planning

Problems in the DCS were evident not only in respect of human resources management and the treatment of prisoners (see sections 4.9 to 4.15 below), but also in the management, planning and specifically financial management of the Department. In 2001/2 the DCS received a qualified audit from the Auditor General based on the problems relating to the medical aid scheme for the Department's employees (Medcor) (see section 4.6.1 below). The qualification was based on the continuing forensic investigation of Medcor, poor internal controls and non-compliance with the Medical Aid Schemes Act (131 of 1998).²⁵⁶ The Auditor General also raised a number of matters of emphasis, and these should be regarded as strongly indicative of poor financial management: problems around the awarding of merit awards; problems around leave administration and failure to implement recommendations made the previous year; the high vacancy rate in the Department's finance management unit; non-compliance with internal auditing standards; poor internal controls; human resource management problems; and poor management at prison pharmacies.²⁵⁷ What was already

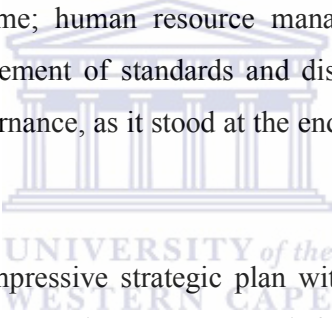
²⁵⁵Jali Commission, pp. 254-255.

²⁵⁶ Report of the Auditor General to Parliament on the financial statements of Vote 19 – Correctional Services for the year ended 31 March 2002. In Department of Correctional Services (2002), p. 118-119.

²⁵⁷ Report of the Auditor General to Parliament on the financial statements of Vote 19 – Correctional Services for the year ended 31 March 2002. In Department of Correctional Services (2002), pp. 120-124.

evident in this report by the Auditor General, as had been found by other external investigations, was that the Department seemed either to ignore recommendations or lack the ability to implement them. In the following year the Auditor General concluded: “An overall comparison of this report with that of the previous report for 2001/2002 would clearly indicate no improvement with regard to the financial and administrative management of the department.”²⁵⁸ Since then, the DCS has received successive qualified audits from the Auditor General, including 2010/11. A more detailed discussion of this is provided in Chapter 4 (section 2.4.2).

The fundamental problems underlying the qualified audits were, however, already identified in the Management Audit conducted by the DPSA and released in 2000, and must have been available to the Department earlier.²⁵⁹ These related to poor planning and budgeting, limited skills and urgent need for training amongst the leadership cadre; the absence of a service delivery improvement programme; human resource management problems; standards of service delivery; and the enforcement of standards and discipline. The overall situation in respect of management and governance, as it stood at the end of 1999, is astutely summarised in the DPSA report:



The Department has an impressive strategic plan with clearly formulated objectives, measurable targets and a strategic management information system that allows the monitoring of performance. By their own admission, management nevertheless still struggles to align the strategic planning and budgetary processes. Macro planning processes also appear to have little impact on the way that prisons are run. A serious concern is the involvement of unions in the strategic planning process. There appears to be no clear definition of roles and responsibilities between management and organised labour.²⁶⁰

The picture sketched is of an organisation that was neither under the control of its political heads nor in control of itself: authority had become fragmented.

²⁵⁸ Report of the Auditor General to Parliament on the financial statements of Vote 20 – Correctional Services for the year ended 31 March 2003. In Department of Correctional Services (2003), p. 78.

²⁵⁹ Department of Public Service and Administration (1999), pp. 1-2.

²⁶⁰ Department of Public Service and Administration (1999), p. 7.

4.6 Manipulation of service benefits

Service benefits refer normally to those benefits that an employee receives in addition to normal salary or wages, such as medical aid, pension fund, payment for overtime worked, housing subsidies and vehicle allowances. Manipulating these benefits dishonestly and/or beyond their original intention would amount to corruption. Even if this form of corruption does not have a direct influence on prisoners, planned expenditure is misdirected. This type of corruption is reflective of a culture of unethical behaviour that would indirectly affect prisoners. Historically, four issues dominate the manipulation of service benefits in the DCS, namely merit awards (discussed above), medical aid fraud (Medcor), sick leave, and payment for overtime worked. The scale of corruption relating to these was indeed shocking.

4.6.1 Medical Aid

In its second interim report the Jali Commission reported on widespread and large-scale fraud related to the DCS's medical aid fund (Medcor), especially in KwaZulu-Natal. In response the Directorate Special Operations (formerly the Scorpions) of the National Prosecuting Authority started investigations; later the Special Investigations Unit (SIU) and the Asset Forfeiture Unit also became involved.²⁶¹ Since DCS employees did not contribute to the fund and there was no ceiling on how much a fund member could claim, it was an open invitation for fraudulent claims.

Reportedly, a medical practitioner and a colluding official would co-operate to charge an innocent member's medical aid account. The colluding official would obtain relevant information that was required for the claim, which the medical practitioner would submit to the fund. Once the fund paid out, the benefit was shared between the official and the medical practitioner. Typically claims would be false, excessive and/or for non-medical goods. When investigations started, the findings and the results were spectacular. For example, the Asset Forfeiture Unit seized assets to the value of R31 million (US\$4.5 million) from two individuals and they were charged with more than 75 000 counts of fraud. The Scorpions instituted prosecutions against 700 DCS officials and the SIU would also refer hundreds of

²⁶¹ Jali Commission, pp. 914 – 916.

officials for criminal prosecution or disciplinary action. As a result of the investigations, the number of fraudulent claims dropped dramatically and the SIU estimated that in the two years after investigations started (2002/3 and 2003/4), savings of nearly R500 million (US\$72.5 million) were made.²⁶²

4.6.2 Sick leave

Feigning illness occasionally can probably not be regarded as serious corruption, but when the utilisation of sick leave takes on proportions above the norm, the impact should be regarded in a cumulative sense. A 2005 report by the Auditor General found that between 1 January 2001 and 31 December 2003, staff of the DCS took 952 160 days sick leave at a cost of R263 061 403 (US\$ 38.7 million).²⁶³ Per capita the DCS had the second highest rate of sick leave per employee, only outdone by the equally problematic Department of Home Affairs.²⁶⁴ The coordinated and collective taking of sick leave was indeed a tactical part of Operation Quiet Storm to make prisons ungovernable.

A more sympathetic view is that due to staff shortages, overcrowding and general poor working conditions, DCS staff experienced a significant amount of stress. Officials were taking stress and sick leave in significant numbers, but this only increased the workload on officials who were on duty.²⁶⁵ In short, it fed a vicious cycle of absenteeism.

4.6.3. Overtime

Historically it has been the case that the DCS operated a five-day establishment and work performed over weekends and public holidays qualified as overtime. The daily weekday staff worked office hours. To enable staff to leave work at 16h00, prisoners were locked up by

²⁶² Jali Commission, pp. 914 – 916.

²⁶³ Auditor General of South Africa (2005) *Report of the Auditor General on a performance audit of the management of sick leave benefits at certain national and provincial departments*, PR 2005, p. 6, <http://www.agsa.co.za/Reports/Our%20Reports/AG%20reports-National/Specialised%20audits/Performance/2005/Performance%20audit%20on%20management%20of%20sick%20leave%20benefits%20at%20certain%20national%20and%20provincial%20departments%20%282005%29.pdf> Accessed 18 December 2011.

²⁶⁴ Auditor General of South Africa (2005), p. 6.

²⁶⁵ Pete, S. (2000), p. 23.

approximately 14h30 in the afternoon after they had received lunch and dinner simultaneously. The cells were re-opened the next morning from 07h00 onwards. From 16h00 to 07h00 the next morning only a skeleton staff, in two shifts, would be on duty.

On the issue of overtime, the Management Audit published by the DPSA in 2000 found the following:

In common with many other organisations, the DCS is finding that a system that depends upon overtime and premium weekend payments to cover a 7-day operation soon faces difficulties and can be held to ransom. Because staff members rely on overtime to boost a low basic income there is always the motivation to corrupt the system to create unnecessary hours. This is often accompanied by unfair distribution of overtime to favour individuals in positions of power in unions or other non-managerial groups. There is a need to replace the current system with a fresh package that will at once provide fair remuneration and benefits to staff members and remove overtime from the service.²⁶⁶

In 2000 an investigation by the PSC noted irregularities with the payment of overtime and recommended the creation of a Seven Day Establishment (SDE). However, for reasons that the Jali Commission could not fathom, nothing was done about the PSC recommendations until 2003 when the DCS established a task team to investigate the issue.²⁶⁷ In its 2001/2 report the Auditor General expressed concern that the monthly overtime paid to DCS officials exceeded 30% of their basic salaries, which was contradictory to Public Service Regulations.²⁶⁸ In 2001, the DPSA also reported to the Portfolio Committee on Public Service and Administration that “it was clear that remunerated overtime was being abused on a large scale. This was evident in employees' practice of taking Mondays to Wednesdays off sick and then claiming overtime by working on weekends.”²⁶⁹

²⁶⁶ Department of Public Service and Administration (1999), pp. 15-16.

²⁶⁷ Jali Commission, p. 796.

²⁶⁸ Auditor General of South Africa (2002) *Report of the Auditor General to Parliament on the Financial Statements of Vote 19 – Correctional Services for the year ended 31 March 2002*, para 5.2.3(i).

²⁶⁹ PMG report on the meeting of the Portfolio Committee on Public Service and Administration meeting on 16 March 2001, <http://www.pmg.org.za/minutes/20010315-department-correctional-services-investigation-and-reconstruction> Accessed 9 November 2011.

Evidence before the Jali Commission established that the overtime system was widely misused, there was no control over the overtime payment system and that attempts to bring it under control (as proposed by the PSC)²⁷⁰ and curtail expenditure were ignored by managers.²⁷¹ A typical practice was that senior staff members would undertake weekend duties performing the functions of an ordinary prison warder, but then be remunerated on their existing (higher) rank. This was contrary to the policies and procedures of the DCS but not enforced.

Expenditure on paying staff for overtime work grew to astronomical proportions and by 2004/5 had increased to R770 million per annum,²⁷² or an estimated 14% of the salary budget. In 2004, the DCS also reported continued overspending on this item for the preceding three years.²⁷³ It was clear that the system was widely abused by employees to supplement their basic salaries, but it also had the effect that, as a result of staff being absent during the week, prisoners' safety, access to services and un-locked time were compromised. Moreover, the involvement of senior staff members in the exploitation of overtime benefits added to a culture of unethical behaviour amongst the staff corps.

4.7 State resources

The misuse or redirection of state assets for private gain diverts these resources from their intended purpose, which is to run an effective and efficient prison system in line with human rights standards. Whilst individual acts of theft or misuse of state assets and resources can be petty, their collective effect is significant.²⁷⁴ The extensive investigations by the SIU²⁷⁵ and

²⁷⁰ Jali Commission, pp. 808-810

²⁷¹ Jali Commission, p. 805.

²⁷² PMG report on the meeting of SCOPA on 10 November 2004, <http://www.pmg.org.za/minutes/20041109-department-correctional-services-hearing> Accessed 9 November 2011.

²⁷³ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 10 August 2004, <http://www.pmg.org.za/minutes/20040809-overtime-budget-and-related-industrial-action-briefing> Accessed 9 November 2011.

²⁷⁴ Muntingh, L. (2006).

²⁷⁵ The SIU visited 179 correctional centres and interviewed 143 887 inmates and 33 132 DCS officials (PMG Report on meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 14 November 2011)

Jali Commission identified three areas of risk: vehicle fleet management; using state assets (especially technical workshops) for personal gain; and poor stock control. The SIU's investigations into vehicle fleet management focusing on the misuse of credit card facilities for fuel purchases resulted in 145 officials being recommended for disciplinary action.²⁷⁶ The Jali Commission found evidence of technical workshops being used for private work²⁷⁷ and even criminal enterprises.²⁷⁸ Stock control was also problematic at technical workshops and kitchens.²⁷⁹ Pharmacies were found to be a serious problem, and the SIU established a number of procurement irregularities or fraudulent activities in the supply of medicines to prisons or in the dispensing of medicines to prisoners. These included: the supply to prisoners of grey medicine (medicine that is illegally manufactured domestically or smuggled into the country and repackaged by professional criminal syndicates); the repackaging of expired medicine and its dispensing to correctional centres; the theft and repackaging of state medicines and its subsequent retailing through private pharmacies; the stockpiling of medicine at some prisons, which resulted in the expiry of medicines; the flouting of procurement policies; and the forging of prescriptions by DCS officials.²⁸⁰

4.8 Undermining the investigation of corruption, ill-discipline and other matters



²⁷⁶ PMG Report on meeting of the Portfolio Committee on Correctional Services of 20 May 2008, <http://www.pmg.org.za/report/20080520-briefing-special-investigations-unit-investigation-department> Accessed 14 November 2011.

²⁷⁷ Jali Commission, pp. 853-872

²⁷⁸ In KwaZulu-Natal it was found that a panel-beating workshop established by the DCS some years earlier turned into a criminal enterprise. It was reported as follows by the Mail and Guardian: *Then things apparently started to go wrong. 'We've been told that prisoners have been given 'shopping lists' of desirable vehicles and then let out for the night by corrupt officials,' says chief investigator for the commission Jerome Brauns SC. 'They return with stolen cars, and the chassis and engine numbers are doctored in the prison workshop while the cars are given a re-spray prior to resale. These are just some of the allegations we've had, but hard evidence is difficult to come by. We've been given the names of some of those allegedly involved, but they, of course, deny all knowledge. Intimidation is very high in these circles and people will talk to us in confidence, but are afraid to speak on the record. Of course, it all makes sense — those people best qualified to do the job are already housed in Westville Prison.* Mail and Guardian Supplement, 25 February 2002.

²⁷⁹ Jali Commission, pp. 876-879.

²⁸⁰ Muntingh, L. (2006), p. 50.

As noted previously, since 1998 there were a number of investigations into the affairs of the DCS by external agencies as well as through internal inspections. However, these efforts would frequently be frustrated and undermined by corrupt groups and individuals in the Department. The officials had significant interests to protect and would not merely roll over and cooperate. Official investigators of the DCS²⁸¹ and SAPS²⁸² were at times refused entry into prisons and denied access to information. In the course of investigations, witnesses were also intimidated²⁸³ and investigations undermined through the fabrication or disappearance of evidence.²⁸⁴ Several attempts were also made by POPCRU to discredit the Jali Commission publicly.²⁸⁵ Delay tactics were used to frustrate investigations, and witnesses would suddenly go on leave or choose to work out of town.²⁸⁶ Internal investigations into misconduct and criminal offences were also done selectively. The “stumbling blocks to transformation” would very soon find themselves the target of disciplinary action,²⁸⁷ but serious violations (e.g. assault of prisoners) would not be attended to.²⁸⁸

4.9 Assaults, assassinations and intimidation of staff

At one stage, factions within the DCS were so intent on achieving their objectives that killing, intimidating and forcibly removing colleagues from their positions became part of

²⁸¹ Department of Public Service and Administration (1999), p. 16.

²⁸² Muntingh, L. (2006), p. 43.

²⁸³ Jali Commission, pp. 24-25; ‘Sex slaves, drugs and video tape’ *IOL*, 18 June 2002, <http://www.iol.co.za/news/south-africa/sex-slaves-drugs-and-video-tape-1.88292> Accessed 9 November 2011.

‘Following the discovery of the [Grootvlei] video, one of the prisoners involved in the filming was severely assaulted and had to be taken to hospital. On the same day, a prisoner was caught with poison, apparently supplied by a warder, meant to kill the injured prisoner.’

²⁸⁴ Jali Commission, pp. 24-25.

²⁸⁵ Jali Commission, p. 25.

²⁸⁶ Jali Commission, pp. 24-25. ‘Prison official abusing Jali Commission’. *The Argus*, 3 December 2002.

²⁸⁷ The case of Ms A and Mr. B was of this nature. Ms A was seen as a stumbling block but Mr. B was influential and her protector. Soon they were charged with abusing their travel claims. Unfortunately for them, there was evidence to support the charge and both were forced out of the Department (Jali Commission, pp. 87-88).

²⁸⁸ Head of Pretoria Local prison testified before the Jali Commission in April 2004 that there were 251 charges against officials at his prison for assault on prisoners. However, not a single warder had been disciplined or criminally prosecuted (‘Jail boss grilled by Jali’. *Pretoria News*, 21 April 2004).

tactic to ensure that the “right people” were in decision-making positions. The situation in Pietermaritzburg (KwaZulu-Natal) was particularly bad at the height of Operation Quiet Storm, and the Jali Commission reported seven confirmed murders there in addition to people being shot at, assaulted and having their property damaged.²⁸⁹ At Middeldrift prison in the Eastern Cape, the assassination of the head of the prison was narrowly averted when the National Intelligence Agency intervened.²⁹⁰ A gun was reportedly smuggled in by warders and given to prisoners with the instruction to kill the Head of Prison. Similar reports from other prisons (e.g. Leeuwkop) were also made.²⁹¹ A key witness to the Jali Commission (P. Ntuli) had to be placed in a witness protection programme after receiving death threats.²⁹²

4.10 Trade in contraband

The security objective of the prison system prohibits the possession of a range of goods in addition to those usually considered illicit.²⁹³ The prohibition of these goods and substances therefore creates a market with warders being the logical suppliers. Lifestyles and addictions developed prior to imprisonment create further demand for a range of commodities. Trading in drugs and alcohol is undoubtedly financially very rewarding for those involved. For example, a warder at Grootvlei prison allegedly made an average profit of R9 000 (US\$ 1200) per month from selling brandy to prisoners at hugely inflated prices.²⁹⁴ The smuggling of drugs is, according to the Jali Commission, prevalent in the prison system and very profitable for both warders and prison gangs.²⁹⁵ The now infamous Grootvlei video²⁹⁶ showed how a firearm was sold inside the prison for R6 000 (US\$900).²⁹⁷ Drugs, alcohol,

²⁸⁹ Jali Commission, pp. 282-283.

²⁹⁰ ‘Commission told of host of problems at E-Cape jail’. *The Herald*, 14 August 2002.

²⁹¹ Pete, S. (2000), p. 40.

²⁹² ‘Prisons spokesperson resigns’. *SABC News*, 21 February 2002, http://196.35.74.234/south_africa/crime1justice/0,2172,41280,00.html Accessed 9 November 2011.

²⁹³ ss 119-121 Correctional Services Act 111 of 1998.

²⁹⁴ ‘Warder likely to lose assets over illicit booze deals’. *The Star*, 16 July 2002.

²⁹⁵ Jali Commission, pp. 169-170; Painter-Morland, M. et al (2003) *Final Consolidated Report – focused assessment of anti-corruption capacity within the Department of Correctional Services*, UNODC, Pretoria.

²⁹⁶ A group of prisoners cooperated in secretly filming corrupt acts committed by warders at Grootvlei prison. The video was aired on national television and generated a tremendous public outcry.

²⁹⁷ ‘Grootvlei warder sacked’. *news24.com*, 28 November 2002, <http://www.news24.com/SouthAfrica/News/Grootvlei-warder-sacked-20021128> Accessed 9 November 2011.

food and weapons are high value commodities and, assessed across the prison system as a whole, trade in contraband must be worth millions of rand every year; smuggling these items will probably always be part of any prison system.²⁹⁸ It was already noted, with reference to Operation Thula (section 4.3), that flooding the prison with contraband was a deliberate tactic to make it ungovernable. However, when warders collude with prison gangs the situation is reason for deep concern, for it not only undermines the legitimacy of the prison system but elevates the status of the prison gangs.²⁹⁹

4.11 Trafficking in people

Although allegations of trafficking in people in prisons had surfaced from time to time in the past, the Grootvlei video demonstrated with horrific clarity the nature of the practice. The video showed how a young prisoner from the juvenile section was brought to an older prisoner by a warder for payment and then made to have sex with the older prisoner.³⁰⁰ This was not an isolated incident, because the Jali Commission found evidence at Grootvlei prison that the sale of young prisoners for sex with older prisoners was commonplace and that a sex ring involving juvenile prisoners existed amongst warders.³⁰¹ The Jali Commission described the situation at Grootvlei prison as follows:

The witnesses were consistent about the fact that none of these abuses would have taken place if it were not for the warders, who either abused them or constantly assisted the prisoners to abuse them. For example, Mr. Joseph Rampano, a twenty (20) year old inmate, testified before the Commission that he played for the Pirates soccer team, which is composed of both juveniles and adults. He stated that one of the adult prisoners wanted him to be “his baby”. This particular prisoner, who was the chief cook in the kitchen, enticed him with food and sodomised him in the storeroom of the kitchen. The most disturbing fact is that Mr. Rampano would never have gained access to the kitchen if it had not been for the warders who took him there and opened the gates for him. All the circumstances of this matter showed that the warders had full

²⁹⁸ Muntingh, L. (2006), p. 21.

²⁹⁹ Jali Commission, p. 161.

³⁰⁰ 'Sex peddling' warder “in no condition” to testify'. *IOL*, 1 August 2002,

<http://www.news24.com/SouthAfrica/News/Sex-peddling-warder-in-no-condition-to-testify-20020801-2>

Accessed 10 November 2011.

³⁰¹ Jali Commission, pp. 408-411.

knowledge of what was going on. It also showed lack of commitment to stamp out sexual abuse.

As a result of the incestuous relationship that existed between warders and adult prisoners, the environment was not conducive for these young victims to report the sexual abuse.

The Jali Commission's findings accord with earlier findings by Gear and Ngubeni that some warders were part of an organised trade in sex in male prisons.³⁰² Corrupt prison officials are ideally placed to regulate the movement of people between sections in a prison based on the discretionary powers they have.³⁰³ They can also arrange for privacy as required. Collusion between warders and prisoners (as the clients) also ensures that complaints by victims will not go very far and be smothered by either the warders or by accomplice prisoners through bribes, intimidation and coercion.³⁰⁴

4.12 Access to services and utilities

The Correctional Services Act sets out the minimum requirements of detention in prisons and further describes the services to which prisoners are entitled.³⁰⁵ Demanding payment from prisoners for services would constitute a corrupt act and violate constitutional rights. The same would also apply when payment is demanded from a prisoner to have expanded, additional, manipulated or lengthened access to a right or amenity.

Findings from the Jali Commission indicated that at Durban-Westville prison the extortion of money from prisoners or former prisoners by warders was prevalent for the purposes of obtaining remission of sentence, the conversion of sentences to periods of correctional

³⁰² A prisoner described it as follows: 'You give [the warder] money and tell him that you want a certain boy in your cell . . . He will agree and he will tell the other warders some story.' (Gear, S. and Ngubeni, K. (2002) *Daai Ding – Sex, Sexual Violence and Coercion in Men's Prisons*, Johannesburg: Centre for the Study of Violence and Reconciliation, Johannesburg, p.67.)

³⁰³ Muntingh, L. (2006), p. 23.

³⁰⁴ Muntingh, L. (2006), p. 23.

³⁰⁵ Sections 4 to 21 of the Correctional Services Act (111 of 1998) and further supported by Chapter 2 of the Regulations.

supervision, and for allowing an inmate amenities to which he or she would not normally be entitled.³⁰⁶ Warders were also extorting money from inmates or their families to ensure the safety of the inmate. Other examples of this included prisoners having to pay a bribe to make a phone call, to have their complaint attended to, and to access services.³⁰⁷ The abuse of power through, for example, asking for small bribes, has an insidious and extremely damaging impact on the prison system and undermines in a very real way any claims to legitimacy. Moreover, even if only a small number of warders engage in such criminal behaviour, prisoners tend to generalise this behaviour to all warders. On a systemic level it is highly damaging to prisoners' perceptions of the prison system and its officials.

4.13 Sexual violence in prisons

Sexual violence in prisons amongst prisoners is a worldwide phenomenon, and in South Africa it is strongly associated with the prison gangs³⁰⁸ which use rape as an instrument of control and dominance within the prison system.³⁰⁹ A more detailed analysis of sexual violence in prisons as a phenomenon is provided in Chapter 5, and the focus is here on the findings from 1994 to 2004. The Jali Commission regarded the issue of sexual violence as so important that it dedicated an entire chapter of its final report to the issue, calling it a “horrific scourge ... that plagues our prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners”.³¹⁰ Despite the reported prevalence of sexual violence in prisons, the official position of the DCS has been one of general denial and at best, uneasy acceptance.³¹¹ It

³⁰⁶ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 20 August 2002,

<http://www.pmg.org.za/minutes/20020819-jali-commission-briefing>;

<http://www.pmg.org.za/docs/2002/appendices/020820jali.htm> Accessed 12 November 2011.

³⁰⁷ Muntingh, L. (2009) *Ex-prisoners' views on imprisonment and re-entry*, CSPRI Research Report, Bellville: Community Law Centre, p. 12.

³⁰⁸ See Chapter 4 section 4.1 for an overview of the number gangs.

³⁰⁹ See generally Gear, S. and Ngubeni, K. (2002); Steinberg, J. (2004) *Nongoloza's Children: Western Cape Prison Gangs During and After Apartheid*, Johannesburg: Centre for the Study of Violence and Reconciliation; Mashabela, P. (2003) Victims of Rape and Other Forms of Sexual Violence in Prisons, Paper Submitted for *XIth International Symposium on Victimology South Africa*, Stellenbosch, 13-18 July 2003, South Africa.

³¹⁰ Jali Commission, p. 393.

³¹¹ Muntingh, L. and Satardien, Z. (2011 a) Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex, *SA Journal for Criminal Justice*, Vol. 24 No. 1, pp. 3-4.

was only in 2008 that the DCS publicly acknowledged that sexual violence, including male rape, in prisons was a problem, and subsequently the DCS has commenced work on developing a policy framework on the prevention of sexual violence in prisons.³¹²

The cases of sexual violence investigated by the Jali Commission paid particular attention to the actions of officials, either as perpetrators or as the persons with a legislated duty to respond to the needs of the victims. The following are two examples, and by no means exhaustive of the issue. The case of Louis Karp, a transsexual presenting as a woman and detained in a male prison, made it clear that at Pretoria Local prison the officials (medical staff included) had no idea of how to deal with sexual violence and also exploited the prisoner further.³¹³ Karp, detained in 2001, was sold to other prisoners for sex, forced to perform oral sex on a warder, repeatedly raped, and when he complained, locked in solitary confinement. When he sought medical help, he was effectively ignored and no HIV tests were done. At Grootvlei prison the Commission heard the case of a prisoner, Kenneth Busakwe, who had been raped by two other prisoners and, when he complained to a warder, was raped by the warder in turn. The same warder also had young prisoners brought to his office regularly, where he would rape them.³¹⁴ The Commission was deeply concerned about the manner in which investigations were conducted once a complaint of rape had been laid by a prisoner. It was clear that DCS officials interfered with and manipulated investigations with the aim at frustrating any outcome.

From these two cases it is evident that the officials directly or indirectly concerned had little regard for prisoners' rights and instead used their positions of authority to exploit them further. Moreover, management appeared unconcerned about the sexual exploitation of prisoners.

4.14 Assisted escapes and irregular releases

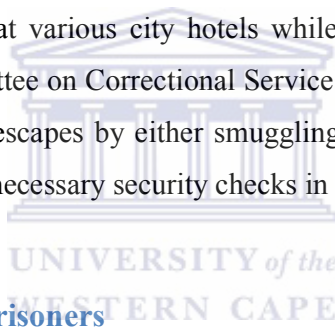
In section 3.3.2 above it was noted that by 1994 escapes from prisons had taken on crisis proportions. The overall impression gained is that no matter how much security hardware (e.g. closed circuit television, metal scanners and electrified fences) was installed, the greatest security risk remained the integrity of the staff. This was patently the case when officials assisted prisoners to escape. This took on several forms, such as warders directly assisting

³¹² Muntingh, L. and Satardien, Z. (2011 a).

³¹³ Jali Commission, pp. 404-408.

³¹⁴ Jali Commission, pp. 409-410.

escapes; irregular releases; allowing escapes for ulterior motives (i.e. as part of Operation Quiet Storm); and illegally leaving a prison. The Jali Commission found that one particular warder at Johannesburg prison was associated with 75 escapes or “disappearances” from that prison.³¹⁵ In 2002 the Jali Commission reported to the Portfolio Committee on Correctional Services that it was clear the Parole Board at Durban Westville prison was being used merely to rubber-stamp sinister decisions made elsewhere, with the Board itself appearing not to apply its mind to the merits of the applications before it.³¹⁶ It also noted that sentence remission procedures were found to be open to abuse, with reports of good conduct by prisoners being at times mere fabrications or having been done by some inmate other than the prisoner applying for remission. In 2004, the police uncovered a syndicate at Barberton Prison that was facilitating early parole releases for R7 000 (US\$1020) each.³¹⁷ At Durban Westville, the Jali Commission found that prisoners were leaving and returning to the prison with the full knowledge and assistance of warders.³¹⁸ One prisoner made numerous visits to his spouse and another stayed at various city hotels while still a prisoner. In 2006 it was reported to the Portfolio Committee on Correctional Services that in November 2005 warders at Zonderwater prison assisted escapes by either smuggling in a firearms and toy pistols or deliberately not performing the necessary security checks in two escape incidents.³¹⁹



4.15 Assault and killing of prisoners

The assault and murder of prisoners by officials are extremely serious human rights violations. Assaults and deaths in custody remain worryingly common, as was found by the Jali Commission³²⁰ and also reported in the Annual Reports of the DCS and the Judicial Inspectorate for Correctional Services. Table 3 below lists the reported deaths due to

³¹⁵ Jali Commission, pp. 284-285.

³¹⁶ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 20 August 2002, <http://www.pmg.org.za/docs/2002/appendices/020820jali.htm> Accessed 12 November 2011.

³¹⁷ ‘Freedom for sale’. *The Star*, 9 February 2004.

³¹⁸ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 20 August 2002, <http://www.pmg.org.za/docs/2002/appendices/020820jali.htm> Accessed 12 November 2011.

³¹⁹ PMG Report on the meeting of the Portfolio Committee on Correctional services of 1 February 2006, <http://www.pmg.org.za/minutes/20060131-zonderwater-incidents-new-generation-prisons-committee-reports> Accessed 12 November 2011.

³²⁰ Jali Commission, Chapter 7, pp. 324-389.

unnatural causes and assaults (in respect of three categories) as reported in the Department's Annual Reports for the period 1994 to 2003/4. Assaults were reported only from 1997 onwards. Deaths due to unnatural causes fluctuated significantly from 84 in 1991/2 to three in 2002/3, and it can be concluded that these have been incident-driven. It must also be added that the figures reported in the Annual Reports should be regarded with healthy scepticism, as problems in death classification were later identified by the Judicial Inspectorate for Correctional Services. In respect of assaults, it is noted that the number of officials assaulted by prisoners is comparatively low – on average 20 prisoners were assaulted for every one official assaulted by a prisoner. The figures also indicate high levels of inter-prisoner violence. The overall impression gained is that the prisons exhibited high levels of violence and that personal safety was not guaranteed.

Table 3

Year	Deaths unnatural (murders, accidents and suicides)	Assault: official on prisoner	Assault: prisoner on prisoner	Assault: prisoner on official
1990/1	48			
1991/2	84			
1993	49			
1994	77			
1995	62			
1996	76			
1997	75	1193	3050	40
1998	68	612	2361	39
1999	61	545	2204	26
2000/1	12	619	2361	15
2001/2	10	624	2301	48
2002/3	3	575	2410	47
2003/4	45	508	2125	42

4.16 Summary of issues: the failure to maintain discipline

The basic argument put forward in Chapter 2 is that the history of prison reform post-1994 is characterised by two crises, the first being the demands placed on the prison system as a result of the new constitutional and democratic order, and the second, the collapse of order

and discipline in the DCS. In section 3.3.4 it was noted that fault lines were already visible in the DCS during the transition period (1990 to 1994). These became more pronounced immediately after 1994, but the available evidence indicates that from 1996 onwards, the year in which the Department was demilitarised, the situation became uncontrollable. Regardless of what went wrong with demilitarisation, it must be accepted that it signalled the start of the transformation process in the Department,³²¹ a process that became perverted. The transition to a new management style was poorly planned,³²² if at all, and its execution resulted in confusion and lack of direction. If done correctly, a new management structure and style derived from the new constitutional order should have replaced the military hierarchy and procedures, but the process of re-institutionalisation failed and left a void. New management principles and procedures did not emerge to replace the system that staff had been familiar with. Indeed, the Jali Commission found little evidence to indicate that DCS senior management made any attempt to train staff and members to function under a civilian management structure.³²³

After demilitarisation the Department was not equipped to deal with the influence of unions or the demands of the new democratic order. This opportunity was seized by unionised labour, in particular POPCRU, to take control of the DCS and its processes and distort them for its own purposes. This was achieved through Operation Quiet Storm and similar activities. With the unions exerting so much control over the Department's day-to-day operations, it became impossible to enforce any decisions regarding employees' conditions of employment (e.g. performance and disciplinary matters) as these would only end up being frustrated by union sympathisers higher up in the management hierarchy of the Department.³²⁴ The appointment and promotion of staff based on union patronage as opposed to skills and competence saw the rapid erosion of the disciplinary system.

It was, and remains, primarily the Heads of Prison that are responsible for the enforcement of discipline,³²⁵ but with 60% of heads of prison belonging to POPCRU by 2001 (and 35% being members of the Public Servants' Association - PSA),³²⁶ it is hardly surprising that

³²¹ Jali Commission, p. 48.

³²² Sloth-Nielsen, J. (2003), p. 13; Luyt, W.F.M. (2001).

³²³ Jali Commission, p. 51.

³²⁴ Jali Commission, p. 98.

³²⁵ Jali Commission, p. 761

³²⁶ Jali Commission, p. 110.

disciplinary action was seldom taken. Even when instituted, it was frequently manipulated or resulted in disproportionately light sanctions.³²⁷ Even in respect of external investigations into the affairs of the Department, of which there were 20 in the ten years preceding the Jali Commission,³²⁸ these recommendations were by and large ignored.³²⁹

With the disciplinary system in shambles, it was relatively easy for opportunists to exploit the situation and engage in a wide range of corrupt and criminal activities. Ultimately, the consequences of Operation Quiet Storm ran away from the POPCRU leadership, resulting in the beneficiaries of Operation Quiet Storm abusing their ill-begotten authority to benefit themselves and their families even further. The collapse of order and discipline should also be seen against the background of poor administrative, financial and asset control systems.³³⁰ The weaknesses of these systems created a legion of opportunities for corrupt officials to benefit financially and otherwise. The collapse of order and discipline, and the descent into a malaise of corruption and maladministration, saw the DCS forsaking the reform of the prison system. The new Constitution had little impact on reforming governance in the Department.

5. Corruption in the prison context³³¹

The Jali Commission's establishment was a turning point in the history of the Department and indicated that the government could no longer ignore the continued allegations and findings that corruption and maladministration had taken on unprecedented levels. In effect, the state had lost control of the DCS. The numerous previous investigations and pronouncements about corruption³³² were, however, sidelined by the Department's leadership

³²⁷ Jali Commission, pp. 762-763.

³²⁸ Jali Commission, p. 97.

³²⁹ Jali Commission, Chapter 19, pp. 881-908.

³³⁰ Department of Public Service and Administration (1999), pp. 1-2.

³³¹ This section is based on Muntingh, L. (2006).

³³² As early as 2 September 1996, the Parliamentary Portfolio Committee on Correctional Services and its counterpart on Health signed a joint resolution requesting 'an immediate independent national investigation into corruption' (Muntingh, L. (2006), p. 1). Also *Report of the Auditor General on the financial statements of Vote 10 for the year ended 31 March 1998 and the Performance Management Audit on the management of Prisons* (RP 181/1998). *Report of the Auditor-General on Findings Arising from a Special Investigation into Alleged Irregularities Among Senior Officials of the Department Of Correctional Services*. Published by Authority RP 123/1999. Department of Public Service and Administration (1999).

and this could no longer be tolerated. The impact of corruption, maladministration and the violation of prisoners' rights (as primarily uncovered by the Jali Commission) on the trajectory of prison reform after 1994 has been profound. Against this background, it is necessary to assess the phenomenon of prison corruption in a more generalised sense. It should also be borne in mind that the scope of the Jali Commission's investigations was primarily aimed at the period preceding 2002 and thus predates the policy and legislative reform brought about by the Public Service Anti-Corruption Strategy (2002) and the Prevention and Combating of Corrupt Activities Act (12 of 2004).

5.1 Definition of corruption

In its simplest form, corruption in the public service is defined as the use of public office for private gain. The Public Service Anti-Corruption Strategy, however, cautions that this definition needs to be expanded to reflect the essential characteristics and components of corruption, these being the abuse of power and trust, the fact that it occurs in the public, private and non-profit sectors, and that private gain is not the only motive.³³³ The Public Service Anti-Corruption Strategy thus concludes that corruption is "any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others".³³⁴ While the list is not exhaustive, the strategy document also describes the various dimensions of corruption: bribery; embezzlement; fraud; extortion; abuse of power; conflict of interest; insider trading and abuse of privileged information; favouritism; and nepotism.³³⁵

Two years after the Public Service Anti-Corruption Strategy was released, the Prevention and Combating of Corrupt Activities Act (12 of 2004) was passed and signed into law, replacing the Corrupt Activities Act (94 of 1992). The new legislation goes to some length to define corruption and provides firstly for the general crime of corruption.³³⁶ The Act also does not

³³³ Department of Public Service and Administration (2002) *Public Service Anti-Corruption Strategy*, pp. 10-11.

³³⁴ Department of Public Service and Administration (2002), p. 11.

³³⁵ Department of Public Service and Administration (2002), pp. 7-8.

³³⁶ 3. Any person who directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

deal with those persons falling under its scope as a homogenous group and describes the crime of corruption in respect of public officers, foreign public officials, agents, members of the legislative authority, judicial officers, and members of the prosecuting authority.³³⁷ Corrupt activities are further defined as they relate to offering or receiving unauthorised gratification, as well as to specific matters, to possible conflict of interest and to other unacceptable conduct.³³⁸ To make this legalistic definition more accessible, the DPSA Guidelines on Minimum Anti- Corruption Requirements describes it as follows: Where one person (A) gives someone in a position of power (B) something (called gratification³³⁹ in the Act) to use that power, illegally and unfairly, to the advantage of A.³⁴⁰

(b) gives or agrees or offers to give to any other person any gratification whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner -

(i) that amounts to the-

(aa) illegal, dishonest, unauthorized, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or function arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.

³³⁷ Sections 4 to 9 Act 12 of 2004.

³³⁸ Section 10, 11 and 17 to 19

³³⁹ Gratification is defined in the Act as (a) money, whether in cash or otherwise; (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage; (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage; (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation; (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; (f) any forbearance to demand any money or money's worth or valuable thing; (g) any other service or favour or advantage of any description. Including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty; (h) any right or privilege; (i) any real or pretended aid, vote, consent, influence or abstention from voting;

In the prison context, with the unequal distribution of power between warders and prisoners, and the wide discretionary powers of the former, it is useful to understand corruption as a formula:

$$\text{Corruption} = (\text{Monopoly} + \text{Discretion}) - \text{Accountability}.^{341}$$

When officials hold the monopoly over a function and have significant discretion in the absence of accountability, corruption is near-guaranteed. Prison managers and warders overseeing prisoners hold the legally mandated monopoly over every aspect of prison life. Moreover, they have an express mandate to maintain and not relinquish this monopoly, in terms of the security mandate. Even within the regulatory framework governing prisons, the prison management and warders have wide discretionary powers in respect of daily operations. The movement of prisoners, lock-up times, dealing with incidents of conflict, or citing disciplinary infractions are examples of such discretion. However, accountability in the prison environment, and in other closed institutions, has always been notoriously difficult to enforce. It has to be concluded therefore that prisons will always present a high risk of corruption and abuse of power.

5.2 The prison context and corruption

Given the structural risks for corruption in prison, three other contextual factors are important in respect of prison corruption: the existence of a unique sub-culture, the commodification of time and authority, and the connection prisons have with criminals and the criminal world. These three factors are elaborated on below.

or (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

³⁴⁰ Department of Public Service and Administration (2006) *Anti-corruption Capacity requirements – Guidelines for Implementing the Minimum Anti- Corruption Capacity requirements in Departments and Organisational Components in the Public Service*, Pretoria: Department of Public Service and Administration, p. 3.

³⁴¹ Hassan, S. (2004) Corruption and the Development Challenge, *Journal of Development Policy and Practice*, Volume 1 No. 1, p. 34.

First, prisons are total institutions;³⁴² they are highly controlled environments and are not exposed to the same societal influences, positive and negative, as other sites of government service delivery. Over time prisons also develop their own sub-culture, one which is unique and not experienced in other parts of the public service. Because working inside a prison is potentially dangerous, staff members depend on each other for safety and security, especially in times of emergency. Prisoners also depend, at least in theory, on staff for safety and security, as well as for access to services and communication with the outside world. However, existing in such close relationships with an unequal power distribution over prolonged periods of time discourages the reporting of improper practices to management and oversight bodies, as this may result in marginalisation and possible victimisation.³⁴³ The risk for whistleblowers was indeed significant in the South African situation, as evidenced by the murders that took place in the Pietermaritzburg management area and which led, as reported in section 4.9, to the establishment of the Jali Commission.

Second, an important manifestation of prison corruption is the (illegal) commodification of the state's control function over imprisoned individuals. A warder engaging in corrupt activities with prisoners (e.g. smuggling in contraband) effectively re-sells his time, authority and function, for which the state has already paid, to a prisoner or organised group of prisoners, such as a gang. The ease and regularity with which this occurs is normally associated with the factors identified as causative of corruption, such as a lack of ethical guidelines, poor salaries, weak control systems, and a lack of transparency.

Third, since the prison exists as an institution for purposes of social control, it has a special connection with crime. Prisons do not serve a fairly representative cross-section of society in the way that hospitals or offices of the Department of Home Affairs do. In prisons are present a range of offenders and suspected offenders who do not necessarily cease their criminal activity because they are imprisoned. While prisoners may continue their criminal activities on an individual basis, organised crime syndicates pose a particular threat in this regard.

³⁴² Foucault, M. (1977) *Discipline and Punish – the birth of the prison*, New York: Vintage Books; Goffman, E. (1957) 'Characteristics of Total Institutions,' in: *Symposium on Preventative and Social Psychiatry*, sponsored by the Walter Reed Army Institute of Research, the Walter Reed Army Medical Centre, and the National Research Council, Washington, (Government Printing Office, 1957), pp. 43-93.

³⁴³ Criminal Justice Commission (2000) *Queensland Prison industries – A Review of Corruption Risks*, Brisbane: Criminal Justice Commission, 2000, p. 1.

Collusion between prison gangs and officials poses a particularly serious threat to the legitimacy of the prison system.

In summary, three issues are relevant to corruption in prisons: the existence of a prison sub-culture that makes it distinct and separate from other sectors of the public service; the commodification of control when the control function and authority of the state is effectively re-sold to prisoners; and the established association prisons have with crime and the external criminal world.

5.3 Perceptions of corruption in the DCS

Evidence before the Jali Commission alluded to a particular perception of corruption in the DCS and, more importantly, a tolerance by management for corrupt and dishonest practices, especially when committed at the expense of prisoners. In April 2003, the then DCS Gauteng Provincial Commissioner, Zacharia Modise, explained to the Jali Commission that corruption was a new concept to the Department and that officials had difficulty in understanding it: “The term corruption is a new word in the Department of Correctional Services and officials have serious difficulty in understanding it. ... There is, however, a word that everybody is familiar with and it is the word 'smuggling'.”³⁴⁴ He went on to explain that “smuggling” was pervasive and referred to trading in contraband as well as stealing prisoners’ food and money or asking them to perform duties such as polishing shoes or altering warders’ uniforms. He added that, in his view, warders caught “smuggling” had always been treated leniently by the DCS, but insisted that serious transgressions such as sodomising or assaulting prisoners had always been regarded in a serious light.

Modise’s testimony gives insight into two important aspects of how “corruption” was perceived by DCS officials. First, management exhibited a measure of tolerance for acts or behaviour based on the abuse of power. Second, these acts or behaviour were not regarded as corrupt and therefore criminal. Euphemistically called “smuggling” or more likely “smokkel” in the lingua franca of Afrikaans, corruption, as it is defined in the Act, had been de-criminalised, according to Modise. His observations may indeed have been more astute than

³⁴⁴ 'Corruption a new concept'. News24.com, 10 April 2003, <http://www.news24.com/SouthAfrica/News/Corruption-a-new-concept-20030409> Accessed 9 November 2011.

it was initially appreciated, for they explain in many ways the pervasive nature of corruption in the prison system as is described in section 4 above. Uncertainty amongst DCS officials as to what constituted corruption was confirmed in a 2003 survey, which found that a range of unethical forms of behaviour were regarded as corruption by the respondents.³⁴⁵ These included acts ranging from nepotism and bribery to being rude and sleeping on duty. In the absence of legal and ethical certainty, there were substantial grey areas to be exploited.

5.4 Maladministration, incapacity, and inefficiency

Corruption should be distinguished from maladministration. Using the concept “corruption” interchangeably with maladministration, incapacity, and inefficiency simply because they all relate to the use of public resources provides too broad an ambit to be useful for analysis.³⁴⁶ The following example from the 2000 DPSA management audit of the DCS illustrates the differences between corruption and maladministration, incompetence and inefficiency:

The holding of young offenders in custody under conditions that clearly violate the UN Convention on the Rights of the Child, the Beijing Rules and other international instruments. For young offenders, the generally poor alignment between departments of this sector (especially in relation to policy), the lack of co-ordinated and synchronised strategy, and the lack of prison population control result in the:

- late arrival of young offenders in court so that hearings are missed and children are kept in the custody of correctional services for unduly long periods;
- inability to trace children under correctional services supervision as children 'get lost' within the system due to poor administrative control;
- remanding into custody of non-scheduled offences for long periods;
- blocking of access for Welfare and NICRO officials to correctional services facilities;
- slighting of the role of probation officers in the assessment of young and petty offenders and the lack of a shared ethos regarding justice and reform between the departments of Welfare and Justice, result in a reduced impact of diversion programmes for the system;

³⁴⁵ Painter-Morland, M. et al (2003), p. 37.

³⁴⁶ Department of Public Service and Administration (2002), p. 9

- lack of training amongst magistrates and their resultant insensitivity and ignorance in dealing with young offenders;
- long delays in children's court inquiries;
- inappropriate placement of young offenders in correctional facilities;
- difficulties in identifying and determining ages of young offenders.³⁴⁷

The example shows that children's rights were violated as a result of poor performance, incompetence and bad management, and that public funds were being wasted, thus denying children the services to which they were entitled. However, there was no indication that this was motivated by corrupt interests or any other activity that may be construed as corrupt. Corruption therefore should be seen as separate and distinct from maladministration and mismanagement even though corruption is often associated with them.

5.5 Petty and grand corruption

In debates on corruption the distinction is often made between grand and petty corruption, with the former presumably being more serious than the latter. It will be argued here, though, that this distinction – and the implied value-judgment about their relative seriousness – should be made with some care. The U4 Anti-Corruption Resource Centre defines the two concepts as follows:

High level or “grand” corruption takes place at the policy formulation end of politics. It refers not so much to the amount of money involved as to the level in which it takes place: grand corruption is at the top levels of the public sphere, where policies and rules are formulated in the first place. [It is] Usually (but not always) synonymous to political corruption.

Small scale, bureaucratic or petty corruption is the everyday corruption that takes place at the implementation end of politics, where the public officials meet the public. Petty corruption is bribery in connection with the implementation of existing laws, rules and regulations, and thus different from “grand” or political corruption. Petty corruption refers to the modest sums of money usually involved, and has also been called “low level” and “street level” to name the kind of corruption that people can experience more

³⁴⁷ Department of Public Service and Administration (1999), p. 28.

or less daily, in their encounter with public administration and services like hospitals, schools, local licensing authorities, police, taxing authorities and so on.³⁴⁸

Rigid definitional boundaries between grand and petty corruption may not be possible as corruption takes on many forms. Rather, cases should be assessed on their individual merits to determine what level of corruption is involved. Four variables may assist in typifying a particular corrupt act. First, questions pertaining to scale should be asked to determine the value of a corrupt transaction. A smaller value normally tends to indicate petty corruption and larger amounts, grand corruption, but this may not always be the case. Second, petty corruption tends to be more opportunistic, less planned or premeditated, and probably more reactive. Grand corruption, on the other hand, tends to be more co-operative, collusive, and less extortive.³⁴⁹ Third, the seniority of officials involved can play an important role, since higher-ranking officials wield more power and therefore more control over resources. The impact of their corrupt decisions, actions, or inaction therefore tends to be wider than those of the low-ranking official with a far smaller locus of control (e.g. controlling visiting hours at a prison).³⁵⁰ Fourth, the impact of the corrupt act on the core business of the institution needs to be examined.³⁵¹ In the case of prisons, security is a key concern and central to all operations. Escapes therefore reflect extremely negatively on the public image of the Department and its ability to perform its core business. The fact that relatively small amounts of money may be involved in an assisted escape is of little importance in this case. The recent history of the DCS shows that escapes from prison had wide-ranging political and internal ramifications for the DCS and affected public perceptions of the prison system and its ability to contribute to public safety.³⁵²

Categorising corrupt acts as “petty corruption” should also be done with caution as the term could be construed as trivialising them. Such corrupt acts should be considered firstly in terms of their collective impact rather than the individual loss which they bring about. A 2003

³⁴⁸ Utstein U4 Anti-corruption Resource Centre, Glossary on corruption,

<http://www.u4.no/document/faqs5.cfm#pettycorruption> Accessed 9 November 2011.

³⁴⁹ What is petty corruption? U4 Utstein Anti-Corruption Resources Centre: ‘Petty corruption and shadow economies’, <http://www.u4.no/helpdesk/helpdesk/queries/query72.cfm>, p. 2.

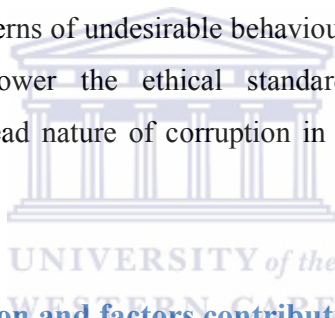
³⁵⁰ Muntingh, L. (2006), p. 15.

³⁵¹ Muntingh, L. (2006), p. 15.

³⁵² Oppler, S. (1998) *Correcting Corrections: Prospects for South Africa's Prisons*, ISS Monograph No. 29, <http://www.iss.co.za/Pubs/Monographs/No29/Prison.html#Anchor-Prison-6751> Accessed 9 November 2011.

victimisation survey found that corruption was the third most frequent form of victimisation in South Africa.³⁵³ On such a scale even small amounts of money or gifts add up to vast sums. Furthermore, it is predominantly poor and marginalised people who fall prey to so-called petty corruption, and the relatively low monetary value belies the impact on people's lives.³⁵⁴ The limited or absent choices available to poor people expose them to direct corrupt acts such as payment of bribes, as well as to the longer-term and more enduring results of corruption. It may be argued that, as a result of their deprivation of liberty and consequent loss of power, prisoners are in a situation analogous to that of the poor in society, who have limited resources and thus limited choices; by that same token, then, prisoners, too, are disproportionately at risk of bribery and corruption.

The pervasive influence of even the smallest acts of corruption should consequently not be underestimated. The impact of all acts of corruption must be regarded as serious since “they lead to the establishment of patterns of undesirable behaviour, patterns that cannot be undone easily, and which thereby lower the ethical standards within a society however incrementally”.³⁵⁵ The widespread nature of corruption in the DCS inculcated a culture of unethical behaviour.



5.6 The reasons for corruption and factors contributing to it

In general, for corruption to occur three basic conditions need to be present and acted upon.³⁵⁶ First, there must be a target, such as cash, equipment or consumables. Second, access and opportunity must be available to the officials concerned, and this may vary according to particular functions in an organisation. Third, motivation to commit the corrupt act must be present; in most instances this will be greed, but could also be revenge or political dynamics. In the case of Operation Quiet Storm, quasi-political motivations were indeed at play.

³⁵³ Van Vuuren, H. (2004) Small bribes, big challenges – extent and nature of petty corruption in South Africa, *SA Crime Quarterly*, No. 9 September 2004, p. 12

³⁵⁴ Van Vuuren, H. (2004), p. 16.

³⁵⁵ Hassan, S. (2004), p. 6.

³⁵⁶ Criminal Justice Commission (2000), p. 13.

At the operational level, numerous reasons for corruption can be discerned, such as greed, ignorance of the applicable laws, personal financial problems, and so forth.³⁵⁷ These are generic reasons for unethical and corrupt behaviour and are not specific or unique to prisons. A 2003 survey at Pollsmoor and Durban Westville prisons provided further description of the reasons for corrupt behaviour at operational level in the DCS.³⁵⁸ It was found that there was a lack of buy-in into the Department's strategic direction and that staff members lacked respect for rules and regulations. Senior personnel did not set an example to more junior staff members in their conduct. Evidence was found of peer pressure (amongst staff) to participate in corrupt activities. Furthermore, that there was a lack of respect between staff and prisoners. Prisoners threatened staff members who did not help them to "beat the system", even though

³⁵⁷ The DPSA list the following as reasons for corruption:

- Good intentions - Some public officials do things that they are not supposed to do (or fail to do things that they are meant to do) in an attempt to help others.
 - Ignorance of laws, codes, policies and procedures - Many public officials simply do not know the laws and directives that deal with what is right and wrong in their work.
 - Ego power trips - Some employees think they know what is best, regardless of what the department has decided.
 - Greed - Some individuals exploit their position at work to enrich themselves.
 - It comes with the territory - Some staff members feel there is nothing wrong with using opportunities at work to enrich themselves.
 - Friendship - In some cases, employees abuse their position in the public service to assist their friends out of a misplaced sense of loyalty.
 - Ideology - People with strong ideological convictions might believe that any means can be justified as long as it leads to the right outcome for them.
 - Post-employment "revolving door"- Some public servants engage in unethical behaviour in an attempt to secure a job outside the public service – for example, awarding tenders to certain companies that they hope will employ them in future.
 - Financial problems and pressures - People with financial problems at home sometimes engage in unethical practices to cope with their problems.
 - Exploiting the exploiters - Some staff feel that they are being exploited by their bosses and so believe that they are entitled to do anything to turn the tables on their exploiters.
 - Going along - Some people feel that, since others act unethically at work, they are entitled to join in.
 - Survival - Some would do anything to ensure that they maintain and defend their current positions.
- (Department of Public Service and Administration (2006) *Anti-Corruption Capacity Requirements – Guidelines for Implementing the Minimum Anti-Corruption Capacity Requirements in Departments and Organisational Components in the Public Service*, DPSA, Pretoria, p. 24.)

³⁵⁸ Painter-Morland, M. et al (2003), p. 7-8.

there were many gaps and loopholes to be exploited. Some staff members had informal relationships with prisoners, and prison gangs negatively affected discipline in the prison.

The same study also found that, apart from these particular issues raised at the two prisons, there were general contributory factors to corruption and unethical behaviour in the DCS: physical conditions and overcrowding; a lack of buy-in into the DCS code of conduct; inconsistency in discipline and performance appraisals; policies and procedures were not well communicated; whistleblowers were not protected; there was a lack of skills and capacity in general; there was uncertainty and a lack of training in the new approach to rehabilitation; low morale and a lack of professional ethics; personal variables (e.g. financial trouble); and a mutual lack of respect between staff and inmates.³⁵⁹ Poor governance did not only result in widespread corruption, but also added to the legitimacy deficit by rendering the Department incapable of fulfilling its mandate as required by the Constitution.

6. Conclusion



This chapter reviewed the period 1994 to 2004 and set out the scope and nature of the crisis in the prison system. Contrary to expectations in 1994, there was not rapid reform of the prison system but rather the opposite. During this period a pattern of governance failures emerged that resulted in the collapse of order and discipline. In the ensuing years, the DCS management was unable to reinvent and re-institutionalise the prison system. The result was a near-intractable mess of operational challenges (e.g. overcrowding), poor skills levels, management inexperience, misdirected policy initiatives, poor financial management, lack of strategic vision, unionisation, corruption, human rights violations, resistance to reform, and so on.

In overview, a number of conclusions can be drawn from the period 1990 to 2004. The first was the lack of strategic vision of the pre-1994 DCS management. Notwithstanding the democratic reforms already under way or anticipated, the DCS management at the time failed to recognise it was already in a crisis. A more realistic, progressive and responsive approach,

³⁵⁹ Painter-Morland, M. et al (2003), p. 7-8.

giving full recognition to the situation at hand, would have improved the chances for a constructive reform process, but as things stood, the DCS's stance was one of denialism.

Second, when the opportunity presented itself to articulate far-reaching reforms following the adoption of the Interim Constitution in the 1994 White Paper, this did not happen and the DCS management remained inward-looking and institutionally preserving. Moreover, it failed to problematise the relationship between the Constitution and the state of the prison system. The 1994 White Paper was woefully inadequate to steer the post-1994 reform task of the newly-elected government to fulfil its historical mission in respect of the prison system. The 1994 White Paper did not engage the Interim Constitution, and when the 1996 Constitution was adopted, there was a similar lack of engagement. Drafting of the 1998 Correctional Services Act appears to have taken place as a distinct and detached process from the DCS. There is little evidence to indicate that either the drafting of the new legislation or its adoption had any noticeable bearing on the operations of the Department. Moreover, the 1998 Act would only come fully into force in 2004.

Third, in Chapter 2 it was argued that reform is the intended fundamental change of a policy sector and that the scope of reform needs to address a wide range of aspects of the policy sector, these including (at least) the policies, strategic direction, legislative framework (as well as subordinate legislation), organisational structure, human resources, financial management, and day-to-day operations. Clear intentions in this regard did not emerge between 1994 and 2004. During this period senior management engaged in a number of policy initiatives that were either cosmetic or so fundamentally ill-conceived or poorly implemented, frequently with unintended consequences, that they detracted from reform efforts. Given the state that DCS was in from a governance perspective, it is hard to see how any new policies could have been successfully implemented. Stable and credible leadership to drive policy reform efforts were equally absent at least until late 2001. Even though the new constitutional framework lifted previous constraints, this opportunity was not seized. Instead, lack of leadership and poor strategy resulted in the perverse consequences described in this chapter. In short, these initiatives did not address the fundamental challenges facing the prison system.

Fourth, the prison system inherited by the GNU was a highly institutionalised organisation characterised by a conservative, preserving, non-responsive, and inward-looking approach. These traits remained dominant at least until mid-1996. This description accords with Boin

and t'Hart's definition of crisis by ignorance, showing "cognitive arrogance – a hermetic, chronically overoptimistic self-image that shuts out discrepant information".³⁶⁰ However, from 1996 onwards levels of institutionalisation eroded rapidly as a consequence of the failure to implement a new management system replacing the military command structure abandoned on 1 April 1996. Coordination problems emerged, basic discipline was not enforced, and the Department was increasingly unable to implement reforms even if it wanted to do so.

Fifth, the legitimacy crisis of the prison system deepened as corruption, poor delivery of services and maladministration became increasingly prevalent. Although the events in DCS should be contextualised by the general state of the public service, corruption and maladministration attained exceptional dimensions to such an extent that Parliament was informed in 2000 that the state had lost control of the Department. It is clear that, from 1996 to the appointment of the Jali Commission in 2001, there was a widening chasm between what the Constitution demanded and what was happening on the ground. Even though previous investigations were undertaken into the affairs of the DCS and Parliament had expressed concern, the Department offered little response to the recommendations made. It was only with the appointment of the Jali Commission that full recognition was given to the crisis in discipline and order. In the eyes of the public and Parliament, the prison system had become deeply corrupted and far removed, ideologically and in practice, from an institution that should provide safe custody and enable offenders to become law-abiding and responsible citizens.

Sixth, by mid-1996 the lack of re-institutionalisation and the shambolic demilitarisation of the DCS had created a management void into which organised labour (POPCRU in particular) could move with impunity. Consequently, the distinction between management and labour became blurred. The role of then Commissioner Sithole in aggravating the situation should not be underestimated. Through purposefully designed campaigns and actions, POPCRU took control of key functions in the Department and this was supported, through action or omission, by senior officials in the Head Office. The key objective of these

³⁶⁰ Boin, A. and T'Hart, P. (2000), p. 17 citing Kouzmin, A. and Jarman, A. (1989) 'Crisis decision making – towards a contingent decision path perspective'. In Rosenthal, U., Charles, M.T. and T'Hart, P. (eds) *Coping with crises: the management of disasters, riots and terrorism*. Springfield: Charles C. Thomas, pp. 397-435.

campaigns was the rapid implementation of affirmative action by all means necessary, and at least in some management areas a culture of fear and intimidation prevailed.

The campaigns launched by POPCRU also had unintended consequences in the sense that a general culture of lawlessness and impunity permeated the Department. This may not have been the original aim of Operation Quiet Storm, but it is an outcome which could have been anticipated. As a result, a wide range of corrupt activities aimed at personal enrichment took place or were permitted to continue. Moreover, this culture of lawlessness placed prisoners in a particularly vulnerable position, given that the wide-ranging failure to adhere to principles of good governance made compliance with human rights standards near impossible.

Lastly, in Chapter 2 it was argued that four broad requirements need to be met for a prison system compatible with a constitutional democracy: the existence of an underlying philosophical framework; the recognition of prisoners' rights; accountability; and transparency. The first ten years of democratic rule saw very little progress in this regard. Government had failed to closely define the role and purpose of the prison system in the criminal justice system and, more particularly, its role in response to crime. Prisoners remained the victims of widespread rights violations despite constitutional protections. The Department continued to lack transparency, and impunity prevailed at all levels in the DCS. In short, constitutionalism had little impact at all on the prison system.

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Chapter 4 Governance, corruption and a new strategy - regaining control and the challenges faced

1. Introduction

The crisis in the DCS, as described in Chapter 3, required responses in two broad domains: addressing governance concerns and addressing human rights concerns. This chapter will describe and analyse how the Department responded in respect of the first domain, governance, looking specifically at what steps were taken to eradicate corruption and reassert control over the Department. Governance and human rights are inextricably linked, as discussed in Chapter 3 (section 2.2.2), but the distinction is made here for analytical purposes. It will also be argued in this chapter and the following one that the DCS made a strategic choice to focus on corruption and maladministration and not on human rights, or at any rate that it did not give the same prominence to the Jali Commission's recommendations on human rights violations as it did to those relating to corruption. A further important distinction in the Department's approach to these two domains is that, while it actively sought assistance from external agencies (e.g. Special Investigations Unit) to deal with corruption, it did not do so in respect of human rights violations. For example, it did not approach the Judicial Inspectorate to assist it with the human rights concerns raised by the Jali Commission and other stakeholders. On the contrary, it regarded the recommendations made by the Judicial Inspectorate in its Annual Reports as tangential. This point will be explored further in Chapters 5 and 6.

The decision to focus on governance may have been motivated by three reasons that would prioritise it over human rights concerns. First, the Department could not implement its policies and mandate if the senior management was not in control of its subjects; solving this problem required the re-institutionalisation of the Department. Second, the extent of the corruption had significant political, financial and public-image implications, with the result that there was urgent pressure from senior government for corruption both to be addressed and be seen to being addressed. Third, so the reasoning would go, once a state of good or acceptable governance was attained, human rights issues would, as a consequence, be

addressed. But irrespective of whether the decision to focus on governance and corruption was well-motivated rather than co-incidental, the effect was the same. Furthermore, in the case of other departments in the justice and security sector (such as SAPS and the Department of Defence¹), firm government action on allegations and evidence of high-level corruption would come to the fore only from 2010 onwards; by contrast, the situation in the DCS was more immediate. The investigations undertaken by the Department of Public Service and Administration (DPSA), the Public Service Commission (PSC) and the Jali Commission compelled the DCS to take action at an earlier stage than other departments in the justice and security sector.

This chapter addresses a number of matters. First, it assesses the Department's strategy-level anti-corruption response and, more specifically, the manner in which these strategy objectives came to be assimilated into the Department's overall Strategic Plan. It is argued that the strategy implementation emphasised law enforcement and that other components (such as prevention) were underplayed and lacked coherence. Second, many of the problems identified by the Jali Commission and others related to the employer-employee relationship. The disciplinary system had collapsed, senior managers were unionising, and a generally strained – at times, confrontational – relationship had developed between employers and employees. It was a problematic state of affairs, and it had to change. Third, in line with the Public Service Anti-Corruption Strategy, the DCS attempted to address corruption both by

¹ In December 2011 the former National Commissioner of Police, Jackie Selebi, was imprisoned for 15 years after he was convicted on several counts of corruption and sentenced to 15 years imprisonment (*Selebi v State* (240/2011) [2011] ZASCA 249 (2 December 2011)). Selebi's appeal was unsuccessful in the Supreme Court of appeal and he was imprisoned in December 2011. A further long standing allegation of corruption concerned the procurement of arms. In December 2011 President Zuma announced, after protracted legal proceedings, the appointment of a judicial commission of inquiry into the arms deal (Zuma announces member of arms deal commission, 7 December 2011, Mail and Guardian, <http://mg.co.za/article/2011-12-07-zuma-announces-member-of-arms-deal-commission/> Accessed 14 December 2011). Also in 2011 President Zuma dismissed two ministers; the Minister of Public Works, Gwen Mahlangu-Nkabinde, and Minister of Cooperative Governance and Traditional Affairs, Sicelo Shiceka. The latter's dismissal relating to the misuse of public funds. Mahlangu-Nkabinde's dismissal and the suspension of National Commissioner of Police, General Bheki Cele, followed the Public Protector's (Adv Thuli Madonsela) report entitled "Against the rules and Against the rules too", which exposed extensive corruption and maladministration in the processing of leasing deals for office space to be used by the South African Police Service (SAPS). ("Zuma wields the axe "for the good of SA", Mail and Guardian, 24 October 2011, <http://mg.co.za/article/2011-10-24-zuma-wields-the-axe-for-good-of-sa> accessed 15 December 2011).

developing internal capacity to do so and by seeking assistance from external agencies. Fourth, in 2004 the Department adopted a White Paper that would define rehabilitation as its new core business. This ambitious policy framework created a new language with new conceptual reference points for the Department, but implementation has been limited. The reasons for this lie in both the inherent deficiencies of the White Paper as well as the inability of the Department to align the budget to the strategic objectives of the White Paper. While notable advances have been made in addressing corruption and maladministration, especially since 2004, this period has not been without “embarrassing incidents” that cast suspicion over its anti-corruption efforts and intimated that the struggle against corruption in the DCS was far from over. The conclusion that is drawn is that while efforts to address governance concerns have had a positive impact, control of the Department has not been entirely regained and the process has had mixed results.

2. Addressing corruption and maladministration

2.1 An anti-corruption strategy

The corruption uncovered by the Jali Commission and, subsequently, the Special Investigations Unit (SIU) was committed on a large scale and caused substantial losses to the state, as described in Chapter 3. The impact of corruption and maladministration on the DCS was far-reaching, particularly in that it prevented the prison system from undergoing reform. The development of a response to corruption in the DCS should, however, be seen in the light of the somewhat pedestrian and tentative response by national government to corruption in the 1990s, as discussed below.

Even though the ministers responsible for the South African National Crime Prevention Strategy established a Programme Committee in March 1997 to work on corruption, evidence of firm action was limited. In June 1997 the Code of Conduct for the Public Service became applicable to all public servants. A year later, in 1998, the Programme Committee’s work resulted in the government’s approval of a National Campaign against Corruption. However, many uncertainties remained, and a Public Sector Anti-corruption Conference was held in November 1998. Resolutions emanating from the conference addressed issues such as the definition of corruption, the restoration of a public service ethos, the role of civil society, the responsibilities of public sector managers, financial management and controls, and co-

ordination of anti-corruption structures.² From this it was evident that a significant amount of consensus-building was required to formulate an effective response. Four years later, in 2002, the Public Service Anti-Corruption Strategy was published.³ Ultimately, new anti-corruption legislation would be enacted only in 2004.⁴ It should also be borne in mind that government's slow response to corruption was also a result of its own prioritisation of service delivery, especially affirmative action, above institution-building and addressing corruption.⁵

By 2004 the DCS senior management could draw upon a number of resources to inform its response to corruption: the Code of Conduct for the Public Service; the National Campaign against Corruption; resolutions from the Public Sector Anti-corruption Conference; the Public Service Anti-Corruption Strategy; the Prevention and Combating of Corrupt Activities Act; and the findings and recommendations of the Jali Commission's interim reports.⁶ Additional assistance became available two years later when the DPSA published the Minimum Anti-Corruption Capacity Requirements.⁷ This section will therefore assess the DCS response to corruption with specific reference to the Department's anti-corruption strategy. However, to make such an assessment it is necessary to clarify a number of the general requirements of a national anti-corruption strategy and also to provide a brief description of the Public Service Anti-Corruption Strategy.

2.1.1 The required strategy components and its context⁸

² National Anti-Corruption Forum website, <http://www.nacf.org.za/government/index.html> Accessed 5 December 2011.

³ Department of Public Service and Administration (2006) *Anti-Corruption Capacity Requirements – guidelines for implementing the minimum anti-corruption capacity requirements in departments and organisational components in the public service*, Pretoria: Department of Public Service and Administration.

⁴ Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁵ Picard, L.A. (2005) *The state of the state – institutional transformation, capacity and political change in South Africa*. Johannesburg: P&DM Wits University Press.

⁶ The Interim Reports of the Jali Commission are not dated and it is therefore not possible to ascertain exactly how many interim reports had been given to the DCS by 2004, but the decision to publish interim reports (a somewhat unusual step for a judicial commission) had already been taken by August 2002 (PMG report on the meeting of the Portfolio Committee on Correctional Services of 20 August 2002, <http://www.pmg.org.za/minutes/20020819-jali-commission-briefing> Accessed 5 December 2011).

⁷ Department of Public Service and Administration (2006).

⁸ This section is largely based on Muntingh, L. (2006) *Investigation prison corruption in South Africa*, CSPRI Research Report No. 12, Bellville: Community Law Centre.

A national anti-corruption strategy must aim to address corruption holistically and be inclusive in its focus and application; this is so because corruption is generally not an individual but an organisational problem. Such a strategy needs to contain four broad components: prevention, law enforcement, public awareness and institution-building.⁹ Successful approaches to fighting corruption are aimed not at removing the proverbial rotten apple from the barrel but at tackling the barrel itself.¹⁰ Therefore, the aim should be to fix the system that created the conditions for corrupt acts to be committed.

Investigations into corruption played a prominent role in the DCS response, but in the context of an anti-corruption strategy, a focus on investigations requires a degree of circumspection. An over-reliance on law reform, enforcement and investigations is no guarantee of changes in behaviour and may lead to repression, the abuse of enforcement power and, ultimately, to further corruption.¹¹ It has also been suggested that over-emphasising law enforcement and control functions can create a self-fulfilling prophecy, in that “having been placed continuously under suspicion, treated like quasi-criminals or probationers, public employees will behave accordingly”.¹² As much as the rhetoric of “being tough on crime” and “zero tolerance” is popular among politicians, law enforcement demands a carefully considered and sufficiently resourced approach sensitive to the fact that it is but one component of what should be a comprehensive strategy.

Law enforcement as a strategy component, in the form of investigations, therefore needs to be appropriately proportional to the other spheres of the strategy, namely prevention, public awareness and institution-building.¹³ The appropriateness of this proportional relationship depends on the circumstances and the overall strategic objectives, but, more importantly, on

⁹ Pope, J. (1999) Elements of a successful anti-corruption strategy. In Staphenurst, R. and Kpundeh, S.J. *Curbing corruption – toward a model for building national integrity*, Economic Development Institute of The World Bank, Washington. Centre for Democracy and Governance (1999) *A Handbook on Fighting Corruption*, Washington: Centre for Democracy and Governance.

¹⁰ Van der Beken, T. (2002) ‘A Multi-disciplinary approach for detection and investigation of corruption’ Fijnaut, C. and Huberts, L. (eds) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague. p. 273.

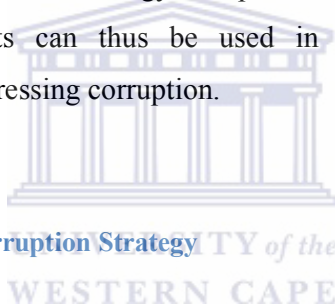
¹¹ Pope, J. (1999), p. 101

¹² Fijnaut, C. and Huberts, L. (2002) “Corruption, integrity and law enforcement” in Fijnaut, C. and Huberts, L. (eds) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague. p. 14.

¹³ Pope, J. (1999), p. 99.

the priorities that have been set for the short, medium and long term.¹⁴ Different constituencies will identify different priorities, and the challenge lies in reaching a workable consensus on what will deliver the most constructive results in the shortest possible period in the most efficient manner. The potential for tension in this process is evident. Setting priorities remains an inherently political task and one in which trade-offs have to be made between different constituencies.¹⁵

In the case of the DCS, as part of the law enforcement apparatus of the state, investigations were prioritised in order to regain some legitimacy, as a prison system publicly known for high levels of corruption is a morally corrupt one. Moreover, the state had suffered significant financial losses, but these could possibly be recovered as a result of investigations. Lastly, it created the means by which management could exert its authority and regain control over the Department. It can be argued furthermore that investigations are more likely to yield quicker and more visible results than other strategy components such as prevention and public awareness. Investigation results can thus be used in media profiling, showing that government is serious about addressing corruption.



2.1.2 The Public Service Anti-Corruption Strategy

As noted above, strategic priorities need to be located between the four pillars of the anti-corruption strategy, namely prevention, public awareness, law enforcement and institution-building. Published in January 2002, the Public Service Anti-Corruption Strategy came at an opportune time when the Jali Commission had only started its investigations. It therefore had an important influence on the DCS Anti-Corruption strategy presented to Parliament in November of that year. The Public Service Anti-corruption Strategy has nine “strategic considerations”.¹⁶ With reference to the four pillars, they can be grouped as follows: *prevention*: managing professional ethics; *public awareness*: social analysis, research and advocacy, and awareness-raising and education; *law enforcement*: review and consolidations

¹⁴ Grindle, M.S. (2004) Good enough governance – poverty reduction and reform in developing countries, *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 17, No. 4, p. 537

¹⁵ Grindle M.S. (2004), p. 539.

¹⁶ Department of Public Service and Administration (2002) *Public Service Anti-Corruption Strategy*, http://www.dpsa.gov.za/macc/Public%20service%20anti_corruption_strategy.pdf, p. 12-21

of the legislative framework; improved access and protection of whistleblowers and witnesses; prohibition of corrupt individuals and businesses; *Institution-building*: improved management policies and practices; partnerships with stakeholders; increased institutional capacity. The principles underpinning the Public Service Anti-Corruption Strategy reflect the desire to find the right balance between prevention, public awareness, law enforcement and institution-building.¹⁷

The Public Service Anti-Corruption Strategy, under the second strategic consideration, “Increased institutional capacity”, placed a number of obligations on departments. It required departments to develop the internal capacity to fulfil the following four functions: to conduct risk assessments; to investigate allegations of corruption and detect risks at a preliminary level; to assist the process of conducting further investigation, detection and prosecution, in terms of prevailing legislation and procedures; and to receive and manage allegations of corruption through whistle-blowing or other mechanisms.¹⁸

To assist government departments to develop a minimum capacity to address and investigate corruption within their respective spheres of control, the DPSA published in 2006 a practical resource guide entitled *Anti-Corruption Capacity Requirements*.¹⁹ The guide provides a useful resource to departments, supported by examples, on how to develop and implement a departmental anti-corruption strategy. It identifies the four key components of an anti-

¹⁷ The strategy is informed by the following principles:

- a. The need for a holistic and integrated approach to fighting corruption, with a balanced mixture of prevention, investigation, prosecution and public participation as the platform for the strategy.
- b. Constitutional requirements regarding the criminal justice system and public administration.
- c. The requirement for tailor-made Public Service strategies that operate independently but that complement national strategies, particularly with regard to detection, investigation, prosecution and adjudication of acts of corruption, as well as the recovery of the proceeds of corruption.
- d. Acts of corruption are regarded as criminal acts that can be dealt with either in the administrative or criminal justice system or both if need be.
- e. Domestic, regional and international good practice and conventions.
- f. All aspects of the strategy must be:
 - i. supported by comprehensive education, training and awareness
 - ii. co-ordinated within Government
 - iii. subjected to continuous risk assessment expressed in terms of measurable and time-bound implementation targets. (Department of Public Service and Administration (2002), p. 11.)

¹⁸ Department of Public Service and Administration (2002), pp. 14-15.

¹⁹ Department of Public Service and Administration (2006).

corruption strategy as preventing, detecting, investigating and resolving corruption. The Anti-Corruption Capacity Requirements cites several good practice examples from the DCS, and it must be accepted that as a result of the Jali Commission and other investigations the DCS was in some ways ahead of other government departments in developing internal capacity to deal with corruption. In this sense the crisis in the Department compelled it to act with greater urgency than other government departments in addressing corruption.

2.1.3 The DCS anti-corruption strategies

The first DCS Anti-Corruption Strategy was presented to the Portfolio Committee on Correctional Services in November 2002²⁰ and a revised version tabled in June 2005.²¹ It is thus necessary to reflect on these two strategies and assess how they were incorporated into the Department's general strategic plan.²² The 2002 Anti-Corruption Strategy outlined a three-pronged approach. First, corruption would be prevented by: addressing management weaknesses; the identification and management of opportunities for corruption and risks; and the development and promotion of a code of conduct. Second, corruption would be investigated by the Jali Commission, the SIU, SAPS and Directorate Special Operations in the National Prosecuting Authority, and supported by the intelligence community. Third, sanctions for corrupt acts would be imposed through the DCS internal disciplinary system; there would also be external sanctions (that is, criminal prosecutions).

Given the history of the Department in respect of corruption and emerging findings from the Jali Commission at the time, the emphasis on law enforcement is not altogether surprising. Two of the three strategy components focused on law enforcement in the anti-corruption strategy. Understandably, it was important to demonstrate a “get tough on corruption” approach. The DCS acknowledged to the Portfolio Committee that a longer-term and more proactive approach would be required to eradicate corruption but that it was imperative to

²⁰ PMG report on the meeting of the Portfolio Committee on Correctional Services of 5 November 2002, <http://www.pmg.org.za/minutes/20021104-anti-corruption-strategy-and-new-insignia> Accessed 9 January 2011. Department of Correctional Services (2004 a) *Annual Report 2003/4*, Pretoria: Department of Correctional Services, p. 10.

²¹ PMG report on the meeting of the Portfolio Committee on Correctional Services of 5 November 2002, <http://www.pmg.org.za/minutes/20021104-anti-corruption-strategy-and-new-insignia> Accessed 9 January 2011.

²² Both strategies were presented to the Portfolio Committee on Correctional Services in the form of PowerPoint presentations. If there are more detailed strategy documents, they are not available in the public domain.

communicate the message that perpetrators will be held accountable.²³ The 2002 Anti-Corruption Strategy can thus be accepted as an interim strategy even though it was never termed as such. An audit of the DCS anti-corruption capacity²⁴ was completed only towards the end of 2003, which provided further reason for the anti-corruption strategy's emphasis on investigation and law enforcement at the time. The audit recommended action on a broader front.

A little more than two and a half years later, in June 2005, the DCS presented a new anti-corruption strategy²⁵ to the Portfolio Committee on Correctional Services. The brief presentation was quite candid in its analysis of the problem, describing the preceding decade as involving the "contested transformation of Correctional Services" and noting weaknesses in internal controls, ethics and corruption prevention measures.²⁶ It was evident that the new strategy was better informed and aimed at finding a balance between the different strategic components outlined in the National Anti-Corruption Strategy. The 2005 anti-corruption strategy, as presented to the Portfolio Committee, stated at the outset that "corruption is inherent in all correctional systems" and located the problem primarily at the levels of area management and prisons in the DCS hierarchy.²⁷ Locating the problem at management area and prison levels echoed the Jali Commission's scope of investigations, as defined by its terms of reference which excluded Regional Offices and the Head Office. The Jali Commission did conduct some investigations, albeit superficially, of the Head Office. Indeed, it was there that serious allegations emerged about the Department being run by a secret and

²³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 5 November 2002

<http://www.pmg.org.za/minutes/20021104-anti-corruption-strategy-and-new-insignia> Accessed 9 January 2011

²⁴ Painter-Morland, M. et al (2003) *Final Consolidated Report – focused assessment of anti-corruption capacity within the Department of Correctional Services*, Pretoria: UNODC.

²⁵ P MG report on the meeting of the Parliamentary Portfolio Committee on Correctional Services of 7 June

2005, <http://www.pmg.org.za/minutes/20050606-special-investigations-unit-and-department-corruption-briefings> Accessed 22 November 2011. Department of Correctional Services (2006) *Annual Report 2005/6*, Pretoria: Department of Correctional Services, p. 20.

²⁶ PMG report on the meeting of the Parliamentary Portfolio Committee on Correctional Services of 7 June

2005, <http://www.pmg.org.za/minutes/20050606-special-investigations-unit-and-department-corruption-briefings> Accessed 22 November 2011.

²⁷ The DCS is managed in terms of six regions - these represent provinces but with two exceptions: Limpopo, Mpumalanga and North West are treated as one region, and Free State and Northern Cape as another. The next level is Management Areas, where there are 53 management areas in total. Areas are subdivided into individual prisons.

inner group known as CORE (see Chapter 3 section 4.3.3). According to the DCS leadership, the approach to prevent corruption would be decentralised and target area management and prison levels in the Department, this because fighting corruption is a collective responsibility and not the preserve of the Head Office.

The overall strategy was graphically represented as a wagon-wheel with “anti-corruption awareness” as the hub and the spokes consisting of 15 anti-corruption areas of intervention: risk management; internal auditing; physical and information security; fraud detection; corruption trend analysis; investigation of corruption; disciplinary code and procedure; systems, policy and procedure; internal controls; integrity testing; whistleblowing policy; obligation to report corruption; code of conduct; ethics training; and communication strategy. The 15 areas of intervention are comprehensive but seem to be at odds with the central aim of “anti-corruption awareness”. Moreover, this central aim of anti-corruption awareness does not feature in the strategic plans of the Department.

The focus of the DCS to address corruption, as described in successive strategic plans, appears to vacillate between the 2002 strategy and components of the 2005 strategy. Evidently, the more comprehensive 2005 strategy contains elements that are relevant not only to dealing with corruption alone but which have broader application. For example, the improvement of systems, policies and procedures is aimed at enhancing performance in general and is not confined to dealing with corruption. Specific anti-corruption efforts are noted in the DCS Strategic Plans under the departmental objective: “To ensure effective, legally sound policy compliance and corruption-free management of Correctional Services”.²⁸ For this purpose, the Strategic Plan for 2006/7 - 2010/11 emphasises three outputs under the heading “Strategy Implementation Plan”, namely: trend analysis; effective and efficient investigations resulting in prosecutions and sanctioning; and effective and efficient delivery on and updating of the integrity and vetting plan.²⁹ In the subsequent strategic plans for 2009 and 2010, the emphasis is placed on prevention, investigations and sanctioning, as contained in the Anti-Corruption Strategy of 2002.³⁰ The two most recent

²⁸ Department of Correctional Services (2006 b) *Strategic Plan for 2006/7 to 2010/11*, Pretoria: Department of Correctional Services, p. 30. Department of Correctional Services (2011 b) *Strategic Plan for 2011/12 -2015/16*, Pretoria: Department of Correctional Services, p. 21.

²⁹ Department of Correctional Services (2006 b), p. 30.

³⁰ Department of Correctional Services (2009 b) *Strategic Plan for 2009/10-2013/14*, Pretoria: Department of Correctional Services, p. 40.

strategic plans (2010/11 and 2011/12) do not provide for specific outputs in relation to the attainment of the relevant outcome.³¹ Whilst the performance targets and annualised targets over a five-year term are clearly defined and measurable, it is unclear what actions will be implemented to attain these targets. The extent to which the DCS is able at both strategic and implementation levels to find a balance between the four pillars of an effective anti-corruption strategy thus seems unclear.

The emphasis on law and rule enforcement, as articulated in the Department's Strategic Plans, may indeed be done at the cost of the other areas of intervention, such as prevention. With specific reference to the DCS, Painter-Morland cautioned that an over-emphasis on investigations (and enforcement-related activities such as vetting) could create the impression that broader issues of ethics are of lesser importance:

It creates the perception that ethics can be managed merely by ensuring that dishonest people do not enter the department, and it loses sight of the important role that current staff within the department, as well as the organisational culture within the department, play in the continuation of corrupt behaviour. Even if one could ensure that only honest people are recruited and appointed, the attitude and practices of long-term staff and the corrupting organisational environment could still create a "rotten barrel" that would corrupt the most ethical individuals.³²

This risk has subsequently manifested itself in the performance measurement of the relevant objective (To ensure effective, legally sound policy compliance and corruption-free management of Correctional Services). Two performance indicators are used in the 2011/2-2015/16 Strategic Plan: (1) Number of DCS personnel detected for corruption, and (2) Percentage of officials charged with fraud, corruption and serious maladministration and found guilty of at least one count.³³ The two performance indicators continue to emphasise law enforcement in anti-corruption efforts, and it is unclear how the two performance indicators are linked and aligned to the other three pillars of an effective anti-corruption strategy. For example, increased proactive and preventive measures may see a decrease in the number of officials detected for corruption; on the other hand, improved investigative

³¹ Department of Correctional Services (2010 b) *Strategic Plan for 2010/11 -2014/15*, Pretoria: Department of Correctional Services; Department of Correctional Services (2011 b).

³² Painter-Morland, M. et al (2003), p.27

³³ Department of Correctional Services (2011 b), p. 21.

capacity and skill may result in an increase in the number of officials detected for corruption. As it is presented in the 2011/12 -2015/16 Strategic Plan, it is unclear what result is being sought.

The Department's strategic direction in addressing corruption is further confounded by the information reported in the Annual Reports. Synchronicity and alignment between the strategic plans and the Annual Reports have been an ongoing problem, and a number of outputs that could be related to the 2005 Anti-Corruption Strategy are not necessarily reported on with reference to the objective "To ensure effective, legally sound policy compliance and corruption-free management of Correctional Services". Examples include an anti-corruption communication strategy;³⁴ training workshops on anti-corruption policies and distribution of promotional material;³⁵ development of vetting policy;³⁶ compliance inspections;³⁷ and development of a fraud prevention plan.³⁸ The overall impression is that while the Strategic Plan places the emphasis on law enforcement and detection, a broader range of activities, generally supportive of addressing corruption, are indeed undertaken, especially activities seen as proactive and preventive; however, these seem to be disjointed and not integrated, as required.

2.2 A new relationship between the DCS and its employees

In Chapter 3 the powerful, and at times destructive, influence of the labour unions was described. Efforts at regaining control over the Department, improving governance and addressing corruption would continue to be thwarted, undermined and frustrated unless a new employer-employee dispensation could be established. Either in response to the Jali Commission's recommendations or as a result of a DCS initiative, four areas were redefined. The first related to senior management union membership. This was an issue of great concern

³⁴ Department of Correctional Services (2007) *Annual Report 2006/7*, Pretoria: Department of Correctional Services, p. 25.

³⁵ Department of Correctional Services (2008 a) *Annual Report 2007/8*, Pretoria: Department of Correctional Services, p. 24. Department of Correctional Services (2010 a) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 47.

³⁶ Department of Correctional Services (2008 a), p. 25.

³⁷ Department of Correctional Services (2008 a), p. 43.

³⁸ Department of Correctional Services (2009 a) *Annual Report 2008/9*, Pretoria: Department of Correctional Services, p. 79.

to the Jali Commission as it fundamentally undermined the authority relationship between employer and employee. Second, and in response to the collapse of discipline and order, the disciplinary code and procedure were renegotiated. Third, in an effort to establish an employer-employee relationship which was less strained and more mutually beneficial, the Department adopted a relationship-by-objectives approach. Fourth, following from the DPSA audit of 2000 and the Jali Commission's recommendations, overtime payment was abolished and a Seven Day Establishment (SDE) adopted. These four areas are discussed in this section.

2.2.1. Union membership and senior management

The Jali Commission found that 99% of DCS employees belonged to a trade union.³⁹ At least part of the incentive for belonging was the result of an agency shop agreement requiring all employees, regardless of union membership to pay fees to the representative unions.⁴⁰ The Jali Commission established that, contrary to what the Labour Relations Act stipulates,⁴¹ that the fees deducted from non-unionised staff were indeed higher than fees deducted from officials belonging to a union.⁴² The general approach to union membership, the Jali Commission observed, would then be skewed because an employee who has no real intention of belonging to a union may do so in any case in order to pay lower fees. It is unclear how and when this arrangement came about, but it does indicate unusually close cooperation between DCS senior management and union leadership at the cost of non-unionised staff. The

³⁹Jali Commission, p. 120.

⁴⁰ Section 25 of the Labour Relations Act (66 of 1995) creates a mechanism whereby, as part of a collective agreement, an employer may deduct fees from an employee who does not belong to a union but who is eligible to belong to a union. The logic is that non-union employees should not benefit from union negotiations without contributing to the union(s) which acts as their agent during negotiations. In the case of DCS such an agreement was signed in the Public Service Bargaining Council on 26 May 1998. The agreement stipulated that that the employer must deduct 1% of the employee's basic salary to a maximum of R60.00 from all employees who do not belong to a union that is a signatory to the agreement (Jali Commission, pp. 106-107).

⁴¹ Section 25(3)(b) of the Labour Relations Act states that, where there is more than one union recognised by the employer, the fee deducted from non-union staff must be lower than or equal to the fee of the union with the highest fees.

⁴² Jali Commission p. 118. Unfortunately, the Jali Commission's report does not give details on the amounts concerned.

issue was ultimately resolved and the fees deducted from non-union members have been reduced in order to be consistent with the Labour Relations Act.⁴³

An issue of particular concern to the Jali Commission was that senior departmental officials were also office bearers in the unions. According to the Jali Commission, this bedevilled not only the enforcement of discipline but the granting of merit awards as it blurred the line between managerial and union responsibilities.⁴⁴ The Jali Commission recommended that senior and junior staff should belong to two different unions. Although the Jali Commission's concerns had not been addressed entirely by 2011, some progress was made in that direction.

As the question of senior management's union membership had broader ramifications across the public service, the DCS did not deal with it directly. However, the DPSA policy guidelines on the establishment of the Senior Management Service (SMS) make provision for the removal of all conditions of service of senior managers and executives from the ambit of the Public Service Coordinating Bargaining Council (PSCBC).⁴⁵ Consequently, their conditions of service, including remuneration, are handled separately and determined through ministerial determination issued by the Minister of Public Service and Administration. In respect of union membership of the SMS, the DPSA was at the time of writing (December 2011) investigating the possibility of a professional association for SMS members and it had not been finalised.⁴⁶ However, the DCS had made it clear to Parliament that it would be unconstitutional to bar any employee, including senior management, from belonging to a particular union, or to dictate to employees to which union they should belong.⁴⁷ The problem of senior management being office bearers in unions was further addressed by the General Public Service Sectoral Bargaining Council Resolution 3/2001, which stipulates that employees on salary level 8 (Senior Correctional Officer) may not be appointed as full-time

⁴³ Department of Correctional Services (2011 e) *Department of Correctional Services implementation of the recommendations of the Jali Commission of Inquiry on Systems and Policies – Section A*, Report presented to the Portfolio Committee on Correctional Services on 7 September 2011, p. 7.

⁴⁴ Jali Commission, pp. 119-123.

⁴⁵ Department of Correctional Services (2011 e), p. 5. Department of Public Service and Administration (2000) *Policy statement on the establishment of a senior management service in the public service*, <http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/sms-policy.pdf> Accessed 23 November 2011.

⁴⁶ Department of Correctional Services (2011 e), p. 5.

⁴⁷ Department of Correctional Services (2011 e), p. 7.

shop stewards.⁴⁸ As a result, Assistant Director and upwards are excluded from being shop stewards but may still represent junior employees in disciplinary hearings.⁴⁹

Whether these changes will place sufficient distance between the unions and DCS senior management remains to be seen. Nonetheless, there has been an acknowledgment that the situation as it stood was unacceptable and recognition was given to the potential conflict of interest. In the long run, a professional association of the sort contemplated by the DPSA may be the only solution to ensure integrity and dispel suspicions of impropriety and undue union influence on the DCS.

2.2.2 The disciplinary code and procedure

By the late 1990s the failure to enforce the disciplinary code in the DCS was at the heart of the crisis in the Department. The Jali Commission had so little faith in the DCS management at the time that it recommended that the enforcement of the disciplinary code (i.e. initiating and conducting disciplinary hearings) be outsourced to an external agency such as the PSC.⁵⁰ Fortunately, the DCS did not accept this recommendation as it pointed out, correctly, that the enforcement of discipline is integral to the management function and this responsibility rests with all managers.⁵¹

The Disciplinary Code and Procedure was reviewed and agreed to at the Departmental Bargaining Council by Resolution 1/2006 between the unions and the Department and, according to DCS, addressed all of the Jali Commission's concerns.⁵² The revised disciplinary code and procedures were also ratified by the General Public Service Sector Bargaining Council⁵³ on 4 December 2006.⁵⁴

⁴⁸ Department of Correctional Services (2011 e), p. 73.

⁴⁹ Department of Correctional Services (2011 e), p. 73

⁵⁰ Jali Commission p. 770.

⁵¹ Department of Correctional Services (2011 e), p. 71.

⁵² Department of Correctional Services (2011 e), p. 72.

⁵³ The General Public Service Sector Bargaining Council (GPSSBC) was designated in terms of the PSCBC Resolution 10 of 1999 as the bargaining council of the general public sector. <http://www.gpssbc.org.za/>
Accessed 25 November 2011.

⁵⁴ Department of Correctional Services (2007), p. 35.

An important change to the Disciplinary Code was that allowing a case to fall away because of prescription or lapse of time was included as misconduct.⁵⁵ Under the previous disciplinary code the deliberate lapsing of time (three months) was abused extensively to evade disciplinary action against officials, especially when the transgressing employee belonged to the same union as the manager.⁵⁶

A number of steps were also taken to train staff on the revised disciplinary code. Five-hundred targeted officials were trained as chairpersons and initiators in disciplinary actions in 2007/8.⁵⁷ A training programme on the Disciplinary Code and Procedure was developed in conjunction with SAMDI (SA Management and Development Institute) and the first training was done in 2007/8, with refresher training reportedly being conducted on a continuous basis.⁵⁸ In the DCS the Directorate Employee Relations and the Directorate Code Enforcement were established after the Jali Commission concluded its work.⁵⁹ The former deals with, among other matters, discipline management and monitoring of discipline, while the latter specialises in disciplinary code enforcement. Both structures render support to the regions and management areas in disciplinary matters.

From 2006 onwards, the DCS took a number of measured and important steps to establish the internal capacity to maintain discipline and order. Creating support structures, specialist training to managers and establishing a new regulatory framework that addressed important loopholes, placed the Department on a footing to deal more effectively with disciplinary infringements. The results of this approach are encouraging, as is described in section 2.2.5 below.

2.2.3 Relationship by objectives

From 2005 it was clear that the DCS senior management wanted to improve the generally strained and at times confrontational relationship it had with its employees. The promises made in 1994 when DCS signed a recognition agreement with POPCRU had failed to materialise. Continued industrial action by DCS staff reflected negatively on the Department and also had consequences for operations, especially with regard to the maintenance of

⁵⁵ Department of Correctional Services (2011 e), p. 73.

⁵⁶ Jali Commission, pp. 700-701.

⁵⁷ Department of Correctional Services (2008 a), p. 35.

⁵⁸ Department of Correctional Services (2011 e), p. 72.

⁵⁹ Department of Correctional Services (2011 e), p. 73.

security.⁶⁰ The then Minister of Correctional Services, Ngconde Balfour (ANC), announced a new approach, namely “relationship by objectives”, in the 2005/6 Annual Report:

This financial year also ushers in the beginning of a new era – the Age of Labour Peace in Correctional Services – following the settlement of a long standing labour dispute with unions. The Memorandum of Understanding we have signed with labour, affirms the Department as an essential service institution that acknowledges and promotes the exercise of people’s and workers’ rights. This marks a new phase of labour relations maturity in the Department. An outstanding feature of the agreement is taking labour relations to a higher level through the introduction of a relationship building by objectives model.⁶¹

To facilitate this new approach, the relationship agreements with unions were revised and Labour Relations Forums established in all regions and management areas.⁶² Regional and Management Area Labour Relations Forums were established and launched in five regions in 2006/7,⁶³ and by 2009/10 were functioning across the Department.⁶⁴ Training and support were also rendered to the members of the forums.⁶⁵ A Ministerial Consultative Forum was established to facilitate high-level interactions between the Minister, Commissioner and union representatives. While the Ministerial Consultative Forum met twice in 2006/7, there is no information from the Department’s Annual Reports whether it still exists or functions.

⁶⁰ In June 2004 there were illegal strikes at Barberton and Nelspruit prisons (Balfour: Statement on illegal strike at Barberton & Nelspruit correctional centres), *Polity.org.za*, 28 June 2004, <http://www.polity.org.za/article/balfour-statement-on-illegal-strike-at-barberton-amp-nelspruit-correctional-centres-28062004-2004-06-28> Accessed 23 November 2011). In February 2004 warders at the private prison in Makhado threatened to go on strike (‘Prison warders threaten with strike’ *Zoutnet*, 20 February 2004, http://www.zoutnet.co.za/details/20-02-2004/prison_warders_threaten_with_strike/905 Accessed 23 November 2011).

⁶¹ Department of Correctional Services (2006 a) *Annual Report 2005/6*, Pretoria: Department of Correctional Services, p. 7.

⁶² Department of Correctional Services (2006 a), p.22.

⁶³ Department of Correctional Services (2007), p. 11.

⁶⁴ Department of Correctional Services (2010 a) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 39.

⁶⁵ Department of Correctional Services (2009 a) *Annual Report 2008/9*, Pretoria: Department of Correctional Services, p. 38.

A number of additional steps were also taken to improve the employer-employee relationship. Strike Management Guidelines were developed and issued to managers and the Departmental Bargaining Chamber in 2007/8.⁶⁶ A year later the Strike Management Guidelines were revised and training sessions conducted with 390 employees. Strike Management Committees were also established in all Management Areas of DCS.⁶⁷ In 2007/8 a Suspension Policy and Procedure and a Grievance Procedure were developed and submitted to the Departmental Bargaining Council,⁶⁸ but by 2011 both had been revised and not yet finalised.⁶⁹ In 2008/9 an Employee Relations Policy and Procedure was submitted for approval,⁷⁰ but it is uncertain if progress was made as there is no further reference to it in the Annual Reports. Regardless of this, compared to the 1994 recognition agreement with POCRU, a far more structured, focused and mature approach had emerged since 2005 to improve the relationship between DCS and its employees. These were important achievements in the efforts to improve governance in the Department.

2.2.4 Medical aid, over-time payment and the Seven Day Establishment

The initial focus of the SIU was on the medical aid scheme of the DCS (Medcor). Because it was a non-contributory fund with no limitations on claims by members, it resulted in widespread fraud and corruption. The situation was rectified by 2004 and since then DCS employees contribute one-third and the employer two thirds.⁷¹ All indications are that this step, combined with the implementation of recommendations made by the SIU, addressed the systemic shortcomings of the medical aid fund.

The DPSA management audit released in 2000 already recommended the implementation of a Seven Day Establishment (SDE) that would do away with overtime payment (see Chapter 3 section 4.6.3). To the Jali Commission it was evident that the overtime payment system was

⁶⁶ Department of Correctional Services (2008 a), p. 34.

⁶⁷ Department of Correctional Services (2009 a), p. 27.

⁶⁸ Department of Correctional Services (2008 a), p. 35.

⁶⁹ Department of Correctional Services (2011 a) *Annual Report 2010/11*, Pretoria: Department of Correctional Services, p. 28.

⁷⁰ Department of Correctional Services (2009 a), p. 27.

⁷¹ Department of Correctional Services (2005) *Annual Report 2004/5*, Pretoria: Department of Correctional Services, p. 30.

grossly abused and that it resulted in significant expenditure for the Department. By the Department's own admission, the overtime system was abused: "Non-compliance with the Basic Conditions of Employment Act of 1997 (Act no. 75 of 1997) resulted from poor budget control practices and entrenched mismanagement of overtime."⁷² In an effort to resolve this problem the Department entered into an agreement with all recognised unions in 2004 to regulate management and expenditure related to overtime.⁷³ The substance of the agreement is, however, not described in the relevant Annual Report. In 2004 an agreement was also reached between the Department and unions to implement an SDE scheduled to commence on 1 June 2005.⁷⁴

The implementation of the SDE, however, suffered serious delays, and when it was finally implemented it had adverse consequences on operations. One reason for the delay was that monies allocated to the SDE were re-allocated to fund other departmental programmes.⁷⁵ The SDE was ultimately implemented with effect from 1 July 2009, some four years late but with immediate and substantial savings to the tune of R900 million (US\$ 132 million).⁷⁶ It, too, ran into difficulties.

At operational level, problems soon emerged with the SDE as different permutations of the shift system were tested and each created different challenges. Contrary to what may be logically expected, the SDE did not propose a uniform shift system for all prisons. The instruction was, after initial problems, that Regions may adopt a system that suits their particular needs and context.⁷⁷ The requirement was essentially that it should not exceed 45 hours worked in a week. As a result, three systems have emerged: (1) 10 hours over a 5-day period in a 7-day cycle; (2) 12 days on and 2 days off in a 14-day cycle; and (3) 10 days on and 4 days off in a 14-day cycle.⁷⁸

⁷² Department of Correctional Services (2006 a), p. 47.

⁷³ Department of Correctional Services (2006 a), p. 47.

⁷⁴ Department of Correctional Services (2005), pp. 18 and 47.

⁷⁵ PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 February 2010, <http://www.pmg.org.za/report/20100217-problems-within-department-correctional-services> Accessed 8 December 2011.

⁷⁶ Department of Correctional Services (2009 a) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 20.

⁷⁷ Government Gazette, No. 34034, Notice 135, 25 February 2011.

⁷⁸ Department of Correctional Services (2011 a), p. 31.

In the absence of overtime payment, the incentive to work longer hours disappeared. From Johannesburg Medium A Prison it was reported that there were 132 officials for 6 000 awaiting trial detainees and that as a result of the shift system, seven officials would supervise 1 500 prisoners. From Baviaanspoort Medium B prison it was reported that three officials had to lock up 1 500 prisoners.⁷⁹ From a security- and staff-safety-perspective these staff-to-prisoners ratios are intolerable, placing both staff and vulnerable prisoners at risk. The Judicial Inspectorate saw the impact of the shift system on a wider level affecting general service delivery:

The implementation of the so-called shift system has had a negative impact effect on staffing at operational levels within most correctional centres which in turn has affected the treatment of inmates in that recreational and rehabilitative programmes have been suspended.⁸⁰

According to the Public Servants Association (PSA), the SDE resulted in a reduced monthly salary of between R1 000 and R3 000 per employee and, “to add insult to injury”, increased working hours from 40 to 45 hours per week.⁸¹ The PSA argued that the DCS did not have enough staff to implement the SDE. It estimated, conservatively, that between 8 000 and 14 000 more officials were required, assuming that prisons were not overcrowded and at least 80% of posts are filled.⁸² The overall situation has created significant security risks for both prisoners and staff,⁸³ and it has further been alleged that officials would exploit the shift

⁷⁹ Public Servants Association (2009) *Submission by the Public Servants Association on the 2009/10 Annual report of the Department of Correctional Services to the Portfolio Committee on Correctional Service*, PMG report on the meeting of the Portfolio Committee on Correctional Service, 28 October 2009, <http://www.pmg.org.za/report/20091028-department-correctional-services-briefing-its-20082009-annual-report> Accessed 23 November 2011.

⁸⁰ Office of the Inspecting Judge (2010) *Annual Report of the Judicial Inspectorate for Correctional Services 2009/10*, Cape Town: Office of the Inspecting Judge, p. 38.

⁸¹ Public Servants Association (2009).

⁸² Public Servants Association (2009).

⁸³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 13 October 2010, <http://www.pmg.org.za/report/20101013-department-correctional-services-claims-parole-staffing-levels-and-ot> Accessed 5 December 2011.

system so that they can do private work to earn additional income.⁸⁴ Moreover, it had severely compromised the Department's capacity to render services to prisoners.

Increased resistance by staff to the SDE developed quickly and one of the unions (POPCRU) turned to the Labour Court for relief. In September 2010 it was granted, in KwaZulu-Natal, an interim interdict against the implementation there of the third option listed above (10 days on and 4 days off in a 14 day cycle).⁸⁵ In February 2011 POPCRU was granted a further interdict in the KwaZulu-Natal matter by the Labour Court, effectively preventing the implementation of a changed shift system for prison-based staff and specifically prohibiting the National Commissioner from acting against any DCS official who refuses to work according to the changed shift system.⁸⁶ In view of this, the parties returned to the Departmental Bargaining Council in April 2011 to deal with the matter on a national basis. By November 2011 a draft agreement had emerged but the details were not available. Indications are, however, that the DCS may indeed need to employ as many as 12 000 more officials to fully implement the SDE.⁸⁷

⁸⁴ MG report on the meeting of the Portfolio Committee on Correctional Services of 13 October 2010, <http://www.pmg.org.za/report/20101013-department-correctional-services-claims-parole-staffing-levels-and-ot> Accessed 5 December 2011.

⁸⁵ Press release by the DCS 'Correctional Services says court interdict has not affected the fundamentals of seven-day establishment' 10 September 2010, <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=12877&tid=17840> Accessed 23 November 2011.

⁸⁶ The interdict stipulated the following: (1) Interdicting and restraining all officials lower in rank from implementing any shift system in the Department or any part thereof [including all management Areas, Correctional Centres, Correctional Facilities, Divisions or Offices], in terms of which the work hours of centre-based correctional officials are changed, (2) Interdicting and restraining the National Commissioner as the respondent from instituting, or continuing with, disciplinary proceedings against any centre-based correctional officials, who failed and/or refused to perform work in accordance with the shift system implemented by any official of a lower rank other than the National Commissioner. (3) Interdicting and restraining the National Commissioner as the respondent from making or continuing to make deductions in respect of unpaid leave, from the salaries of officials who failed and/or refused to perform work in accordance with a shift system implemented by any official of a lower rank other than the National Commissioner as the respondent. (Press release by POPCRU, 'POPCRU's Urgent Labour Court Application granted on Shift System' 11 February 2011, <http://popcru.org.za/?p=249> Accessed 23 November 2011).

⁸⁷ Telephonic interview with Mr. Simon Madini, HOD: Collective Bargaining, POPCRU, 24 November 2011.

Six years after the initial implementation date, the DCS is still struggling to get the SDE off the ground. Regardless of what technical and practical difficulties there may be, it is evident that this initiative was not properly planned and costed. The employment of thousands of more officials would add significantly to the already bloated budget of the Department. Moreover, merely employing more staff may not solve the problem if they are not properly trained and monitored to perform the tasks they are required to do by law and policy.

The effective and efficient utilisation of state resources is a constitutional requirement⁸⁸ and includes the utilisation of human resources. While the situation in respect of medical aid in DCS was resolved, the SDE (a matter of governance) has proven to be a more complex. Moreover, it has clear rights implications with reference to safe custody and the services provided to prisoners.

2.2.5 Re-establishing the disciplinary code and procedure

In Chapter 3 detailed information was presented on the collapse of discipline and order in the DCS, and section 2.2.2 above described the re-negotiation of the disciplinary code and procedure. The overall impression gained from the Jali Commission's findings is that managers, in particular Heads of Prisons, were reluctant or unable to enforce the Department's disciplinary code, and further, that when this was done, extremely light sanctions were imposed. To restore discipline and order in the DCS it was required that the disciplinary code be revised, the necessary structures and support be put in place (as described above) and, ultimately, that the code be enforced. The trends in respect of enforcing the disciplinary code are presented in Figures 1 to 3 below and provide some reason for optimism.

Figure 1 shows the number of disciplinary actions initiated by the Department against employees per 1 000 employees for the period 2002/3 to 2010/11. In 2002/3 this stood at 48 disciplinary actions for every 1 000 employees. By 2010/11 this ratio had increased to 106 disciplinary actions for every 1 000 employees. The result is that by 2010/11 nearly one out of every ten DCS employees was the subject of a disciplinary action in that year.

⁸⁸ s 195(1)(b) Act 108 of 1996.

Figure 1

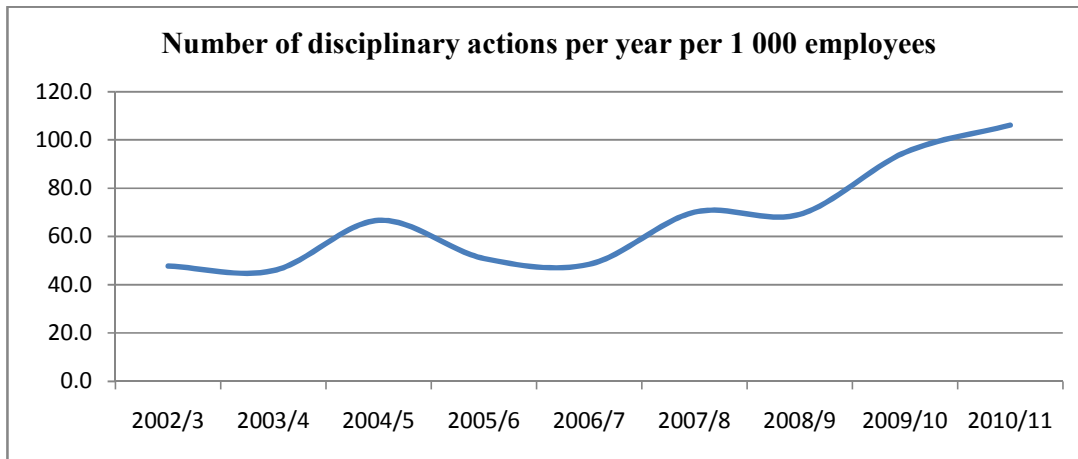


Figure 2 shows the profile of sanctions imposed as a result of disciplinary actions per year from 1997 to 2010/11. Two categories of sanctions are presented, namely dismissals from the employ of the Department and Other.⁸⁹

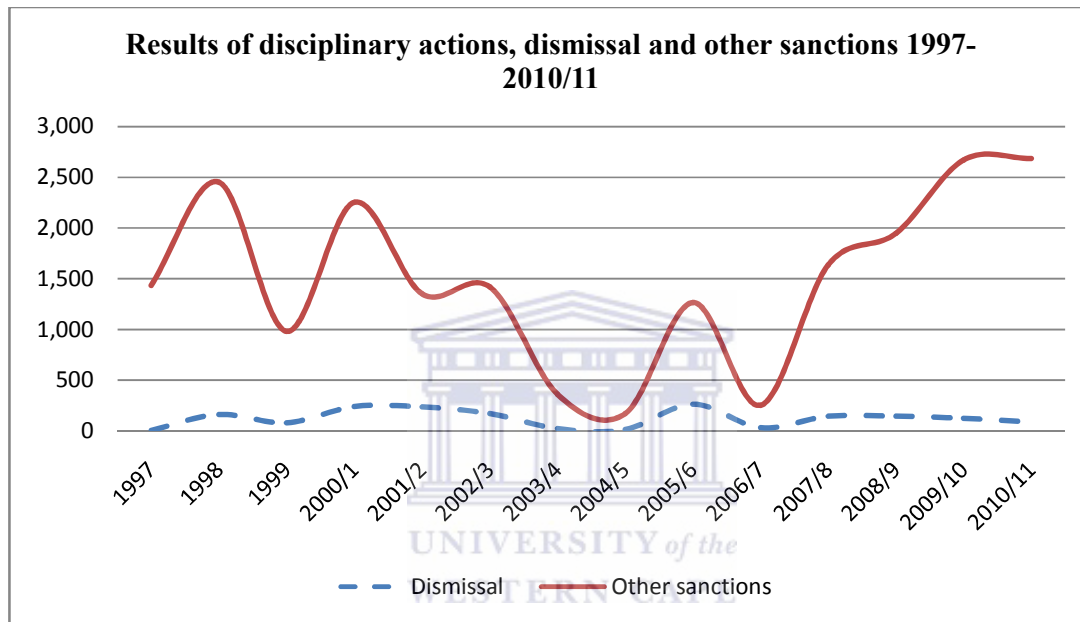
Given the findings of the Jali Commission and the work of the SIU, one would have expected a consistent, if not growing, trend in disciplinary actions against DCS officials and a significant proportion of dismissals. However, as shown in Figure 2, the trends point in a different direction at least until 2007/8.⁹⁰ The most obvious of them is the see-saw figure in total disciplinary sanctions imposed, standing at nearly 2 500 in 1998, dropping below 1 000 the following year but then climbing above 2300 in 2000/1. The high number of disciplinary actions in 1997 and 1998 were the result of the investigations undertaken by the PSC and the DPSA. The spike in 2001 to 2003 can again be attributed to the early work of the Jali Commission and the SIU. During the first three years of the SIU's involvement in the DCS (2002-2005), the total number of disciplinary actions did, however, drop to just above 200 cases in 2004/5. But the fruits were harvested the following year when disciplinary sanctions imposed climbed again to above 1200. These were cases primarily related to medical aid and social grant fraud. Dismissals, nonetheless, remain rare events in the DCS. The highest number of dismissals was 264 in 2005/6. In the following year, 2006/7, the total number of disciplinary sanctions imposed dropped to 253, with only 33 dismissals. An encouraging

⁸⁹ 'Other' refers to the following: corrective counselling; verbal warning; written warning; final written warning; dismissal; demotion; and suspension without pay.

⁹⁰ The data used in Figure 2 were extracted from the various annual reports of the DCS of the period covered. It should be noted that the report for 2000/1 covers a 15-month period when the Department changed its reporting period from a calendar year to a financial year.

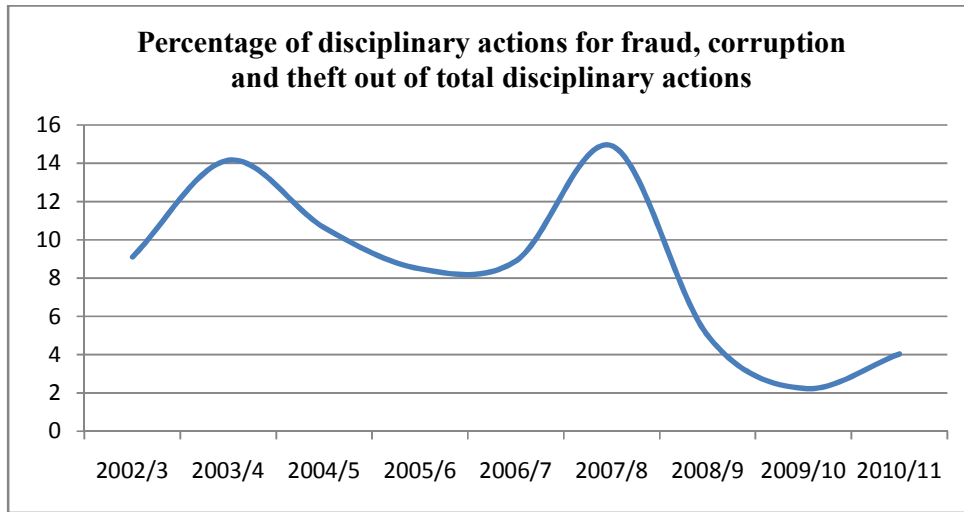
trend is visible from 2007/8. A sharp increase in disciplinary sanctions imposed has been sustained since then, and the period 2009 to 2011 saw the highest-ever number of disciplinary sanctions imposed against employees – more than of 2 500 per year. The trend from 2007 onwards also shows that code enforcement had become less a function of external investigations and increasingly the result of DCS internal actions, demonstrating that internal capacity and commitment to enforce the code has improved.

Figure 2



Notwithstanding the widespread findings of corruption, fraud and theft, the number of disciplinary actions initiated in response to this group of offences remains relatively low. It, too, describes a see-saw pattern, as shown in Figure 3. Between 2002/3 and 2007/8, this category constituted between 9% and 15% of initiated disciplinary actions, but thereafter its proportional share had dropped to as low as 2% by 2009/10. A possible explanation could be that corrupt officials had been prosecuted and disciplined, an explanation warranted by the repairs that have been made to systemic weakness and loopholes that have been closed; improvements in the general employee culture in the Department could also be contributing to the trend. A more pessimistic explanation is that after the SIU ended its investigations in 2009, the DCS found itself bereft of the specialised skills and additional capacity needed to investigate the more forensically complex cases of fraud and corruption. If the latter is indeed the more accurate explanation, it would mean that the Department is at risk of an increase again in corruption.

Figure 3



2.3 Developing internal capacity to address corruption

As discussed in Chapter 3 (section 2.1), the Correctional Services Act mandates the National Commissioner to investigate corruption and dishonest practices in the Department. The Act also enables the establishment of internal capacity to investigate corruption and enforce the disciplinary code. This section describes and assesses the measures that were implemented in fulfilment of that mandate.

2.3.1 The legislative mandate

The National Anti-Corruption strategy requires, as described in section 2.1, the development of an internal capacity in all national departments.⁹¹ This is expanded on further in the *Minimum Anti-Corruption Capacity Requirements*. The legislative mandate to establish the internal capacity to investigate theft, fraud and corruption was originally provided for in the Correctional Services Act in Chapter 11 “Internal service evaluation and eradication and prevention of corruption”.⁹² This mandate was originally created by the 2001 amendment to

⁹¹ Department of Public Service and Administration (2002), pp. 14-15.

⁹² Sections 95(2)(f) and 95(2)(g) prior to Act 25 of 2008.

the Correctional Services Act.⁹³ Following the 2001 amendment, sections 95(2)(f) and 95(2)(g) specifically provided for developing measures to combat theft, fraud and corruption and for investigating such practices as well as dishonesty in general. The 2001 amendment provided for the establishment of a unit in the DCS to deal with matters of this kind.⁹⁴ The unit was further mandated to initiate disciplinary action resulting from any investigation related to theft, fraud, corruption or dishonest practices.⁹⁵

The Correctional Services Amendment Act (25 of 2008) replaced the provisions in section 95(3)A for an investigative unit with two specifically named structures, the Departmental Investigation Unit (DIU)⁹⁶ and the Code Enforcement Unit (CEU).⁹⁷ The mandate of the DIU is to investigate theft, fraud, corruption and maladministration by correctional officials. The CEU is tasked with instituting disciplinary proceedings emanating from investigations undertaken by the DIU. The Correctional Services Amendment Act also requires the National Commissioner to include in the Departmental Annual Report a report on compliance monitoring, investigations undertaken by the DIU and disciplinary proceedings initiated and concluded by the CEU.⁹⁸ The DIU and CEU were already established by 2006, and the purpose of the amendment to the legislation was thus to bring the law in line with practice.⁹⁹ A more detailed description of the two units is provided below in sections 2.3.3 and 2.3.4.



2.3.2 Risk Management and Fraud Prevention Committees

Even though a risk management strategy was developed in 2002, a Risk Management Committee was created only in 2004 and it is responsible for conducting risk assessments in the DCS.¹⁰⁰ The Risk Management Committee is chaired by the Chief Deputy Commissioner (CDC) Central Services and further comprises six Deputy Regional Commissioners, the 16 Deputy Commissioners, the Director: Inspectorate and the Director: Internal Audit. It is

⁹³ Act 32 of 2001.

⁹⁴ s 34(s) of Act 32 of 2001 inserted s 95(3A) into the principal act.

⁹⁵ s 95(3A).

⁹⁶ s 95A.

⁹⁷ s 95B.

⁹⁸ s 95C.

⁹⁹ Muntingh, L. (2006).

¹⁰⁰ Department of Correctional Services (2005), p. 67.

evidently representative of the Department's most senior officials and its main task is to identify risks based on information emanating from the internal audit, the Inspectorate's report, Strategic Plan reviews and reports from external bodies such as the Auditor General.¹⁰¹ Risk assessment is done annually - in time to inform the Department's strategic plan. As part of the strategic plan, it is the responsibility of management at all DCS facilities and all branches to implement the strategy. Identified risks and mitigating measures are integrated into the strategic plans of the Department.

While it is accepted that risk assessment is a dynamic process requiring constant updating, it is also the case that the identified risks, as reflected in the DCS Annual Reports, show continuous shifts in their nature and the priority given to them.¹⁰² For example, in the 2007/8 Annual Report the number-one rated risk was "Non-compliance with directives, policy and procedures; lack of internal control and supervision; and resultant repeated audit queries".¹⁰³ Three years later, the top-rated risk was "Inadequate contract management".¹⁰⁴ Such fluidity in risk assessment may perhaps undermine a sustained focus on specific and long-term risks.

In 2007/8 the DCS also developed a Fraud Prevention Strategy and established a Fraud Prevention Committee.¹⁰⁵ The Fraud Prevention Committee cooperated closely with the SIU during its investigations and was tasked amongst other to monitor the implementation of the

¹⁰¹ Department of Correctional Services (2006 a), p. 12.

¹⁰² For example, the 2010/11 DCS Annual Report (p. 111) lists the following as the top ten risks for the Department:

1. Inadequate contract management
2. Inadequate HR Provisioning in order to deliver the core mandate of the department
3. Ineffective functioning of Case Management Systems
4. Inadequate IT Systems security
5. Inadequate basic IT infrastructure
6. Lack of integrated planning on infra-structural needs
7. Lack of comprehensive, accurate and reliable data for decision making
8. Ineffective implementation of HRD (human resource development) Strategy
9. Inadequate Asset Management
10. Overcrowding.

¹⁰³ Department of Correctional Services (2008 a), p. 18.

¹⁰⁴ Department of Correctional Services (2011 a), p. 111.

¹⁰⁵ Department of Correctional Services (2008 a), p. 82.

SIU's recommendations, since this had been identified as a problem area.¹⁰⁶ The extent to which the Fraud Prevention Committee remained optimally functional is questionable as the 2010 DPSA audit of the DCS noted that meetings of the Committee were poorly attended.¹⁰⁷

Both of these structures place the emphasis on prevention through risk-identification – a significantly different approach to ones taken in the past, when there was little control over corruption and even less concern about it.

2.3.3 The Departmental Investigations Unit

While the corruption prevention strategy is decentralised, the investigation and sanctioning functions are centralised. The investigative function resorts under the Deputy Commissioner Legal and Special Operations, which resides under the Chief Deputy Commissioner: Central Services. The Chief Directorate Legal and Special Operations has three directorates: Code Enforcement (CEU), Legal Services, and the Departmental Investigations Unit (DIU).¹⁰⁸ The DIU has 20 funded posts of which one was vacant by the end of September 2011.¹⁰⁹

The DIU was specifically created to deal with the detection and investigation of corruption, fraud and serious maladministration. Although overseen by Central Services and Legal and Special Operations, it has relative autonomy in the Department regarding investigations.¹¹⁰ The approach is that all managers should provide the DIU with full support in the course of its investigations. Within the DIU there are two sub-units, namely the Investigation Unit and Analytical and Prevention Desk.¹¹¹

¹⁰⁶ PMG report on the meeting of the Portfolio Committee on Correctional Services of 20 May 2008, <http://www.pmg.org.za/report/20080520-briefing-special-investigations-unit-investigation-department> Accessed 25 November 2011.

¹⁰⁷ Department of Public Service and Administration (2010) *An audit of the internal anti-corruption capacity of the Department of Correctional Services*, Pretoria: DPSA, p. 10.

¹⁰⁸ Department of Correctional Services (2011 f) *Information on the component Legal and Special operations for the Portfolio Committee on Correctional Services*. Presented to the Portfolio Committee on Correctional Services on 18 October 2011.

¹⁰⁹ Department of Correctional Services (2011 f).

¹¹⁰ Department of Public Service and Administration (2006), p. 16.

¹¹¹ Department of Correctional Services (2011 f).

The DIU is responsible for investigating allegations of corruption. It has a Director, 12 investigators, and two administrative support staff. The DIU is located in Pretoria but its mandate is national. Apparently, this arrangement is a beneficial one, as investigators are not close to the targets of investigation and therefore at a reduced risk of intimidation or undue influence.¹¹²

The Analytical and Prevention Desk is responsible for maintaining a database on incidents, doing trend analysis and reporting on this line function to the executive management committee.¹¹³ Information from the database is used to identify high-risk areas and prisons with high levels of reported incidents in order to advise the relevant managers. It is argued that this flow of information back to the implementation level places the responsibility of strategy implementation in the hands of the Area Managers and Heads of Prisons. The sub-unit has a director and three analytical and prevention staff members.

2.3.4 The Code Enforcement Unit

The CEU has two sub-units, Prosecutions and Sanctions. The Prosecutions sub-unit is responsible for initiating disciplinary investigations and prosecuting cases. The Sanction sub-unit is responsible for training chairpersons for disciplinary proceedings. The CEU has 11 funded posts of which one was vacant by end September 2011.¹¹⁴ After the DIU has completed an investigation, the file is given to the Prosecutions Unit of the CEU, which deals with disciplinary prosecutions. The CEU is also responsible for handing cases over to the police or other external agencies, which should happen as soon as there is reason to believe that a criminal case may emanate from an investigation.

2.3.5 Other units

Two other units in the department are also important to the investigation of corruption.¹¹⁵ The first is the Human Resource Department, which is responsible for doing pre-employment screening and verifying the qualifications of recruited staff. The second is the Finance Unit that is part of the Risk Management Committee, which is responsible for allocating additional

¹¹² Department of Public Service and Administration (2006), p. 16.

¹¹³ Department of Public Service and Administration (2006), p. 16.

¹¹⁴ Department of Correctional Services (2011 f).

¹¹⁵ Department of Public Service and Administration (2006), p. 18.

resources when external assistance is required, such as the SIU, forensic auditors, or expert witnesses.

2.3.6 Assessment of performance of internal capacity

In response to the widespread occurrence of corruption and maladministration, the DCS developed a number of polices and created internal structures to improve governance in the Department. Assessed against technical compliance, meaning whether particular measures are in place to prevent and address corruption, the DCS was rated very highly in a 2010 audit of minimum internal anti-corruption capacity requirements and received an overall rating of 86.3%.¹¹⁶ The rating should, however, be contextualised. The audit assessed the extent to which measures were put in place, such as mandates established, policies developed, and structures created. It did not assess their effectiveness. Moreover, some of the scores given in the audit report are perhaps indulgent of shortcomings or unsupported by other findings. For example, on the indicator “Review of internal controls” a rating of 100% is given, yet the quality of internal controls has been a long-standing issue noted by the Auditor General and raised as a matter of emphasis since 2001 (see discussion below at section 2.4.2).

Staff capacity also places further limitations on the extent to which the Department can successfully address corruption and maladministration. The DIU and CEU illustrate this well. Collectively the staff establishment of the DIU and the CEU is 29 filled posts as at September 2011, but it is doubtful if this is sufficient for a department with more than 40 000 employees and a known risk of corruption and other transgressions. Figures presented to the Portfolio Committee on Correctional Services in 2011 confirmed this, indicating that nearly half of the DIU’s cases are awaiting investigation.¹¹⁷ Of the cases already investigated, 84% were closed due to lack of evidence,¹¹⁸ the implication being that time and resources are spent on investigations but few proceed to the next step of disciplinary or criminal action. In respect of the CEU, the situation is somewhat better but a significant proportion of cases remain

¹¹⁶ Department of Public Service and Administration (2010), p. 9.

¹¹⁷ Department of Correctional Services (2011 f).

¹¹⁸ Department of Correctional Services (2011 d) *Annual trend analysis on corruption, fraud, theft and maladministration in the DCS – 1 April 2010 to 31 March 2011*, Presented to the Portfolio Committee on Correctional Services on 18 October 2011.

pending from year to year. It is evident that the current capacity of the DIU and CEU is insufficient to deal with the volume of cases.¹¹⁹

There is little doubt that the Department has made notable progress in addressing corruption and considerable momentum has been attained in this effort. This is reflected, for example, in the number of disciplinary actions taken against officials in recent years, as well as by the establishment of internal anti-corruption capacity. However, limited staff capacity in these internal units – along with limited leadership commitment to maintaining a sustained focus on eradicating corruption – may weaken the existing momentum, a prognosis reflected in the growing backlog of cases.

2.4 External agencies

There is no single anti-corruption agency in South Africa. As Van Vuuren points out, it was decided to mandate a number of agencies with the powers to address corruption – “a one-dragon-with-many-heads approach” – rather than have a single agency.¹²⁰ These agencies are categorised as follows: (1) Constitutional and oversight bodies that have a special mandate in respect of Chapter 9 of the Constitution, such as the Auditor General, Public Protector, PSC and the Independent Complaints Directorate; (2) Criminal justice agencies such as SAPS, SIU, National Prosecuting Authority, Asset Forfeiture Unit; and (3) Other stakeholders such as the Department of Public Service and Administration, National Intelligence Agency, South African Revenue Service and the cross-sectoral National Anti-Corruption Forum (NACF).¹²¹

Two of these agencies have had a more direct involvement than others in assisting the DCS to address corruption and maladministration: the SIU and the Auditor General, which are discussed below. While the Auditor General has a constitutional mandate to conduct audits, the investigations by the SIU are focused and time-limited and, in the case of the DCS, took the form of two multi-year agreements.

2.4.1 The Special Investigations Unit

¹¹⁹ Department of Correctional Services (2011 f).

¹²⁰ Van Vuuren, H. (2005) *National Integrity Systems – Transparency International Country Study Report – South Africa*, Final Draft, Transparency International, p. 71.

¹²¹ Van Vuuren, H. (2005), p.71.

The Special Investigations Unit (SIU) is the only state agency that is specifically dedicated to combating corruption.¹²² The SIU was originally created in terms of the Special Investigations Units and Tribunals Act.¹²³ Following a decision from the Constitutional Court,¹²⁴ the new SIU was established by Presidential proclamation in July 2001.¹²⁵ The SIU is an independent structure and accountable to Parliament. Investigations are conducted at the request of the President to whom investigation outcomes are reported. In short, the mandate of the SIU is to investigate fraud, corruption and maladministration, and to institute civil litigation to recover losses suffered by the state, or to prevent further losses.¹²⁶ The President may refer a matter to the SIU for investigation if it relates to serious maladministration and corruption.¹²⁷

The SIU is also mandated to take civil legal action to recover losses, cancel contracts if procedures were not followed, and stop transactions and actions that are not properly authorised. In order to expedite this process of civil litigation, the SIU litigates in a Special Tribunal that focuses only on these matters. While the emphasis falls on civil litigation, it has the powers to arrest and prosecute. In the event that criminal activity is uncovered, the SIU will hand over a court-ready docket to the National Prosecuting Authority (Directorate Special Operations). The SIU may also investigate private sector matters that may cause significant harm to public interests.

¹²² Van Vuuren, H. (2005), p. 72.

¹²³ Act 74 of 1996.

¹²⁴ The SIU was originally headed by Judge Heath until he had to resign in June 2001 after the Constitutional Court ruled that a judge could not head the SIU (*South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000).

¹²⁵ Special Investigations Unit (2005) *Annual Report 2004/5*, Pretoria: Special Investigations Unit, p. 2.

¹²⁶ Special Investigations Unit (2005), p. 2.

¹²⁷ More specifically, the president can refer the following matters:

- serious maladministration in connection with the affairs of any state institution;
- improper or unlawful conduct by employees of any state institution;
- unlawful appropriation or expenditure of public money or property;
- any unlawful, irregular or unapproved acquisitive act, transaction, measure or practice that has a bearing on state property;
- intentional or negligent loss of public money or damage to public property;
- corruption in connection with the affairs of any state institution;
- unlawful or improper conduct by any person who has caused or may cause serious harm to the interest of the public or any category thereof. (Special Investigations Unit (2005), p. 2.)

Following the findings of widespread corruption in the DCS by the Jali Commission, the Department approached the SIU for assistance and a three-year agreement was signed in October 2004.¹²⁸ Since then, the scope of investigations into the DCS has been broadened and formed the basis for a productive partnership between the DCS and the SIU.¹²⁹ After an initial agreement that the project would last for three years, the SIU agreed to extend it beyond 2006 and the agreement came to an end in 2009. Despite being urged by Parliament's Standing Committee on Public Accounts (SCOPA) to renew the agreement, this was not done.¹³⁰ The scope of investigations under the first agreement focused primarily on medical aid fraud and corruption at prisons. Under the second agreement the focus was on procurement, asset management at prison farms and pharmacies. The scope of the second agreement was expanded to investigate high-value contracts and was referred to the SIU by the Auditor General and the PSC (see section 4.2). Increasingly, the SIU's focus of investigations targeted procurement in the DCS and significant advances were made to identify corrupt contracts as well as improve the procurement system and practices.¹³¹

An important shift in the nature of the engagement with DCS was that while the focus during the first agreement was primarily on criminal investigations, under the second agreement more emphasis was placed on identifying and addressing systemic and institutional weaknesses. Over time the SIU developed the capacity and experience to provide a broad range of forensic services, and it relied on this to assist the DCS not only to investigate

¹²⁸ Briefing by Special Investigations Unit to the Portfolio Committee on Correctional Services. PMG report on the meeting of the Portfolio Committee on Correctional Services of 20 May 2008, <http://www.pmg.org.za/report/20080520-briefing-special-investigations-unit-investigation-department> Accessed 24 November 2011.

¹²⁹ Briefing by Special Investigations Unit to the Portfolio Committee on Correctional Services. PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 24 November 2011.

¹³⁰ PMG report on the meeting of the Standing Committee on Public Accounts (SCOPA) of 30 January 2010, <http://www.pmg.org.za/report/20100128-department-correctional-services-and-special-investigating-unit-annua> Accessed 7 December 2011.

¹³¹ Special Investigations Unit (2009) *Annual Report 2008/9*, Pretoria: Special Investigations Unit, p. 26.

crimes but fix systemic weaknesses and develop capacity within the DCS.¹³² The SIU also assisted with setting up the DIU through the transference of skills and capacity.¹³³

There is no doubt that the DCS and SIU co-operation has been very productive and resulted in enormous savings.¹³⁴ The systematic and focused approach followed in respect of grand corruption cases ensured that results were of a concomitant magnitude in respect of the monetary value of recoveries and future savings. Despite the investigations being wide-ranging and intensive, a characteristic reflected in the number of prisoners and staff members interviewed and the number of complaints followed up,¹³⁵ the number of criminal convictions has been comparatively low. Of 157 criminal referrals between 2002 and 2005, there have been only five convictions, with 96 investigations still pending in 2006 and another 19 cases on trial.¹³⁶

The SIU has been instrumental in uncovering fraud and corruption in the DCS as well as in addressing systemic weaknesses and thus preventing fraud, corruption and maladministration. In 2002, the circumstances at the time necessitated that an independent body with highly skilled and dedicated staff undertake the investigations. It was evident then that neither the Department's own investigative unit nor that of the SAPS would be able to investigate properly the allegations emanating from the Jali Commission's investigations. The successive

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¹³² Briefing by Special Investigations Unit to the Portfolio Committee on Correctional Services. PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 24 November 2011.

¹³³ Special Investigations Unit (2007) *Annual Report 2006/7*, Pretoria: Special Investigations Unit, p. 24.

¹³⁴ According to the Special Investigations Unit, the investigation into medical aid fraud alone yielded the recovery of R22 million (US\$ 3.2 million) and savings amounting to R3.4 billion (US\$ 500 million) (Briefing by Special Investigations Unit to the Portfolio Committee on Correctional Services, PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 24 November 2011).

¹³⁵ The 2004/5 Annual Report of the Special Investigations Unit (p. 8) reflects that 161 prisons were visited, 103 496 prisoners interviewed, 16 927 DCS staff members interviewed, 8 091 complaints followed up, 244 cases referred for criminal prosecution and 398 disciplinary actions against officials instituted.

¹³⁶ Special Investigations Unit, Fact sheet on the National Investigation into corruption, fraud and maladministration at various Correctional Centres, p. 10.

agreements between the SIU and DCS did much to regain control over a department where corruption had become endemic and widespread.

2.4.2 The Auditor General

The Auditor General of South Africa (the Auditor General) is a Chapter 9 institution established in terms of s 181 of the Constitution with its functions set out in s 188. The Auditor General must audit and report to the National Assembly on the accounts, financial statements and financial management of all national and provincial state departments and administrations; all municipalities, and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor General. The Auditor General performs a number of different audits and supporting activities in respect of its mandate, including regularity auditing, performance auditing, computer auditing, environmental auditing and forensic auditing.¹³⁷

The Auditor General reports annually on the DCS in respect of the annual auditing process and comments on the budget vote. In addition to these functions, the Auditor General has prepared a number of focused reports on the DCS relating to a performance audit (1998),¹³⁸ alleged irregularities among senior officials (1999),¹³⁹ progress in implementing the White Commission recommendations (1999),¹⁴⁰ and the use of sick-leave benefits (2003).¹⁴¹ The three reports produced before 2000 were part of the motivation for the management audit

¹³⁷ Van Vuuren, H. (2005), p. 45.

¹³⁸ RP 181/1998.

¹³⁹ RP 123/1999.

¹⁴⁰ The White Commission (formerly the Browde Commission) was established to review complaints submitted to it by any interested party regarding, amongst others, irregularities in respect of promotions in the public service which occurred between 27 April 1993 and 30 September 1994. In the case of DCS 1651 such cases in the former Transkei were uncovered by the White Commission (Auditor General (1999) *Overview of the status of the implementation of the findings of the Judge White Commission (formerly Browde Commission), and the resultant recoveries as at 30 June 1999*, Pretoria: Auditor General, RP 173/1999).

¹⁴¹ Auditor General (2005) *Report of the Auditor General on a performance audit of the management of sick leave benefits at certain national and provincial departments*, [http://www.agsa.co.za/Reports/Our%20Reports/AG%20reports-National/Specialised%20audits/Performance/2005/Performance%20audit%20on%20management%20of%20sick%20leave%20benefits%20at%20certain%20national%20and%20provincial%20departments%20\(2005\).pdf](http://www.agsa.co.za/Reports/Our%20Reports/AG%20reports-National/Specialised%20audits/Performance/2005/Performance%20audit%20on%20management%20of%20sick%20leave%20benefits%20at%20certain%20national%20and%20provincial%20departments%20(2005).pdf).

Accessed 24 November 2011.

ordered by the Minister of Public Service and Administration in 1999 and presented to Parliament in 2000.

Over the years, the Auditor General has expressed concern about the Department's financial management and accounting, and has given the Department qualified audit reports since 2000/1.¹⁴² While this does not allege or imply corruption or any illegal activity, it creates risk areas that need to be managed more effectively.

The reasons for the qualified audits since 2000/1 are summarised and set out in Table 1 below. While the majority of issues raised by the Auditor General as reasons for qualification remained as such for a period of one to three years and were subsequently resolved, concerns regarding the medical aid scheme and asset management have been reasons for qualified audits for five and six years respectively. The medical aid scheme problems were finally resolved in 2006/7, but asset management was by 2011 still a concern to the Auditor General and resulted in the tenth consecutive qualified audit. While still a qualified audit result, the number of qualifications has been reduced significantly, especially since 2006/7, and by 2011 there remained only one issue to be addressed, namely asset management.

Table 1

Reason for qualification	Description	UNIVERSITY of the WESTERN CAPE									
		2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11
Medical services (Medcor)	On-going forensic investigation										
	Internal control systems										
	Non-compliance with Medical Aid Scheme Act										
	Payments made on face value										
Paymaster General Reconciliation	Lacking supporting documentation										
Receivables	Staff debt										
	Inter-departmental debt										
APOPS (Asset Procurement and Operating Partnerships System)	Financial lease versus operational lease										

¹⁴² See relevant Department of Correctional Services Annual Reports containing the audit reports of the Auditor General.

Reason for qualification	Description	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11
		Asset management	3 computer programmes used for asset register and management								
	Capital assets										
	Buildings and other fixed structures										
	Intangible assets - no asset register										
	Movable tangible minor assets										
Housing loan guarantees	Lack of internal controls & verification of information										
Accruals											

The Auditor General also raises matters of emphasis that may or may not affect the financial statements. Matters not affecting the financial statements deal by and large with systemic issues, such as the quality of internal controls, an issue emphasised by the Auditor General since 2001 in successive reports. Despite these concerns, the overall impression gained is that the quantum of matters of emphasis raised by the Auditor General has been declining. However, significant concerns remain, especially in relation to internal controls, performance management and the quality of reporting on programme performance.¹⁴³ With reference to performance indicators in three of the seven DCS programmes,¹⁴⁴ the Auditor General noted in 2011 that there were problems with the clarity and specificity of the indicators, the measurability of the indicators, and fact that the targets were not time-bound.¹⁴⁵

While the DCS has shown notable progress in improving financial management and accounting, as reflected in the number of qualifications and their scope, non-financial issues relating to performance monitoring and reporting on performance remain problems. The quality of reporting, as reflected in the Annual Report, was already noted as a problem in the

¹⁴³ *Report of the Auditor General to Parliament on vote 20: Department of Correctional Services*, In Department of Correctional Services (2011 a), p. 126.

¹⁴⁴ The three programmes were Corrections, Security and Social Integration.

¹⁴⁵ *Report of the Auditor General to Parliament on vote 20: Department of Correctional Services*, In Department of Correctional Services (2011 a), p. 126.

2009/10 financial year by the Auditor General¹⁴⁶ and non-governmental organisations commenting on the annual report of that year.¹⁴⁷

A closer reading of the 2009/10 DCS Annual Report gives reason for concern as it is reported in a number of instances that the responsible official did not submit the required information.¹⁴⁸ In one instance the required information related to performance monitoring, and the Annual Report notes that “reporting on quarterly performance information [is] poor due to non-submission of reports against performance indicators”.¹⁴⁹ Two important conclusions can be drawn from this: first, officials lower down the hierarchy can apparently ignore instructions from the Head Office to submit required information, and second, the quality and integrity of the information on performance in the Annual Report must be treated with caution. The quality of internal performance reporting and thus accountability is also noted in the Auditor General’s report: “The quarterly reports of the department did not track progress against targets as per the approved strategic annual performance plan and therefore did not facilitate effective performance monitoring and evaluation, as required by Treasury Regulation 5.3.1.”¹⁵⁰ The Auditor General is even more specific, noting that the Department does not have “effective, efficient and transparent system and internal controls regarding performance management, which describe and represent how the institution’s processes of performance planning, monitoring, measurement, review and reporting will be conducted, organised and managed, as required in terms of section 38(1) (a) (i) and (b) of the PFMA” (Public Finance Management Act).¹⁵¹ However, the Annual Report notes that the Performance and Development Management system is aligned to the Occupation Specific Dispensation (OSD)¹⁵² and that Performance Agreements are aligned with the Strategic

¹⁴⁶ *Report of the Auditor General to Parliament on vote 20: Department of Correctional Services*, In Department of Correctional Services (2010 a), p. 132.

¹⁴⁷ Muntingh, L. (2010 b) *Submission by the Civil Society Prison Reform Initiative on the Department of Correctional Services Annual Report 2009/10*, Bellville: Community Law Centre.

¹⁴⁸ Department of Correctional Services (2010 a), pp. 61 (A.4.5), 66 (B.1.3), 72 (C.1.1), 73 (C.1.9),

¹⁴⁹ Department of Correctional Services (2010 a), p. 61 (A.4.5).

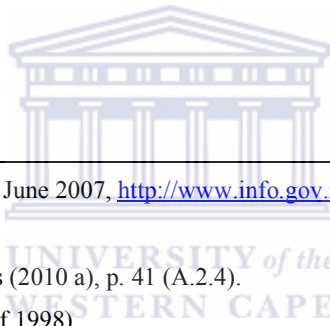
¹⁵⁰ Department of Correctional Services (2010 a), p. 132.

¹⁵¹ Department of Correctional Services (2010 a) Auditor General Report pp. 131-132.

¹⁵² The Occupation Specific Dispensation (OSD) refers to revised salary structures that are unique to each identified occupation in the public service. These unique salary structures will: be centrally determined through grading structures and broad job profiles; develop career pathing opportunities for public servants based on competencies, experience and performance; provide for pay progression within the salary level; and consolidate certain benefits and allowances into the salaries of employees (Press release by the Issued by the Department of

Plan.¹⁵³ This appears to be a clear contradiction of the Auditor General's analysis of the situation. The implications of the Auditor General's statements are significant because in the final analysis the Department has to account for the use of public funds. Moreover, it has to account that it has used these funds in an appropriate manner on agreed upon results that will contribute to the overall objectives of the prison system as described in the Correctional Services Act.¹⁵⁴

Staff capacity in Department's financial management unit has been a long-standing problem and accordingly noted so by the Auditor General and SCOPA.¹⁵⁵ Not only has the financial management unit been understaffed but there has been an unhealthy turn-over of Chief Financial Officers, resulting in the position remaining vacant for long periods.¹⁵⁶ In one instance it was filled by an unqualified internal appointment¹⁵⁷ who was later implicated in corruption.¹⁵⁸



Public Services and Administration, 12 June 2007, <http://www.info.gov.za/speeches/2007/07061811451001.htm> Accessed 24 November 2011.)

¹⁵³ Department of Correctional Services (2010 a), p. 41 (A.2.4).

¹⁵⁴ s 2 Correctional Services Act (111 of 1998).

¹⁵⁵ *Report of the Auditor General to Parliament on vote 21: Department of Correctional Services*. In Department of Correctional Services (2005), p. 83. *Report of the Auditor General to Parliament on vote 20: Department of Correctional Services*. In Department of Correctional Services (2006 a), p. 63. *Report of the Auditor General to Parliament on vote 20: Department of Correctional Services*. In Department of Correctional Services (2011 a), p. 128. PMG report on the meeting of the Standing Committee on Public Accounts (SCOPA) of 7 November 2007, <http://www.pmg.org.za/minutes/20071106-department-correctional-services-national-agricultural-marketing-council-sa-wine-in> Accessed 7 December 2011.

¹⁵⁶ PMG report on the meeting of the Standing Committee on Public Accounts (SCOPA) of 30 January 2010, <http://www.pmg.org.za/report/20100128-department-correctional-services-and-special-investigating-unit-annua> Accessed 7 December 2011. PMG report on the meeting of the Standing Committee on Public Accounts (SCOPA) of 19 November 2008, <http://www.pmg.org.za/report/20081119-department-correctional-services-national-prosecuting-authority-20070> Accessed 7 December 2011.

¹⁵⁷ PMG report on the meeting of the Standing Committee on Public Accounts of 10 November 2004, <http://www.pmg.org.za/minutes/20041109-department-correctional-services-hearing> Accessed 18 December 2011.

¹⁵⁸ Basson, A. (2011) Prisons graft – here's the proof, Minister. In Harber, A. and Renn, M. (eds) *Troublemakers: The Best of South Africa's Investigative Journalism*, Johannesburg: Jacana Media, p. 182.

2.4.3 The Judicial Inspectorate for Correctional Services and corruption

The mandate and structure of the Office of the Inspecting Judge and Judicial Inspectorate was briefly described in Chapter 2 (section 3.7.2). It was noted that the Inspecting Judge, who heads the Judicial Inspectorate, inspects or arranges for the inspection of prisons in order to report on the treatment of prisoners, on conditions of detention and any corrupt or dishonest practices.¹⁵⁹ The mandate to investigate and report on corrupt and dishonest practices was originally also part of the Judicial Inspectorate's mandate but was removed when the Correctional Services Act was amended in 2001.¹⁶⁰ The result is a strange one where the Inspecting Judge can report on corrupt and dishonest practices, but the Judicial Inspectorate is not mandated to investigate it. Moreover, for the purposes of conducting an investigation the Inspecting Judge may also make any enquiry and hold hearings, the latter of which is regulated by the Commission Act (8 of 1947).¹⁶¹ The removal of corrupt and dishonest practices from the Judicial Inspectorate's mandate was at the request of the Judicial Inspectorate in 2000.¹⁶²

Where others saw a synergy created by investigating both corruption and the treatment of prisoners,¹⁶³ the Inspectorate saw a clear line of division between corruption and the treatment of prisoners, opining that each should be dealt with by different institutions. It argued that corruption calls for "a criminal investigation whilst the latter is concerned with the humane treatment of prisoners and ensuring their human dignity".¹⁶⁴ The reasoning is blatantly flawed as the link between corruption (i.e. governance) and the treatment of prisoners (i.e. human rights) has been well demonstrated, for example, by the Jali Commission, and confirmed by the Human Rights Council (see Chapter 3 section 2.2.2). The Inspectorate motivated further that its Independent Visitors and Inspectors were reliant on the "good relationship that exists between the officials on the one hand, and our inspectors and visitors on the other hand".¹⁶⁵ If the Inspectorate were to investigate corruption and dishonest

¹⁵⁹ S 90(1) of the Correctional Services Act (111 of 1998).

¹⁶⁰ Section 31 of Act 32 of 2001 amended section 85 (2) of the Correctional Services Act.

¹⁶¹ s 90(5-6) Act 111 of 1998.

¹⁶² Office of the Inspecting Judge (2001) *Annual Report of the Judicial Inspectorate for Prisons 2000*, Cape Town, pp. 18-19.

¹⁶³ Testimony of Prof Dirk Van Zyl Smit before the Jali Commission, Jali Commission, p. 568.

¹⁶⁴ Office of the Inspecting Judge (2001), p. 18.

¹⁶⁵ Office of the Inspecting Judge (2001), p. 18.

practices, the argument went, it would create suspicion and thus jeopardise the “good relationship”. Moreover, the Inspectorate argued that the DCS had an Anti-Corruption Unit in place and if necessary, allegations of corruption would be reported to it or to the police. As an afterthought the Inspectorate added, “It would appear that the presence of Independent Prison Visitors has an inhibiting effect on corruption and dishonesty.”¹⁶⁶ No evidence to substantiate the claim was presented. However, the Director of the Office of the Inspecting Judge testified before the Jali Commission that the change in mandate was also motivated by a fear for the safety of the Independent Prison Visitors if they were to report on and investigate corruption.¹⁶⁷ Again no evidence was submitted to substantiate this fear.

The Jali Commission was critical of the Judicial Inspectorate’s actions, observing that it was “more concerned about the safety of its staff than about its mandate”¹⁶⁸ and that “since it opened, the Office of the Inspecting Judge has never investigated corruption. Instead of pursuing its mandate to investigate corruption as required in the Act, it sought instead to amend the Act.”¹⁶⁹ When testifying before the Jali Commission in November 2002, less than a year after the amendment came into force,¹⁷⁰ the Director of the Office of the Inspecting Judge conceded that the distinction between corruption and the treatment of prisoners, as made in the Judicial Inspectorate’s 2000 Annual Report, may in some instances be non-existent or, if it is there, imprecise.¹⁷¹

It should be borne in mind that at the time when the Judicial Inspectorate requested the change in mandate (2000), the Jali Commission had not yet been established and neither had the SIU started its investigations. There was indeed no external institution investigating corruption in the DCS, and the Department’s own Anti-Corruption Unit had been reduced to five investigators.¹⁷² Yet it was well known that corruption was rife, given that in April 2000 the Director General of the PSC declared to Parliament that the state had lost control of the

¹⁶⁶ Office of the Inspecting Judge (2001), p. 19.

¹⁶⁷ Jali Commission, p. 571.

¹⁶⁸ Jali Commission, p. 571.

¹⁶⁹ Jali Commission, p. 575.

¹⁷⁰ Act 32 of 2001 came into force on 14 December 2001.

¹⁷¹ Jali Commission, p. 575.

¹⁷² PMG report of the meeting of the Portfolio Committee on Correctional Services of 3 October 2000, <http://www.pmg.org.za/report/20001003-overcrowding-prisons-release-prisoners-escapes-anti-corruption>

Accessed 13 November 2011.

DCS.¹⁷³ Parliament was thus well aware of the situation pertaining to corruption and maladministration, but acceded to the Judicial Inspectorate's request and passed the amendment that saw corruption removed from the Judicial Inspectorate's mandate.

The Inspectorate's desire to be relieved of the mandate to investigate corruption had no basis in fact or logic; instead that basis was strategic, and even possibly political. The Inspectorate adopted a very narrow interpretation of its mandate, namely to monitor the treatment of prisoners. In its analysis of the prison system and the root causes of the problems there, it did not identify poor departmental governance or poor staff performance – or, indeed, anything else that the DCS happened to be doing or not doing – as the source of these difficulties. It identified rather the less politically sensitive issue of prison overcrowding.¹⁷⁴ By focusing on overcrowding, attention was diverted from the failings of the Department and this suited the Department well. The DCS was keen to be regarded as a victim of overcrowding while in fact it was crowded by virtue of its own misdeeds, in the form of corruption, maladministration and poor management. Moreover, the DCS had limited control over the size of the prison population, and to address prison overcrowding the Judicial Inspectorate had to focus on systemic problems in the criminal justice system, particularly at the level of the courts.

While the drafters of the Correctional Services Act saw a clear link between governance and human rights, the Inspectorate forced a distinction to avoid a confrontational relationship with the DCS. The Jali Commission did not have much hope for the Inspectorate and concluded that it had been rendered ineffective and appeared to be reluctant to investigate corruption.¹⁷⁵ The Commission made a number of recommendations, focusing on amendments to the Correctional Services Act to strengthen its independence and grant it more powers, but still believed that this was not sufficient.¹⁷⁶ It consequently recommended the creation of another national agency which it called the Prison Ombudsman with powers

¹⁷³ 'Staat het alle beheer oor DKD verloor, sê DG'. *Die Burger*, 15 April 2000. [State lost all control over DCS says DG - Own translation.]

¹⁷⁴ In his opening paragraph to the 2000 Annual Report, Judge Fagan states: 'In executing its statutory mandate of monitoring the conditions in which prisoners are held, this office found that prisoners in certain prisons were being kept under the most awful conditions. The cause was overcrowding.' (Office of the Inspecting Judge (2000) *Annual Report of the Judicial Inspectorate for Correctional Services*, Cape Town: Office of the Inspecting Judge, p. 3.)

¹⁷⁵ Jali Commission, p. 589.

¹⁷⁶ Jali Commission, pp. 590-593.

similar to that of the Independent Complaints Directorate (ICD)¹⁷⁷ to investigate corruption, maladministration and dishonest practices.¹⁷⁸ The Jali Commission favoured the mandate and powers of the ICD and did not assess its efficiency and effectiveness, despite it being well known that there is room for substantial improvement.

Ultimately, few of the Jali Commission's recommendations in respect of the Judicial Inspectorate would be implemented, and the proposals for the establishment of a Prison Ombudsman were rejected by the DCS, as reported in 2011 to Parliament. The DCS explained that the Department concluded memoranda of understanding with SAPS, the SIU and the National Prosecuting Authority's Directorate: Special Operations (or Scorpions as they were known) to secure their intervention in dealing with complicated corruption cases that cannot be dealt with by the DIU;¹⁷⁹ furthermore, it said, these agencies were more than competent to investigate corruption.

The Department's explanation presented in 2011 was not entirely truthful. First, the agreement with the SIU had come to an end in 2009 and had not been renewed, even though SCOPA recommended the extension of the agreement.¹⁸⁰ Second, the quality of

¹⁷⁷ The Independent Complaints Directorate (ICD) is a government department, established in 1997, to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service (MPS). It received its mandate from the Section 53(2) of the South African Police Act (Act 68 of 1995). It operates independently from the SAPS in the effective and efficient investigation of alleged misconduct and criminality by SAPS members. The ICD investigates the following:

- deaths of persons in police custody or as a result of police action (such as shooting, assault).
- the involvement of SAPS members in criminal activities such as assault, theft, corruption, robbery, rape and any other criminal offences.
- police conduct or behaviour which is prohibited in terms of the SAPS Standing Orders or Police Regulations, such as neglect of duties or failure to comply with the police Code of Conduct.
- dissatisfaction/ complaints about poor service given by the police
- failure to assist or protect victims of domestic violence as required by the Domestic Violence Act
- misconduct or offences committed by members of the Municipal Police Services (MPS). (ICD Website <http://www.icd.gov.za/about%20us/legislation.asp> Accessed 7 December 2011)

¹⁷⁸ Jali Commission, p. 614.

¹⁷⁹ Department of Correctional Services (2011 e), p. 59.

¹⁸⁰ PMG report on the meeting of the Standing Committee on Public Accounts of 28 January 2010, <http://www.pmg.org.za/report/20100128-department-correctional-services-and-special-investigating-unit-annua> Accessed 9 January 2011.

investigations conducted by SAPS is generally poor if the investigation of prisoner deaths serves as a gauge of this ability.¹⁸¹ SAPS had also not developed any proven experience in investigating prison corruption or forensically complex cases and would probably suffer from its own legitimacy problems in the eyes of the prison population. Third, the Directorate: Special Operations had been dissolved by January 2009 and absorbed into the SAPS Directorate for Priority Crime Investigation (DPCI).¹⁸² More than two years after the dissolution of the Directorate: Special Operations, the DCS informed Parliament that there was a memorandum of understanding in place with the Directorate: Special Operations to deal with the investigation of corruption. Moreover, the two pieces of legislation that enabled the dissolution of the Directorate: Special Operations and the creation of the DPCI¹⁸³ do not make any provision for the continuity or transfer of memoranda of understanding. Fourth, even if it is assumed that the DPCI could be called upon to investigate prison corruption, it is unlikely that it will investigate the cases that directly affect prisoners' treatment, such as having to pay bribes for basic amenities. The mandate of the DPCI is to prevent, combat and investigate national priority offences and any other offence or category of offences referred to it by the National Commissioner of Police.¹⁸⁴ Consequently, the focus is on serious organised crime, corruption and commercial crime.

The Jali Commission's recommendation to create a structure similar to that of the ICD was aimed in particular at filling the gap created by the Judicial Inspectorate declining to investigate corruption cases reported by prisoners and the high-level, but time-limited, investigations being undertaken by the SIU. The Prison Ombudsman would have filled that gap by forging the link between governance and human rights.

2.5 Summary of issues

¹⁸¹ For example, the 2009/10 Annual Report of the Judicial Inspectorate notes a number of prisoner deaths that were investigated by SAPS. Not one of these has resulted in criminal prosecutions at the time.

¹⁸² The NPA Amendment Act (Act 56 of 2008) and the SAPS Amendment Act (Act 57 of 2008) provided for the dissolution of the DSO. The DSO and SAPS Organised Crime Unit became a single agency known as the Directorate: Priority Crime Investigation (DPCI), within the SAPS. (National Prosecuting Authority of South Africa, SA Government Information, <http://www.info.gov.za/aboutgovt/justice/npa.htm> Accessed 25 November 2011).

¹⁸³ NPA Amendment Act (Act 56 of 2008) and the SAPS Amendment Act (Act 57 of 2008).

¹⁸⁴ s 2(a) SAPS Amendment Act (Act 57 of 2008).

In respect of the DCS anti-corruption strategy, questions remain about its clarity of focus and the extent to which it finds a suitable balance between the four pillars of an effective anti-corruption strategy. It is particularly in respect of prevention that there may be shortcomings. The focus continues to stay on law enforcement.

The relationship between employer and employees in the Department saw significant and substantial changes for the better. However, the SDE has the potential to derail much of what has been achieved to date if it is not resolved with urgency. It was poorly planned and executed. What appears to be the favoured solution (the employment of as many as 12 000 additional DCS officials) will not sit well with Parliament and may in fact not be affordable. But even if this is pursued it would not guarantee a resolution of the problematic shift system.

The more effective enforcement of the disciplinary code can be ascribed to the increase in internal capacity. This saw a remarkable increase in the volume of disciplinary actions initiated against DCS officials, but the still-limited capacity and growing backlog of cases may undermine what has been one of the Department's more notable achievements after 2004.

The SIU and Auditor General made significant contributions to improving governance, financial management and addressing corruption. The Auditor General's relentless raising of matters of emphasis and qualified audits placed the Department under increasing pressure to rectify problems, so much so that an unqualified audit in the near future has become a real possibility. Despite these generally positive developments, though, the prison system remains without an independent oversight and investigative institution that would, as part of its mandate, investigate the nexus between corruption and human rights. This remains a challenge to prison reform of critical importance.

3. A new strategic framework and the budget

The requirements for effective interventions with offenders aimed at rehabilitation were set out in Chapter 2 (section 3.2.6). The 2004 White Paper defined offender rehabilitation as the core business of the Department but, as it will be argued here, there is little to indicate that this new vision is supported by the evidence on effective interventions. A further problem that has emerged is the difficulties the Department has experienced in aligning the budget to the 2004 White Paper. Assessed against an objective set of criteria (presented in Chapter 2

section 2.4), it is argued in this section that there are material shortcomings in the 2004 White Paper and that the realities of the South African prison system demanded a reform agenda to be both more modest and more closely aligned to Constitutional prescripts and the requirements of the Correctional Services Act.

3.1 The 2004 White Paper

The 2004 White Paper was, similar to the 1994 White Paper, rushed through Parliament with limited opportunity for civil society organisations to provide input.¹⁸⁵ When the Portfolio Committee on Correctional Services was initially briefed by the DCS on the Green Paper in November 2003, it was informed that Cabinet had already approved it, despite the Department not having consulted with external stakeholders and especially Parliament.¹⁸⁶ The Committee regarded this as a procedural irregularity but did not pursue it any further. In early February 2004 the Portfolio Committee held public hearings on the Draft White Paper and 13 submissions were made by civil society organisations.¹⁸⁷ The submissions had little if any impact on the draft White Paper, and the version tabled in Parliament became, with a few minor editorial changes, the final version. The public hearings in February 2004 were nothing

¹⁸⁵ It appears that on 19 December 2003 the Green Paper on Corrections in South Africa was announced in the *Mail and Guardian* but copies were not made available. Electronic copies became available and were circulated on 13 January 2004. Public hearings on what had become the draft White Paper were held by the Portfolio Committee on Correctional Services on 3 February 2004 (PMG report on the meeting of the Portfolio Committee on Correctional Services of 3 February 2004, <http://www.pmg.org.za/minutes/20040202-draft-white-paper-corrections-south-africa-hearings> Accessed 4 January 2012).

¹⁸⁶ PMG report on the meeting of the Portfolio Committee on Correctional Services of 25 November 2003, <http://www.pmg.org.za/minutes/20031124-white-and-green-paper-process-briefing-minister> Accessed 4 January 2012.

¹⁸⁷ PMG report on the meeting of the Portfolio Committee on Correctional Services of 3 February 2004, <http://www.pmg.org.za/minutes/20040202-draft-white-paper-corrections-south-africa-hearings> Accessed 4 January 2012. PMG report on the meeting of the Portfolio Committee on Correctional Services of 4 February 2004, <http://www.pmg.org.za/minutes/20040203-draft-white-paper-corrections-south-africa-hearings> Accessed 4 January 2012.

more than window-dressing and the 2004 White Paper was formally launched on 30 March 2004 at a conference hosted by the Department.¹⁸⁸

3.1.1 Is the White Paper good policy?

Notwithstanding the problems with the consultative process, the 2004 White Paper is the official policy framework of the Department and thus represents an important achievement in the Department's efforts to create a new strategic vision to guide reform. From a governance perspective it represents a milestone. The White Paper is candid about the problems faced by the Department, internal and external, and also provides a useful historical overview of the Department. As such it is an attempt to build consensus about the prison system, its history and its challenges. However, given the prevailing realities of the South African prison system, it needs to be asked if the 2004 White Paper created an appropriate and attainable vision for the prison system, namely the rehabilitation of offenders.¹⁸⁹ It is in answering this question that the White Paper exhibits a number of more substantive problems. Even though the White Paper sets a 20-year time-frame for implementation, it is extremely optimistic and in many ways looks like a wish list.

The White Paper deals with a wide range of issues, but it is only nearly halfway through that it starts describing the “nuts and bolts” of the envisaged prison system.¹⁹⁰ Chapter 4 articulates the objectives of the prison system as being:

- implementation of sentences of the courts;
- breaking the cycle of crime;
- security risk management;
- providing an environment for controlled and phased rehabilitation interventions;
- providing guidance and support to probationers and parolees within the community;
- provision of corrective and development measures to the offender;
- reconciliation of the offender with the community;
- enhancement of the productive capacity of offenders;

¹⁸⁸ Address by the Minister of Correctional Services, Mr. B.M.N Balfour, MP, at the Policy and Research Conference held on 30 - 31 March 2004, Krugersdorp.

¹⁸⁹ Department of Correctional Services (2004 b) *White Paper on Corrections in South Africa*, Pretoria: Department of Correctional Services, para 2.9.7.

¹⁹⁰ Chapter 9 The needs-based intervention plan.

- promotion of healthy family relations; and,
- assertion of discipline within the correctional environment.

The ten objectives are significantly more detailed and more onerous than the three objectives of the correctional system described in the Correctional Services Act.¹⁹¹ The White Paper is also replete with descriptions stating that rehabilitation is the core business of the Department, for example:

The responsibility of the Department of Correctional Services is first and foremost to correct offending behaviour, in a secure, safe and humane environment, in order to facilitate the achievement of rehabilitation and avoidance of recidivism.¹⁹²

The high, if not unrealistic, ambitions of the White Paper were quickly recognised by external stakeholders when the draft was considered by the Portfolio Committee on Correctional Services in 2004.¹⁹³

Central to achieving rehabilitation is the development of a “needs-based intervention plan”¹⁹⁴ for each offender. The needs-based intervention plan should cover the following areas:

- needs in terms of correcting offending behaviour (Corrections plan);
- security needs taking into account the human rights of the individual (Security plan);
- needs in terms of the physical and emotional well-being of the offender (Care plan);
- education and training needs (Development plan);

¹⁹¹ Section 2 Correctional Services Act (111 of 1998): ‘The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by: (a) enforcing sentences of the courts in the manner prescribed by this Act; (b) detaining all prisoners in safe custody whilst ensuring their human dignity; and (c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections.’

¹⁹² Para 4.1.2.

¹⁹³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 3 February 2004, <http://www.pmg.org.za/minutes/20040202-draft-white-paper-corrections-south-africa-hearings> Accessed 8 November 2010. See, for example, the submissions by the Centre for Conflict Resolution and the Civil Society Prison Reform Initiative.

¹⁹⁴ It is called a ‘sentence plan’ in an earlier version of the White Paper and also identified as such in the Correctional Services Act 111 of 1998 s 38.

- needs in terms of allocated physical accommodation (Facilities plan); and,
- needs in terms of the support required for the successful social reintegration of the offender (After-Care plan).¹⁹⁵

It should be noted that the White Paper does not make any distinction between different categories of sentenced offenders, while the Correctional Services Act requires that only sentenced offenders serving sentences of longer than 24 months have a sentence plan.¹⁹⁶ Although those serving sentences of less than 24 months constitute less than 11% of the daily average, they constitute nearly 60% of released sentenced offenders and are thus excluded from the benefit of a sentence plan and the services to which it may give rise.¹⁹⁷ The implication is that nearly two-thirds of the Department's out-put (i.e. released sentenced prisoners) are excluded from the rehabilitation objective.

3.1.2 The nine principles of good policy-making

In Chapter 2 (section 2.4) reference was made to the nine features of modern policy-making, as defined and developed by the UK government. These are used below to assess the quality of the 2004 White Paper as central policy framework for the DCS.¹⁹⁸

Forward-looking: The policy-making process results in clearly defined outcomes that the policy is designed to achieve and takes a long-term view (five years), based on statistical trends and informed predictions of social, political, economic and cultural trends and the possible effect and impact of the policy. The following are examples: a statement of intended outcomes is prepared at an early stage; contingency or scenario planning is used; account is taken of government's long-term strategy; and use is made of forecasting research.

While the White Paper identifies the ten objectives of the correctional system (see section 3.1.1 above), these cannot be regarded as clear outcomes.¹⁹⁹ Some are broad statements of

¹⁹⁵ Para 9.7.2.

¹⁹⁶ Section 38(1)(A) Correctional Services Act. Prior to the 2008 amendment of the Act, the limit was 12 months.

¹⁹⁷ Statistics supplied by the Judicial Inspectorate for Correctional Services.

¹⁹⁸ Bullock, H., Mountford, J. and Stanley, R (2001) *Better Policy-Making*, London: Centre for Management and Policy Studies, p.14.

intent (e.g. breaking the cycle of crime), some are definitional descriptions without articulating an outcome (e.g. Security risk management),²⁰⁰ and others approach clarity but fall short (e.g. providing an environment for controlled and phased rehabilitation interventions).²⁰¹

Section 7.3 of the White Paper superficially reflects on changes in the offender population, indicating that certain categories (e.g. life imprisonment and children) are rapidly increasing. Apart from this brief mention, there is little reliance on any forecasting research in the White Paper. The White Paper also did not use any scenario planning. For example, while offenders sentenced to life imprisonment have continued to increase, the number of children in prison has dropped dramatically and by February 2011 there were 846 children in custody, compared to the more than 4 000 in 2002/3.²⁰² Moreover, the decline in the number of children in prison was already well under way by the time the White Paper was adopted in 2004. More importantly perhaps, the White Paper's assertions about changes in the offender population are not critically assessed in terms of their potential impact on the objectives of the prison system.

While good practice, as described by Bullock, Mountford and Stanley, considers a long-term view as a period of five years into the future, the White Paper sets itself a 20-year time-frame. With such a long time-frame it is difficult, if not impossible, to articulate clear and firm outcomes, and the real risk is the creation of a wish list instead of a policy document. Over a 20-year period senior leadership will change several times, institutional memory will be lost and the environment can change fundamentally. Indeed, the past 17 years attest to the fluidity of the context in which the prison system functions as well as the volatility of its own inner workings.

¹⁹⁹ In Chapter 4 these are referred to as 'objectives' but in the executive summary as 'strategies'.

²⁰⁰ Para 4.4.3: Security risk management: The correctional system is tasked to provide appropriate measures to ensure that the public is protected from offenders. While this forms part of the rationale of the particular sentence handed down in court, the Department must balance this responsibility with the need to provide circumstances appropriate to rehabilitation. Security risk management and needs-based correction inform incarceration classifications and the community correctional supervision classifications of the offenders.

²⁰¹ Para 4.4.4 Providing an environment for controlled and phased rehabilitation interventions: The function of incarceration or correctional supervision is, while ensuring public safety, to create a controlled environment for intense and needs-based rehabilitation, correction and development.

²⁰² Statistics supplied by the Judicial Inspectorate for Correctional Services.

Outward-looking: National, regional and international influencing factors are taken into account, as are experiences from other countries. Modern policy-making also assesses how the policy will be communicated to the public and stakeholders. The following are examples: use is made of regional and international cooperation structures; policy-makers look at how other countries dealt with the issue; recognition is given to regional variation within the country; and a communications and presentation strategy is prepared and implemented.

The White Paper makes numerous references in a generalised sense to the international human rights instruments applicable to prisons and prisoners. In a number of instances it draws selectively on the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR), citing particular rules as they may apply, for example, to labour of prisoners, a civilian staff corps and the rehabilitation of offenders. The general recognition of international human rights law applicable to prisoners does not translate, however, into giving international norms and standards a central position in the White Paper. Giving central recognition to the international norms and standards, as the Act does, would have prioritised meeting the minimum standards of humane detention in the strategies of the DCS. For example, the White Paper does not so much as mention the UN Convention against Torture (UNCAT), ratified by South Africa in 1998, even though it has important implications for the DCS, especially under Articles 10, 11 and 12.²⁰³

²⁰³ Article 10: (1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. (2) Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11: Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

The White Paper makes a number of references to the Constitution as applicable to the prison system.²⁰⁴ However, the White Paper does not refer to the significant body of South African case law on prisoners' rights.²⁰⁵ While it cannot be expected that a policy document should also be a legal text, it should also not fail to recognise the decisions of the courts which, in South Africa's case, have had a substantive influence on the rights of prisoners. Prisoners' rights jurisprudence has indeed been a notable influence on prison reform since 1994.

There are several references in the White Paper to "international best practice" but it is unknown how these practices were identified and who or what identified them precisely as international best practices. Even within the sphere of rehabilitation, the Department's core business, there is limited information and often conflicting opinions about what indeed is effective in rehabilitation and reintegration programmes.²⁰⁶ The shortcoming of the White Paper is that it refers to "international best practice" in a general sense and fails to motivate why particular policy options were selected.

The White Paper does not present its own communication strategy, but it is generally known that the DCS took considerable effort to distribute and communicate it to its staff and stakeholders. This resulted in the development of a new terminology and set of concepts in the Department, the value of which should not be underestimated. However, the lofty ideals of the White Paper were not accompanied by an implementation plan, and at ground-level the initial enthusiasm was not sustained by delivery. Whether or not the DCS rank and file still

²⁰⁴ Human dignity (s 10); Equality (s 9); Rights underlying humane treatment of every detainee (s 35); The right to health care services and other associated rights (s 27); Freedom and security of the person (s 12); Children's rights (s 28); The right to education (s 29); Freedom of religion (s 31); Intergovernmental relations (s 41); Values and principles governing Public Administration (s 195).

²⁰⁵ See Chapter 2 (section 3.3), Chapter 5 (section 8), Chapter 6 (section 3.3).

²⁰⁶ An authoritative work cites the following as proven principles for effective programmes: risk classification should determine the nature and intensity of programmes; programmes should target criminogenic needs, such as anti-social attitudes and drug dependency; programme integrity is maintained by adhering to the plan and using appropriately skilled staff; responsibility in programmes should be adhered to by matching teaching styles of facilitators with learning styles of beneficiaries; programmes emphasise treatment modality – interventions are skills-based, aimed at problem-solving, social interaction and includes a cognitive component to address attitudes, values and beliefs supporting offending behaviour; and interventions should include community-based programmes to render support to released offenders and their families (Dünkel, F. & Van Zyl Smit, D. (2001) *Imprisonment Today and Tomorrow*, London: Kluwer Law International, p. 822).

have faith in the White Paper is an open question, but among prisoners and the NGO sector the cynicism is palpable.

Innovative, flexible and creative: Flexibility and innovation characterises the policy-making process. Critically examining established ways of dealing with problems is encouraged, as is developing creative solutions. The process is open to comments and suggestions of others, and risks are identified and actively managed. The following are examples: the process uses alternatives to the usual ways of working (brainstorming sessions, etc.); it defines success in terms of outcomes already identified; it consciously assesses and manages risk; steps are taken to create management structures which promote new ideas and effective team working; and it includes outside people in the policy team.

From the contents of the White Paper it is not possible to assess if the policy-making process was “innovative, flexible and creative”, and it therefore needs to be assessed if the White Paper creates an appropriately enabling framework in which these virtues can flourish. The lack of consultation in the drafting of the White Paper, as noted above, does indicate a measure of inflexibility.

The White Paper is at a sufficiently abstract level to enable innovation, flexibility and creativity at operational level. Moreover, Chapter 13, which deals with external partnerships, established a useful framework for collaboration between the DCS and civil society service providers. Civil society has been shown to be particularly creative in developing new programmes and approaches to rehabilitation and should thus be able insert their knowledge and skills into the Department.²⁰⁷ However, an appropriate forum for interacting with civil society organisations had not yet been established. It recently came to light that the DCS is planning to remunerate civil society organisations for services rendered.²⁰⁸

Evidence-based: Decisions of, and advice to, policy-makers are based upon the best available evidence from a wide range of sources, and all key stakeholders are involved at an early stage and throughout the policy's development. All relevant evidence, including that from

²⁰⁷ Muntingh, L. (2009 a) *A Societal Responsibility The role of civil society organisations in prisoner support, rehabilitation and reintegration*, Pretoria: Institute for Security Studies and Community Law Centre.

²⁰⁸ Department of Correctional Services (2010 a) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 69.

specialists, is available in an accessible and meaningful form to policy makers. Key points of an evidence-based approach to policy-making include: reviewing existing research; commissioning new research; consulting relevant experts and/or using internal and external consultants; and considering a range of properly costed and appraised options.

Since the White Paper places rehabilitation at the core of the Department's business, it is required that this focus in the White Paper should be based on the best available evidence and that the approach adopted reflect it accordingly. In the past 20 to 30 years there has been a considerable amount of research conducted on "what works" in offender rehabilitation, especially in the US and Canada. Notable contributions in this regard came from Sherman, Gendreau, Cullen, Bonta, Andrews, and Ross.²⁰⁹ It is not within the scope of this thesis to deal with extant literature, and only a number of salient findings will be highlighted.

Cullen and Gendreau advocate for "evidence-based corrections" which, in practice, means the following: embracing professionalism that is respectful of data; training of practitioners based on research; the creation of correctional training academies; the implementation of programmes informed by empirically-based theory of effective interventions; the integration of evaluation as part of delivery; and the auditing and accreditation of agencies and programmes.²¹⁰

Sherman found that programmes which demonstrated a reduction in re-offending shared certain common principles. These principles were also confirmed in the work by Cullen and Gendreau.²¹¹ Programmes need to be carefully designed to target the specific characteristics and problems of offenders. These specific characteristics and problems are frequently referred to in the literature as dynamic characteristics and commonly addressed through cognitive behavioural programmes. The programmes also need to address factors which

²⁰⁹ See Sherman, L.W. et al (1997) *Preventing Crime: What Works, What Doesn't, What's Promising*, National Institute of Justice, US Department of Justice, Washington; Gendreau, P., Goggin, C. and Cullen, F.T. (1999) *The Effects of Prison Sentences on Recidivism*, Public Works and Government Services, Canada; Cullen, F.T. and Gendreau, P. (2000) *Assessing Correctional Rehabilitation: Policy Practice and Prospects* in J Horney (ed) *Criminal Justice 2000, Volume 3: Changes in Decision Making and Discretion in the Criminal Justice System*, Washington: US Department of Justice; Cullen, F.T. (2005) The Twelve People who saved rehabilitation: How the Science of Criminology Made a Difference, *Criminology*, Vol. 43 No. 1.

²¹⁰ Cullen, F.T. and Gendreau, P. (2000), p. 111.

²¹¹ Cullen, F.T. and Gendreau, P. (2000), pp. 145-148.

could influence the individual's future criminal activities such as anti-social attitudes, drug use and anger management. This is frequently referred to in the literature as the criminogenic environment of the individual. The programmes need to be designed by professionals using techniques that are known to work, be delivered by skilled staff and adequate time must be invested in offenders undergoing these programmes. The most intensive programmes should be aimed at offenders who pose the highest risk of re-offending. Programmes should use cognitive and behavioural treatment methods which emphasise positive reinforcement and which are capable of being amended to meet the needs of specific individuals.

Section 9.6 of the White Paper identifies the key service delivery areas, with the first being "Corrections", and states that "the initial focus will be to target the actual offence for which the person has been convicted and sentenced" (para 9.6.2). This approach is not supported by the principles for effective programmes outlined above, which in fact make no mention of the current offence but rather the dynamic criminogenic factors driving criminal behaviour. The paucity in evidence-based policy-making is further demonstrated in paragraph 9.7.3 of the White Paper, which reads:

Scientific and thorough research into the components of sentence planning for the various categories of offenders will have to shape the delivery of appropriate and effective corrections and development programmes in all aspects of the offender's life. While rehabilitation is the desired outcome of the work of correctional services, of which correcting the offending behaviour is the key component, there is much debate about the components that are required to make up the route to rehabilitation.

The work done by the above-noted scholars demonstrates that there is indeed increasing agreement on what works and the components that "make up the route to rehabilitation". The lack of engagement in the 2004 White Paper with evidence-based interventions is perhaps its most serious flaw.

A further brief but important point needs to be made in respect of evidence-based policy. The White Paper makes no mention of the costs of implementation or even the cost-drivers, yet emphasis is placed on the need for professionals to provide the necessary services.²¹² In short, it

²¹² See for example para 9.4.2: These professional services [needs-based interventions] must be rendered to offenders on the basis of either a court instruction or the need as determined by the Department. Care

remains unknown what it will cost to fully implement the services described in the White Paper. Seven years after the White Paper's adoption, the DCS has not been able to align its budget to its strategic plans and thus the White Paper.²¹³

Inclusive: The policy-making process directly involves key stakeholders to take account of the impact on and/or meet the needs of all people directly or indirectly affected by the policy. An inclusive approach may include the following aspects: consulting those responsible for service delivery and implementation; consulting those at the receiving end or otherwise affected by the policy; carrying out impact assessments; and seeking feedback on the policy from recipients and frontline deliverers.

The extent to which external stakeholders were brought into the policy-making process prior to the tabling of the draft in Parliament is unknown, although the Minister of Correctional noted that the concerns of stakeholders were taken into consideration.²¹⁴ As stated above, the public hearings held by the Portfolio Committee on Correctional Services on the White Paper in early 2004 were the first time that civil society stakeholders had sight of the draft White Paper. At an earlier briefing, in November 2003, by the DCS on the Green Paper (which preceded the White Paper), the Portfolio Committee expressed concern that there had been insufficient consultation on the Green Paper.²¹⁵ At the public hearings in February 2004, a number of civil society stakeholders expressed their dismay at the limited time they were afforded to study and comment on the lengthy White Paper.²¹⁶ Furthermore, subsequent to

intervention in the form of therapy, crisis intervention, and counselling must be responsive to the changing needs of an offender throughout the sentence period. These changing needs should be assessed through profiling and guided by the model for intervention.

²¹³ PMG report on meeting of the Portfolio Committee on Correctional Service, 19 October 2010, <http://www.pmg.org.za/report/20101019-researchers-briefing-stakeholder-input-department-correctional-servic>

²¹⁴ PMG report on the meeting of the Portfolio Committee on Correctional Services of 25 November 2003, <http://www.pmg.org.za/minutes/20031124-white-and-green-paper-process-briefing-minister> Accessed 4 January 2012.

²¹⁵ PMG report on the meeting of the Portfolio Committee on Correctional services, 25 November 2003, <http://www.pmg.org.za/minutes/20031124-white-and-green-paper-process-briefing-minister>

²¹⁶ Submission by CSPRI on the Draft White Paper and Submission by the Centre for the Study of Violence and Reconciliation. PMG report on meeting of the Portfolio Committee on Correctional Service, 3 February 2004, <http://www.pmg.org.za/docs/2004/appendices/040203cspri.htm>

the adoption of the White Paper there had been no formal and broad-based consultations on the content of and progress made in implementing the White Paper.

Joined-up: The process takes a holistic view by looking beyond institutional boundaries to the government's strategic objectives and seeks to establish the ethical, moral and legal base for policy. There is consideration of the appropriate management and organisational structures needed to deliver cross-cutting objectives. The following points demonstrate a joined-up approach to policy-making: cross-cutting objectives are clearly defined at the outset; joint working arrangements with other departments are clearly defined and well understood; barriers to effective joined-up work are clearly identified with a strategy to overcome them; and implementation is considered part of the policy making process.

The White Paper presents an adequate description of the legal basis and legislative mandate of the prison system, although a more overt focus on international human rights law would have added value. Reference is made to the now effectively abandoned National Crime Prevention Strategy (NCPS) (see Chapter 6 section 2.1) as regulating the relationship between the prison system and Department of Justice (para 1.2.1). Chapter 6, entitled “Integrated justice and social sector responsibilities for rehabilitation”, attempts to delineate the relationship between these two sectors but the description does not proceed beyond a high-level outline of a desirable state of affairs. From a structural-functional perspective, the White Paper is vague and the allocation of internal implementation functions is left to subordinate policies.

The White Paper does not explicitly identify cross-cutting objectives. These need to be inferred, and include adherence to human rights standards, effective social integration, reducing prison overcrowding, and sentencing reform. It may perhaps be concluded that the White Paper's focus on rehabilitation is so intense that it resulted in tunnel vision and a loss of sight of the other two objectives of the correctional system, namely implementing the sentences imposed by the courts and ensuring safe and humane custody. It is in particular the omission of an overt human rights-based approach that raises concern, an omission made increasingly conspicuous by extensive and often gross human rights violations after 2004, as discussed in Chapter 5. In many ways the goals of the White Paper are so abstract in nature that they seem transcendently removed from such daily realities as lack of services, poor conditions of detention, human resource constraints, corruption and human rights violations.

Review progress: Existing and established policy is constantly reviewed to ensure it is indeed dealing with the problems it was designed to solve, taking account of associated effects elsewhere. Aspects of a reviewing approach to policy-making include: an ongoing review programme is in place with a range of meaningful performance measures; mechanisms to allow service deliverers and customers to provide feedback directly to policy-makers are set up; and redundant or failing policies are scrapped.

The White Paper did not establish a review mechanism for itself, nor did it set at policy level the requirements for a performance monitoring system. However, the Department's performance is overseen by Parliament (through the Portfolio Committee) and by civil society actors.²¹⁷ In this regard five documents are important, namely the Departmental Annual Report, the budget vote, the strategic plan, the Annual Report of the Judicial Inspectorate for Correctional Services and the Auditor General's report.

The overall performance of the DCS since (and prior to) the adoption of the White Paper has not been satisfactory, as has been evidenced by successive qualified financial audits, critical reports by the Judicial Inspectorate for Correctional Services on the treatment of prisoners, low to moderate target setting in respect of which delivery was often not compliant, critique by civil society, and continued incidents (and allegations) of corruption and maladministration. The 2009/10 report by the Auditor General, in respect of the Department's performance monitoring system, sketches a picture that makes reviewing of performance in respect of the White Paper virtually impossible:

The accounting officer did not ensure that the department has and maintains an effective, efficient and transparent system and internal controls regarding performance management, which describe and represent how the institution's processes of performance planning, monitoring, measurement, review and reporting will be conducted, organised and managed, as required in terms of section 38(1) (a) (i) and (b) of the PFMA" (Public Finance Management Act).²¹⁸

²¹⁷ ss 55 and 59 of the Constitution Act 108 of 1996.

²¹⁸ *Report of the Auditor-General to Parliament on the financial statements of vote no. 18: Department of Correctional Services for the year ended 31 March 2010*, In Department of Correctional Services (2010 a), p. 131.

Moreover, the Auditor General noted that the strategic plan is incomplete (some targets lack indicators) and deviations from set targets are not adequately explained. It should be added that the successive strategic plans of the Department have changed every year, with the result that it is extremely difficult to assess performance over a multi-year period. The current situation is thus that the available performance information is of such questionable validity that it would be risky to base policy review on it.

Evaluation: Systematic evaluation of the effectiveness of policy is built into the policy-making process. Approaches to policy-making that demonstrate a commitment to evaluation include: a clearly defined purpose for the evaluation is set at outset; success criteria are defined; means of evaluation are built into the policy making process from the outset; and pilot projects are used to influence final outcomes.

The White Paper (in paragraph 9.18) narrows the scope of evaluation to measuring success in respect of rehabilitation and, in so doing, sidelines the other goals of the White Paper. Importantly, compliance with the Correctional Services Act is not emphasised in the White Paper with particular reference to meeting the minimum standards of humane detention and implementing the sentences imposed by the courts. Moreover, and problematically, it identifies recidivism as the indicator of success.

Measuring success in offender rehabilitation by means of a recidivism rate requires closer scrutiny. It is significant that effectiveness in rehabilitation and reintegration is commonly constructed in relation to its apparent failure, i.e. the recidivism rate. The recidivism rate is, however, trickier than a simple counting of crimes committed after the release of a sentenced prisoner or an intervention. Beck calls recidivism a “fruit salad concept” because of the different measurements that have been called recidivism rates, and poses three questions:²¹⁹ (1) What is counted as recidivism? For example, is it arrests, prosecutions, convictions, custodial and non-custodial sentences? Are all offences counted, including parole violations, consensual crimes and serious offences? (2) What is the time-frame of measurement? Is reoffending measured, for example, at one year for all offences, or are violent and sex

²¹⁹ Beck, A.R. (2001) *Recidivism: A Fruit Salad Concept in the Criminal Justice World*, Available from <http://www.justiceconcepts.com/recidivism.pdf>, Accessed on 4 January 2012.

offences measured over longer periods?²²⁰ (3) What is the basis for making sense of the data? With recidivism data it is crucial to compare “apples with apples”. A general figure, stating that the recidivism rate, for instance, is 50%, does not say anything about managing certain categories of offenders and understanding re-offending patterns. Crucially, recidivism data on persons who participated in a particular intervention needs to be compared with a matched group that did not participate in the intervention. In short, reliable recidivism data requires sophisticated research and analysis.

When using recidivism as an indicator of success, there must be clarity on the answers to these three questions as well as on the additional limitations of re-offence data. Particular changes in policing or prosecution priorities may produce elevated results for an offence category or a particular geographical area. A large police-swoop operation in an urban area can lead to the arrest of hundreds of suspects. Furthermore, the supervision of persons placed under community corrections is affected by a number of variables, for example, the staff-to-parolee ratio. Legislative reform can have a further impact on results: by improving legislation, conviction rates may improve. Even if there is clarity on the three questions raised by Beck and other variables can be controlled, using recidivism as a measure for the success of rehabilitation and reintegration intervention is still simplistic – it is akin to “using retention as a measure of Adult Basic Education Programmes”.²²¹ By the same token, successful reintegration and rehabilitation is not about remembering and regurgitating a set of external facts but continuously demonstrating skills and abilities in a variety of (risky) life-settings.

In short, using recidivism as an indicator of success in rehabilitation and reintegration is fraught with difficulties and highly dependent on accurate recording and reporting. When information systems in the criminal justice system are not set up to and do not function in pursuit of this objective, the results will be questionable. Rehabilitation and reintegration is a multi-layered process with too complex an interaction of variables for it to be measured by

²²⁰ The research on criminal careers (such as that by Farrington) clearly indicates that persistent violent offenders do not offend as frequently as persistent property offenders. See Farrington, D. (2007), Origins of violent behaviour over the life span. In D. Flannery, A. Vazsonyi, & I. Waldman, *The Cambridge Handbook of Violent Behaviour and Aggression*, Cambridge: Cambridge University Press; Piquero, A., Farrington, D., & Blumstein, A. (2007), *Key issues in criminal career research - new analysis of the Cambridge study in delinquent development*. Cambridge : Cambridge University Press.

²²¹ Vacca, J.S. (2004) Educated prisoners are less likely to return to prison, *The Journal of Correctional Education*, Vol. 55 No. 4, p 302.

one indicator that is, in essence, subject to a range of other intermediaries and at best can show us only part of the picture.

Learns lessons: The process learns from experience of what works and what does not. A learning approach to policy development includes the following aspects: information on lessons learned and good practice is disseminated; there is an account available of what was done by policy-makers as a result of lessons learned; there is a clear distinction drawn between failure of the policy to impact on the problem it was intended to resolve and managerial/operational failures of implementation.

In the preceding section it has been shown that the inadequate performance management systems of the DCS do not meet the requirement relating to the review of policies. In short, the current systems are not collecting the right information in a reliable manner that would yield valid answers. It was shown furthermore that the White Paper defined evaluation in a narrow manner, emphasising rehabilitation and identifying recidivism as the relevant indicator; the limitations of this have been noted. These two shortcomings place severe constraints on the extent to which lessons can be learnt from the implementation process. Moreover, a review of the post-2005 Departmental Annual Reports as well as the comments from the Portfolio Committee on Correctional Services, the Annual Reports of the Judicial Inspectorate for Correctional Services and the Auditor General, indicates that the problems facing the Department are strikingly consistent and recurrent. If lessons to be learnt have been identified, they have not been assimilated.

3.1.3 Assessment

The discussion has shown that the White Paper falls short in substantive ways of the requirements of modern policy-making. Seven years after its adoption, results in respect of the rehabilitation vision remain unknown and elusive. The Judicial Inspectorate for Correctional Services estimated that only 15% of sentenced prisoners are involved in some form of treatment programmes and labour.²²² For the overwhelming majority of sentenced prisoners, the White Paper has not lived up to expectations. While it may be argued that re-inventing the South African prison system is not a goal that can be reached in a seven years,

²²² Office of the Inspecting Judge (2010), p. 23.

it should also be asked if the White Paper provides the correct response (i.e. rehabilitation) to the challenges facing the prison system.

The main challenges to the prison system are enumerated in the White Paper as: overcrowding; the state of prison infrastructure; institutional “prison culture”; corruption; training for the new paradigm; and “structuring [the department] for the new paradigm”. Conspicuously absent from this list are human rights violations and an explicit mention of meeting the minimum standards of humane detention. Presumably the latter can be read into challenges around infrastructure and overcrowding. These are significant challenges, yet the White Paper gives scant attention to human rights concerns and deals in far more detail with rehabilitation. Moreover, compliance with the Correctional Services Act is not a stated outcome of the White Paper, although several selected references to the Act are made. It is therefore unsurprising that the DCS finds itself continuously in litigation.²²³

The White Paper says little about implementation, and while this is not a fundamental shortcoming, it should have articulated the pre-conditions or requirements for implementation. If rehabilitation is indeed the core business of the Department, the White Paper should have articulated, in more tangible terms, what is required at operational level with reference to staff skills, required staff categories, infrastructure, and so forth. After seven years it remains unknown to what extent the necessary pre-conditions for implementation have been met. In view of the above, it is argued that the White Paper needs to be re-visited and particular attention paid to compliance with the Correctional Services Act as well as to ensuring that knowledge informs the policy development process and that there is extensive consultation with stakeholders.

3.2 Aligning the budget to the White Paper

In the preceding section mention was made of the misalignment of the budget to the White Paper and this requires further analysis. The 2011/12 budget for the DCS is R16.6 billion

²²³ By 2010 there were claims against the DCS involving nearly R900 million (US\$132 million) (Department of Correctional Services (2010 a).

(US\$ 2.4 billion)²²⁴ which will result in a per-day-per-prisoner cost of R255 (US\$ 37.00).²²⁵ Compared to the other departments in the Justice and Security cluster the DCS has a sizeable budget, especially when considering the narrow scope of its mandate compared to that of the Department of Justice and Constitutional Development or the South African Police Services. The DCS budget is a third larger than the budget for the Department of Justice and Constitutional Development and half the Defence budget.²²⁶ DCS staff are also remunerated well, with 63.6% of personnel costs spent on employees at Levels 6-8 with an average annual salary of R253 197 (US\$ 37 234). Since the late 1990s the DCS budget has increased substantially, but spending patterns have remained fairly stable.

Presumably the White Paper should have had a profound impact on the budget allocation and more specifically the allocations to different programmes within the budget. However, this did not happen, as shown in Table 2 below.²²⁷ There has indeed been very limited change in the proportional distribution of the budget across the seven programmes since 2004/5. The only notable change is in respect of the programme Corrections,²²⁸ and in this instance certain salary costs originally allocated to Security were transferred to Corrections. Moreover, the planned estimates of expenditure until 2013/4 also indicate no substantive shift in expenditure. This is especially true for the four programmes that are closely aligned to the objectives of White Paper and the new core business of the Department, namely Corrections, Care, Development and Social Reintegration. Historically, more than 63% of the total DCS budget is spent on compensating employees, leaving the balance for other direct operational expenses.

²²⁴ National Treasury (2011) *Estimates of National Expenditure Vote 21 Correctional Services*, Pretoria: National Treasury, p. 1.

²²⁵ In calculating this, expenditure on infrastructure was excluded as this does not form part of daily operational expenditure on a prison population.

²²⁶ National Treasury (2011), p. 1.

²²⁷ The calculations are based on the figures presented in Table 21.2 of National Treasury (2011).

²²⁸ The aim of the Corrections programme is to: Provide needs-based correctional sentence plans and interventions, based on an assessment of the security risk and criminal profile of individuals, targeting all elements associated with offending behaviour, and focusing on the offence for which a person is sentenced to correctional supervision, remanded in a correctional centre or paroled (Department of Correctional Services (2010 a), p. 67).

Table 2

Programme	Administration	Security	Corrections	Care	Development	Social Reintegration	Facilities
2004/5	30.0	30.0	5.6	8.5	4.5	3.5	18.0
2005/6	25.6	33.2	6.6	9.6	3.7	3.2	18.1
2007/8	25.7	33.6	8.2	11.4	3.3	3.3	14.6
2008/9	25.9	35.5	8.0	10.5	3.5	3.3	13.3
2009/10	25.7	35.3	9.2	11.3	3.2	3.4	11.9
2010/11	26.6	34.0	9.6	11.5	3.7	3.6	11.0
2011/12	26.9	33.8	9.3	11.2	3.4	3.5	12.0
2012/13	27.2	33.6	9.1	11.2	3.3	3.4	12.3
2013/14	27.2	33.8	9.0	11.1	3.3	3.4	12.2

The lack of alignment of the budget to the strategic objectives of the White Paper has also been a source of concern to the Portfolio Committee, which noted that the four programmes most closely associated with the aim of rehabilitation (see shaded columns in Table 2) receive the smallest share of the budget.²²⁹

The question arising from the above is, What should the Department spend the budget on in order to align it with the White Paper? Rehabilitation and social reintegration programmes do not ordinarily involve large capital programmes or expensive equipment. Typically they entail socio-psychological interventions aimed at cognitive behavioural modification of offenders, usually in the form of semi-structured programmes. Added to this may be education and training programmes. While there are personnel costs involved, the interventions do not require significant expenditure above these in most instances. Even post-release support services are not dependent on significant capital costs similar to that of prison construction or security services. However, securing the right staff with the correct skills and required levels of motivation is a significant challenge, and it is well known that the DCS is finding it difficult to retain scarce skills. It then appears as if it is indeed easier to spend the budget on large capital works, such as prison construction and technologically advanced security systems.

²²⁹ Portfolio Committee on Correctional Services' budgetary review and recommendation report on the Department of Correctional Services' performance in 2010/11, and the first half of the current financial year, 20 October 2011, PMG report on the meeting of the Portfolio Committee on Correctional Services of 20 October 2011, <http://www.pmg.org.za/report/20111020-consideration-and-adoption-committees-budgetary-review-and-recommenda> Accessed 4 January 2012.

Aligning the budget to the White Paper may therefore not see substantial shifts in programme allocations, but it should see changes in performance of the prison system demonstrating results in respect of the programmes most closely associated with the aims of the White Paper. From a management perspective the budget is a powerful tool to change the performance and behaviour of subordinates, especially when attempting to introduce new policies. However, to affect such changed behaviour will require the devolution of decision-making responsibilities as well as budgetary control. This should be supported by objective and agreed-upon performance indicators, service delivery targets and a monitoring system at the level of individual prisons.

4. The set-backs and challenges

In the preceding section it was argued that the DCS, after 2004, took a number of steps to address corruption and maladministration. This has reaped some modest results but many challenges remain. It would be unfair and ignoring the facts to claim that the Department is not dealing with corruption. Furthermore, it can be argued that addressing corruption and maladministration in a large organisation facing a multitude of risks and threats to good governance will take time and a concerted effort to achieve the end result of a clean, efficient and effective bureaucracy that is transparent and accountable. It can also be assumed that there will be set-backs, mistakes and failure: old habits die hard, and systemic weaknesses are not fixed overnight.

Reflecting on the post-2004 period, however, there have been a number of noteworthy set-backs. Some of these have frequently been of embarrassing proportions as they involved or implicated senior officials in corruption and thus attracted significant attention from the media and Parliament. Other set-backs demonstrated an unnerving inability by the Department to follow through on important projects. This section will provide an overview of these set-backs, mistakes and failures. It is not the intention to describe each of them in detail as this has been done already by other authors. The purpose is rather to illustrate how they have impacted on prison reform after 2004. These are: the role of prisons gangs in corruption; the discovery of high-level corruption in the Head Office involving tender manipulation; conflict between successive National Commissioners and Ministers; and the failure to renegotiate the public-private partnership prisons contracts.

4.1 The prison gangs

The origin and history of South African prison gangs have been documented elsewhere and need not be repeated here,²³⁰ but a few background remarks are necessary to contextualise them in the current prison system and in the discussion on governance. The most well-known prison gangs are the so-called number gangs, these being the 26s, 27s and 28s. Two smaller gangs are also relatively common, namely the Big 5 (which colludes with officials) and the Airforce (which specialises in escapes). The lore of the number gangs is steeped in myth and mystery but it is generally agreed by scholars that they have their roots in the late nineteenth century in the Witwatersrand area (Gauteng province). The main objectives of the 28s centre on food, taking boy-wives and correcting the wrongs of the institution.²³¹ The 26s focus on gathering wealth in the prison and smuggling contraband. The 27s are there to keep the peace and facilitate coordination and cooperation between the 26s and the 28s, but will also enforce discipline sanctioned by the gang laws of the three camps.²³² In short, the number gangs are closely associated with, and frequently the architects of, coerced sex, violence and illegal activities in the prison system. The gangs are also structured in strictly hierarchical fashion and the authority of senior members must be obeyed. In many ways the hierarchy of the gangs mirror the hierarchy of the colonial and later administrations. Equally, gang law must be rigidly adhered to and punishments may be severe, if not fatal.

The use of violence itself, unless in immediate self-defence, is rigorously controlled as is the taking of a wife (Afr. *wyfie*). Gang membership is for life and the gangs are prevalent in most prisons in South Africa, especially in the Western Cape and Gauteng provinces. In a perverse way the number gangs perform an important governance function by controlling the use of violence, maintaining order amongst prisoners and regulating trade in contraband. An

²³⁰ Haysom, N. (1981) *Towards and understanding of prison gangs*, Cape Town: Institute of Criminology, University of the Western Cape; Steinberg, J. (2004) *Nongoloza's children – Western Cape prison gangs during and after apartheid*, Johannesburg: Centre for the Study of Violence and Reconciliation; Lötter, J.M. and Schurink, W.J. (1986) *Gevangenisbendes – 'n ondersoek met special verwysingnanommerbendesonderKleurlinggevangenes*, Pretoria, Human Sciences Research Council; Lötter, J.M. (1989) Prison gangs in South Africa – a description, *South African Journal of Sociology*, Vol. 19 No. 2, pp. 67-75; Van Onselen, C. (1984) *The small matter of a horse*, Johannesburg: Ravan Press; Steinberg, J. (2004) *The Number*, Johannesburg: Jonathan Ball.

²³¹ Jali Commission, p. 152.

²³² Jali Commission, pp. 152-153.

anarchic prison system would not serve the interests of the gangs and violence must thus be used sparingly and with clear objectives, for example, punishing an errant gang member or purposefully stabbing a warder.

While the number gangs have existed in South Africa's prisons for more than a century, the DCS has generally failed to deal with them in a manner that would diminish their influence over prisoners and officials. The Jali Commission was particularly concerned about DCS officials themselves belonging to number gangs, the lack of a coherent policy on gang management, and the contradictory departmental practices relating to gang members and non-gang members (Afr. *Franse*).²³³ That gangs will probably always be part of the South African prison landscape is generally accepted, but the ostrich mentality of the Department in relation to the number gangs beggars belief. The gangs remain a powerful force within the prison system and directly undermine the Department's duty to create a safe prison system free of contraband. The prison economy, inclusive of trade in contraband and assisted escapes, relies on corruption and the bribing of officials.²³⁴ When addressing corruption and governance, it is thus not an issue which the DCS can lightly ignore.

When the DCS reported to the Portfolio Committee on Correctional Services in 2011 on its responses to the Jali Commission's recommendations, the overall impression gained was that it regarded the gangs as less important than other matters.²³⁵ The Jali Commission made 11 recommendations pertaining to the prison gangs, focusing on: the appropriate separation of different categories of prisoners; conducting research on prison gangs to inform a gang management strategy; the development of a gang management strategy; collecting intelligence on gang activities and cooperating with the National Intelligence Agency and police; cooperating with non-governmental organisations; amending the disciplinary code to make gang involvement by officials a dismissible offence; and training staff and managers to deal with gangs more effectively.²³⁶

²³³ Jali Commission, pp. 159-162; 172-175.

²³⁴ Jali Commission, pp. 160 and 169.

²³⁵ Department of Correctional Services (2011 e) *Department of Correctional Services implementation of the recommendations of the Jali Commission of inquiry on systems and policies*, Report presented to the Portfolio Committee on Correctional Services, 7 September 2011.

²³⁶ Jali Commission, pp.180-184.

The response by the Department was not convincing. By and large it referred to policies that were either in existence (e.g. separation of different categories) or which had been developed recently, but no evidence was presented on any results that have been achieved in reducing the influence of prison gangs. For example, in response to the recommendation that gang involvement by officials should be a dismissible offence, the Department replied as follows:

The current Departmental Disciplinary Code for staff members provides effective leverage to deal with officials who promote gangs and who are involved in gang activities. Training of officials in Disciplinary Code Enforcement is done on a continuous basis to ensure effective enforcement of the code and to update officials on latest developments in the field of labour law.²³⁷

In effect it regarded the gang membership of an official as an individualised labour relations matter, not grasping the serious ethical implications of such membership for the prison system. An official belonging to or colluding with a prison gang contradicts the core purpose of the prison system. The DCS evaded the Commission's recommendation and as a consequence did not give the deserved priority to concerns about the involvement of officials in prison gangs. The most tangible result reported on was the development of a gang management strategy which was approved in April 2010 and circulated to all the regions in July 2010 for implementation. Whether any training or other support has been rendered to Heads of Prison to implement the strategy is unknown. On the strategy's implementation, the Department concluded: "At this stage the effectiveness of the strategy is being evaluated by staff and managers at different correctional centres."²³⁸ If no training and support are provided to implement the gang management strategy, it is unlikely that it will be effective. The strategy document itself is not available in the public domain and an assessment of its appropriateness is thus not possible.

In overview, it is concluded that the DCS appears to be making light of probably its oldest and most enduring problem. It is perhaps because of this lack of prioritisation that the gangs have been such a lasting problem in the prison system. A more sinister interpretation would be that the management of the prison population has been deferred to the gang leaders.

²³⁷ Department of Correctional Services (2011 e), p. 15.

²³⁸ Department of Correctional Services (2011 e), p. 12.

4.2 High value contracts

In 2006 several allegations were made in the media about the awarding of high-value contracts by the DCS to a company called Bosasa,²³⁹ a company which since 2004 has benefited from prison tenders to the value of R3 billion (approximately US\$ 360 million).²⁴⁰ Shortly thereafter, the Auditor General and the PSC referred specific allegations regarding these contracts to the SIU for further investigation. A year later President Mbeki signed a proclamation instructing the SIU to investigate tender irregularities in the DCS.²⁴¹ In November 2009 the SIU reported on its findings to the Portfolio Committee on Correctional Services. It should be noted that in its report to Parliament the SIU refrained from naming the individuals or company involved, but it was evident who the players were. The SIU investigated four contracts awarded to the Bosasa Group of Companies between 2004 and 2006 and reported on these.²⁴² The findings were damning and implicated the Chief Financial Officer (Patrick Gillingham) and the former National Commissioner, Linda Mti. The manner in which the four contracts were awarded showed strong similarities between them, and all evidenced deviations from the Treasury Supply Chain Management Policy. The SIU described as follows its findings in respect of the first contract:

Instead of the end-user departments being involved in drafting the specifications of the product or service, the CFO (Chief Financial Officer), the Accounting Officer and the service provider company participated in the drafting of the specifications. In addition,

²³⁹ ‘*Spoor van tender HK 2/2005 wys konkelry*’ [Trail of tender HK2/2005 shows cheating - Own translation], *Beeld*, 16 November 2006, <http://www.beeld.com/Suid-Afrika/Nuus/Spoor-van-tender-HK-22005-wys-konkelry-20100617> Accessed 7 December 2011; ‘*Skryf tender self en kry kontrak!*’ [Write tender yourself and get the contract! - Own translation], *Beeld*, 17 November 2006, <http://www.beeld.com/XArchive/Spesiaal/Ondersoeke/Skryf-tender-self-en-kry-kontrak-20100617> Accessed 7 December 2011.

²⁴⁰ ‘Prisons graft: Bosasa’s empire of influence’ *Mail and Guardian*, 20 November 2009, <http://mg.co.za/article/2009-11-20-prisons-graft-bosasas-empire-of-influence> Accessed 7 December 2011.

²⁴¹ ‘Prisons Boss bribed’ *City Press*, 20 March 2011, <http://www.citypress.co.za/SouthAfrica/Prison-boss-bribed-20110320> Accessed 7 December 2011.

²⁴² These were a catering contract to the value of R717 million (US\$ 85 million); an access control tender for R237 million (US 28 million); a fencing contract for R587 million (US\$ 70.2 million); and a tender for televisions at R224 million (US\$26.8 million). (‘Prisons graft: Bosasa’s empire of influence’ *Mail and Guardian*, 20 November 2009, <http://mg.co.za/article/2009-11-20-prisons-graft-bosasas-empire-of-influence> Accessed 7 December 2011.)

no financial planning, feasibility study or needs analysis was done. The security aspects concerned provided the company with a clear advantage above all the other bidders.²⁴³

This same modus operandi was followed with the other three contracts, but additional steps were taken to manipulate the process in the preferred service provider's favour. In the second contract the submission period was reduced from 30 to 21 days without reason, thus limiting the time available for competitors to prepare their bids. In the same contract the tender was awarded to an affiliate company of Bosasa which had been in existence for a mere seven days by the time bids had to be submitted, this despite government procurement policy requiring that a company should have been in existence for at least five years. In the third contract the budget was overspent by R150 million (US\$ 18 million) and then increased with another R100 million (US\$ 12 million). Moreover, payment of 90% of the contract price was made on the delivery of raw materials without the service provider committing to a final project completion date. In the fourth contract the same irregularities appeared, but the first invoice (R106 million - US\$ 12.6 million) for payment was received three days after the contract was signed and duly paid. Ten days later another payment was made, exceeding the budget. The SIU then turned its investigation to the CFO and his family and found that he benefited to the tune of R2.1 million (US\$ 251 000) through various payments from Bosasa.²⁴⁴ The SIU also found that the former National Commissioner benefited from payments by the same company to the value of R63 500 (US\$ 8000). The SIU summarised its findings as follows:

The general findings of the SIU in relation to these four tenders were that the proper procurement processes were not followed by DCS. This was aggravated by the payments made to the CFO and Accounting Officer at the time that tenders were being

²⁴³ Briefing by SIU to the Portfolio Committee on Correctional Services.PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 24 November 2011.

²⁴⁴ The CFO received a car and financial contributions to two other cars, his son and daughter received a car each, and his daughter's overseas trip was sponsored by the company. He also received six Blue Bulls rugby season tickets and the company financed the development of a house for him, worth more than R1 million. He had renovations done to the kitchen for R 180 000 (US\$ 23 400) and received R80 000 (US\$ 10 400) from the company towards a retirement home. In addition, the company paid three amounts totaling R48 000 (US\$ 6200) into the credit card account of the CFO. (Briefing by SIU to the Portfolio Committee on Correctional Services.PMG report on the meeting of the Portfolio Committee on Correctional Services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 24 November 2011.)

awarded to this company and its affiliates. It was also aggravated by the fact that there was such a close working relationship between the CFO, the accounting officer and the service provider company and its affiliates. The SIU was satisfied that the procurement process was undermined, in the sense that this company and its affiliates had an unfair advantage over its competitors in respect of these tenders. This prejudiced the DCS. The SIU was also satisfied that this close relationship undermined the procurement process itself and that DCS was significantly exposed to civil claims by the companies that lost out in the tender process.

The SIU's final report was handed to the Minister of Correctional Services and the National Prosecuting Authority in September 2009, but at the time of writing (December 2011) no criminal prosecutions were in progress. The CFO was suspended in September 2010 and ultimately resigned without facing disciplinary action from DCS.²⁴⁵

The tender manipulation of the high-value contracts between 2004 and 2006 sent out the message that some of the most senior officials in the Department paid little attention to what was happening around them and followed their own agenda. The Jali Commission had at the time not yet finalised its investigations and the SIU was still busy with its investigations into other matters. Publicly the National Commissioner had committed himself to rooting out corruption,²⁴⁶ but from the SIU's investigations it appears he was deeply involved in manipulating high-value contracts and colluding with his CFO. The whole saga remains deeply damaging to the public image of DCS and the level of trust that the rank and file place in the Department's leadership.

4.3 The Commissioners versus the Ministers

Between 2007 and 2010 the respective Ministers and National Commissioners at the helm of the Department clashed, but for different reasons. In what can be seen only as political manoeuvring, Minister Balfour got rid of Commissioner Petersen who had challenged him. Petersen's replacement, Sibeko, was initially investigated for corruption, subsequently acquitted but not reinstated.

²⁴⁵ 'Suspended prisons official quits' *News24.com*, 12 November 2010, <http://www.news24.com/SouthAfrica/News/Suspended-prisons-official-quits-20101112> Accessed 7 December 2011.

²⁴⁶ Department of Correctional Services (2004 a), p. 7.

4.3.1 Petersen v Balfour

In May 2007 Vernon Petersen was appointed as National Commissioner of Correctional Services after he joined the Department some time earlier as Chief Deputy Commissioner Corporate Services.²⁴⁷ He was previously employed by the Mpumalanga Provincial Government and was thus an outsider to the Department. His independence and commitment to clean up the DCS soon brought him into conflict with his Minister, Ngconde Balfour. Petersen blocked Balfour in extending a multi-million-rand catering tender to Bosasa while the company was being investigated by the SIU (see section 4.2 above). Petersen also reported Balfour to Parliament's Ethics Committee for allegedly failing to declare a discount he received on the financing of a luxury vehicle. The financing was being provided by a company linked to the Bosasa Group of Companies.²⁴⁸ It was also Petersen who suspended the Chief Financial Officer (Patrick Gillingham) who was implicated in the SIU investigations of high-value contracts. In media reports Gillingham was described as a "confidant"²⁴⁹ and "right-hand man"²⁵⁰ of Balfour. Several public spats ensued and the Minister, in one incident, accused Petersen of a "drunken outburst" at an official event, although the claims were never substantiated. Reportedly, Petersen wrote a letter to Balfour in September 2008 warning that "something must break" if they could not "trust and work together in the department".²⁵¹ The breakdown in the relationship between Balfour and Petersen was also being discussed for some time at the highest level, involving then Public Service and Administration Minister, Geraldine Frazer-Moleketi, and then President Mbeki. The rupture happened two months later.

Following the ousting of President Mbeki in September 2008, Kgalema Motlanthe was appointed as President. While Motlanthe was on an official visit abroad in October-November 2008, the Deputy President (Baleka Mbete) was Acting President. It was during this period that Balfour and his counterpart in the Ministry of Sport and Recreation (Makhenkesi Stofile) approached Acting President Mbete and proposed that Petersen be

²⁴⁷ Department of Correctional Services (2005), p. 3.

²⁴⁸ 'DG of Sport Vernie Petersen dies' *Mail and Guardian*, 28 February 2011,

²⁴⁹ 'Prisons graft: Bosasa's empire of influence' *Mail and Guardian*, 20 November 2009, <http://mg.co.za/article/2009-11-20-prisons-graft-bosasas-empire-of-influence> Accessed 7 December 2011.)

²⁵⁰ 'DG of Sport Vernie Petersen dies' *Mail and Guardian*, 28 February 2011.

²⁵¹ 'DG swap: Did Kgalema know?' *Mail and Guardian*, 3 November 2008.

swopped with the Director General of Sport and Recreation, Xoliswa Sibeko. Mbete, in her capacity as Acting President, assented and signed off on the necessary paperwork. There is some speculation as to whether she consulted Motlanthe on the matter.²⁵² In the aftermath, Stofile denied any involvement. It should be added that the relationship between Stofile and Sibeko was also strained and he had refused to appoint her permanently as Director General of Sport and Recreation after her 12-month probation period came to an end in August 2008. After less than two years in the position as National Commissioner, Petersen moved over to Sport and Recreation as Director General and Sibeko became the National Commissioner of Correctional Services, with a less than convincing track record in her previous position and no experience of managing prisons.

According to a long-serving member of the Portfolio Committee on Correctional Services (James Selfe, Democratic Alliance), the transfer of Petersen was directly related to the Bosasa catering tender. Petersen's removal was a blow to prison reform. He had earned great respect from the Portfolio Committee on Correctional Services and civil society organisations for his stance on corruption and willingness to deal with the tough issues facing the prison system, such as sexual violence and unnatural deaths in custody.²⁵³ The conflict between Balfour and Petersen must have created confusion, if not further division, in the Department's senior management team, undermining efforts to implement policy and improve service delivery. On 27 February 2011 Petersen died of natural causes, aged 52.²⁵⁴

4.3.2 Sibeko v Mapisa-Nqakula

Following the recall by the ANC of Thabo Mbeki as President in September 2008, Minister Balfour did not resign immediately as Minister of Correctional Services but he was subsequently replaced by Nosiviwe Noluthando Mapisa-Nqakula on 11 May 2009.²⁵⁵ In mid-July 2009 Minister Mapisa-Nqakula suspended National Commissioner Sibeko, the Acting CFO (Nandi Mareka) and the Gauteng Regional Commissioner, Adv Tozama Mqobi-Balfour, wife of former Minister Ngconde Balfour. The allegation was that Sibeko and Mqobi-Balfour

²⁵² 'DG swap: Did Kgalema know?' *Mail and Guardian*, 3 November 2008.

²⁵³ 'Why was I shifted, Kgalema?' *Mail and Guardian*, 26 October 2008,

²⁵⁴ 'DG of Sport Vernie Petersen dies' *Mail and Guardian*, 28 February 2011,

²⁵⁵ GCIS Profile: Ms NosiviweNoluthandoMapisa-Nqakula http://www.info.gov.za/gol/gcis_profile.jsp?id=2262

were renting luxury accommodation in a prestigious area of Pretoria while there was official accommodation available for them.²⁵⁶ Other charges were also subsequently brought and in December 2009 Sibeko was cleared of all, but was then placed on special leave by the Minister.²⁵⁷ After much wrangling and Sibeko demanding to be reinstated since she was acquitted at the disciplinary hearing, she ultimately agreed to the termination of her contract in March 2010, accepting a payment of R700 000 (US\$ 103 000).²⁵⁸ Mqobi-Balfour was further investigated for additional charges relating to fraud and misuse of public funds and further suspended in January 2010. In October of that year she was found guilty on six of the eight charges²⁵⁹ and dismissed in November 2010.²⁶⁰

Both Sibeko and Mqobi-Balfour were suspended for long periods before their cases were finalised, even though the requirement is that a precautionary suspension should not exceed 60 days.²⁶¹ This was also the case with the former CFO, Gillingham. The reasons for the lengthy suspensions are not clear but the DCS had, according to the Public Service Commission, the highest number of precautionary suspensions for the period 2008 to 2010 of the Departments surveyed – 73 at a cost of R7 million.²⁶²

It is uncertain what the real cause was of the breakdown in the relationship between Sibeko and Minister Mapisa-Nqakula, but the implication that the National Commissioner was suspected of corruption, even if later acquitted, added to the woes of the Department. Mqobi-Balfour's actions pointed to the lack of integrity of some officials at the most senior level of

²⁵⁶ 'Prisons bosses suspended' *Mail and Guardian*, 13 July 2009, <http://www.news24.com/Africa/News/Prisons-bosses-suspended-20090713>; 'Probe Balfour housing' *Mail and Guardian*, 14 July 2009, <http://www.news24.com/SouthAfrica/Politics/Probe-Balfour-housing-20090714> Accessed 7 December 2011.

²⁵⁷ 'Prisons boss cleared' *Mail and Guardian*, 15 December 2009, <http://www.news24.com/SouthAfrica/Politics/Prisons-boss-cleared-20091214> Accessed 7 December 2012.

²⁵⁸ 'Sacked chief gets R700 000' *Mail and Guardian*, 4 March 2010, <http://www.news24.com/SouthAfrica/News/Sacked-chief-gets-R700-000-20100304> Accessed 7 December 2012.

²⁵⁹ 'Gauteng prisons commissioner guilty' *News24.com*, 12 October 2010, <http://www.news24.com/SouthAfrica/News/Gauteng-prisons-commissioner-guilty-20101012> Accessed 7 December 2012.

²⁶⁰ 'Prisons big shot fired over posh home scandal' *Pretoria News*, 5 November 2010.

²⁶¹ Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003 (Public Service Commission (2011) *Report on management of precautionary suspension in the public service*, Pretoria: Public Service Commission, p. 3.)

²⁶² Public Service Commission (2011), p. 12.

the Department. Moreover, as wife of then Minister Ngconde Balfour, it suggests that he knew what was happening or should have known. Again the episode attracted significant media attention and the ire of the Portfolio Committee on Correctional Services.²⁶³ It was an embarrassing scandal at a time when the SIU was continuing its investigations into the DCS and reporting on other matters.

4.4 Failure to renegotiate PPP contracts

In Chapter 3 (section 3.1.3) reference was made to the two privately operated prisons situated in Bloemfontein (Free State province) and Makhado (Limpopo province), respectively. Private sector involvement in the prison system remains a contentious but under-studied issue in South Africa.²⁶⁴ Both prisons accommodate roughly 3 000 sentenced prisoners and are often referred to as “state of the art prisons”.²⁶⁵ The specifications for their construction and operation²⁶⁶ were set extremely high. A fundamental difference between the DCS-operated

²⁶³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 11 November 2009, <http://www.pmg.org.za/report/20091111-minister-progress-case-against-national-commissioner-developments-ye> Accessed 7 December 2011.

²⁶⁴ Berg, J. (2001) Private prisons: the international debate and its relation to South Africa, *Acta Criminologica* Vol. 14 No. 3, pp. 2-12; Muntingh, L. (2010) ‘Love Me, Love Me Not’ – *Public Private Partnerships in the Department of Correctional Services*, Paper delivered at seminar hosted by Institute for Security Studies, 28 July 2010, Cape Town.

²⁶⁵ *Technical review of the public-private partnership prisons contracts for the PPP prisons task team*, Report presented to the Portfolio Committee on Correctional Services 18 March 2003, <http://www.pmg.org.za/minutes/20030317-public-private-partnership-prison-contracts-briefing> Accessed 7 December 2011.

²⁶⁶ The following are examples of the level of detail provided in the specification:

- Out of cell activities are based on a minimum 12 hours per day.
- Cell sizes of 5.5m² for single cells and 8.0m² for double cells based on normal building requirements.
- Minimum 5 layers of security protection.
- Restrictions on persons to whom telephone calls may be made and recording / monitoring of all calls.
- Complaints from prisoners to be responded to within 24 hours.
- Cash-free environment.
- Implement drug testing program with prevention and treatment.
- All bedding material and furniture coverings (including in administration offices) to be of fire retardant material.

and the PPP prisons is that the latter may not, by contract, be occupied above their specified capacity.²⁶⁷ Furthermore, while prisoners in Public Private Partnership (PPP) prisons must be outside of their cells for a minimum of twelve hours per day, other prisoners are entitled only to a minimum of one hour per day. Similarly, the space norm in DCS prisons is 3.34 m² per prisoner compared to the 8m² in the PPP prisons for prisoners in double cells. The guaranteed profits of the contractors linked to the Consumer Price Index, as noted in Chapter 3, added to the cost. It was this high cost that ultimately prompted a review in 2002 of these two contracts and future PPP prisons.

In November 2002 the Portfolio Committee was presented with a lengthy, detailed and highly technical review and analysis of the two PPP prison contracts.²⁶⁸ The same report was again presented to the Committee in March 2003. It was a financial analysis and recommended that a number of aspects of the PPP contracts could be renegotiated to improve “value for money” to the Department. The following were identified as key areas for renegotiation: reviewing standards and specifications; amending the fee payment structure; considering options for accommodating additional prisoners on a marginal cost per inmate basis; and negotiating debt funding to improve cash flows and net present value benefits, including considering inflation-linked funding.²⁶⁹ From the available documentation it appears that a transaction advisor was

-
- Sick inmate to be seen by healthcare worker in 30 minutes.
 - Provide assistance for Legal Aid including reference library. (*Technical review of the public-private partnership prisons contracts for the PPP prisons task team*, Report presented to the Portfolio Committee on Correctional Services 18 March 2003, <http://www.pmg.org.za/minutes/20030317-public-private-partnership-prison-contracts-briefing> Accessed 7 December 2011.)

²⁶⁷ Berg, J. (2001), pp. 5-8.

²⁶⁸ Sloth-Nielsen, J. (2007) ‘The state of South Africa’s prisons’. In S. Buhlungu, J. Daniel, R. Southall & J. Lutchman, *State of the Nation – South Africa 2007*, HSRC Press, Cape Town, p. 382; PMG report on the meeting of the Portfolio Committee on Correctional Services of 12 November 2002, <http://www.pmg.org.za/minutes/20021111-review-public-private-partnership-prison-contracts-mothers-babies-women-imprisoned>-*Technical review of the public-private partnership prisons contracts for the PPP prisons task team*, Report presented to the Portfolio Committee on Correctional Services 18 March 2003, <http://www.pmg.org.za/minutes/20030317-public-private-partnership-prison-contracts-briefing> Accessed 7 December 2011.

²⁶⁹ *Technical review of the public-private partnership prisons contracts for the PPP prisons task team*, Report presented to the Portfolio Committee on Correctional Services 18 March 2003, <http://www.pmg.org.za/minutes/20030317-public-private-partnership-prison-contracts-briefing> Accessed 7 December 2011, para A.3.2

subsequently appointed, and in August 2006 the Portfolio Committee received a presentation from the transaction advisor on the PPP prisons regarding the renegotiation of contracts.²⁷⁰

Again the Committee received a highly technical financial analysis of the two PPP prison contracts, indicating that there was some scope, albeit limited, for renegotiation. The contractors were, quite understandably, not interested in reducing their fees and the transaction advisor thus focused on increasing the capacity of the two prisons. The assumption was that the unit cost per prisoner would then be distributed over a higher number of prisoners, thus creating more value for money. Potentially an additional 2 076 bed spaces could be created.

The transaction advisor did not, however, investigate the profile of the prisoners detained at the two PPP prisons and how a change in the profile could add value to the prison system. For example, at Mangaung prison 75% of prisoners are serving sentences of longer than ten years and 41% are serving sentences of longer than 20 years.²⁷¹ Prisoners at the two PPP prisons have, by all accounts, access to exceptional facilities, quality programmes, education, technical training, and so forth. In sharp contrast to the DCS-run prisons, as specified in the contracts, prisoners at the two PPP prisons are indeed kept constructively busy for 12 hours a day. The majority of them will, however, for the foreseeable future have little use for the skills acquired. The two PPP prisons could therefore be used far more effectively to provide access to quality programmes and services to prisoners with a release date in the near future, especially for younger and first-time prisoners.

Using the two PPP prisons for juvenile offenders was proposed to the contractors by the Portfolio Committee in June 2008. The contractors indicated that they were open to the idea but that the DCS had not made such a proposal to them and it was contractually the Department's decision which prisoners to transfer to the two PPP prisons from the DCS-

²⁷⁰ PMG report on the meeting of the portfolio Committee on Correctional Services of 10 August 2006, <http://www.pmg.org.za/minutes/20060809-ppp-correctional-centres-contracts-briefing-negotiations> Accessed 7 December 2011.

²⁷¹ PMG report on the meeting of the Portfolio Committee on Correctional Services of 3 June 2008, <http://www.pmg.org.za/report/20080603-briefing-public-private-partnership-prisons-ppps-mangaung-and-kutama-> Accessed 7 December 2011.

operated prisons.²⁷² The idea would nonetheless remain in the thinking of the Portfolio Committee and was included in its hand-over report at the end of its term in 2009.²⁷³ There is subsequently no evidence to indicate that the Department has taken this proposal on board.

Fundamentally the DCS and its advisors interpreted the creation of additional value for money too narrowly by recommending the distribution of the existing costs over a higher number of (long-term) prisoners, which was not acceptable to the operators. If the profile of prisoners at the two PPP prisons were changed to target younger and first-time offenders with a release date in the near future, it could potentially make a significant contribution to attaining the rehabilitation objectives of the Department. The two private prisons are indeed “showcase” prisons but their impact on the entire prison system has been negligible, if not negative.²⁷⁴ As it stands now, this valuable resource is in practical terms being spent in a wasteful manner.

4.5 Summary of issues

In section 2 above, it was concluded that substantial efforts were made by the DCS after 2004 to eradicate corruption and improve governance. Even if results were modest, it was evident that steps were being taken to undo the mess created in the previous decade and re-institutionalise the prison system. There were, however, shortcomings in the approach followed. The most obvious is the Department’s reluctance to deal with the number gangs in a decisive manner, and it must be assumed that the gangs remain as influential as they were ten years ago. The gangs remain a prominent threat to the integrity of the prison system and its staff, yet they were excluded from the Department’s problem analysis. It was only in 2010, several years after the Jali Commission submitted its final report, that the Department embarked on the development of a gang management strategy. There appears to be an

²⁷² PMG report on the meeting of the Portfolio Committee on Correctional Services of 3 June 2008, <http://www.pmg.org.za/report/20080603-briefing-public-private-partnership-prisons-ppps-mangaung-and-kutama>. Accessed 7 December 2011.

²⁷³ Parliament of the Republic of South Africa (2009) *Overview report of the oversight activities of the Portfolio Committee on Correctional Services (2004 - 2009) - Hand-Over Report*, p. 7.

²⁷⁴ Cavadino, M. and Dignan, J. (eds) (2006) *Penal Systems – a comparative approach*, London: Sage Publications, p. 321.

inexplicable lack of urgency to understand the number gangs and develop an appropriate response to them.

In his analysis of Polish prison reform, Coyle lists a number of factors that contributed to a successful reform process. Apart from having a clear vision and knowledgeable leaders heading the prison system, he notes that during the period of the most radical reform “there were no embarrassing incidents, such as scandals, riots or escapes.”²⁷⁵ He argues that such embarrassing incidents would have been attributed to the reform process and would thus have undermined it. In the case of South Africa, the embarrassing incidents and scandals were of note and have proven to be extremely damaging to prison reform after 2004, fundamentally attacking the integrity of the leadership and the legitimacy of the prison system.

The period after 2004 saw a series of smaller-scale and ensuing crises in the Department in the form of the findings of the SIU (the high-value contracts implicating the CFO and former National Commissioner Mti), the allegation that Minister Balfour received financial benefits from a Bosasa-linked company, the conflict between National Commissioner Sibeko and Minister Mapisa-Nqakula and the dismissal of Adv Mqobi-Balfour. Although not of the same scale as the general collapse of discipline and order described in Chapter 3, they contributed to the perception and reality that the DCS is a deeply troubled department.

A first consequence of this is that in the eyes of the public and the ordinary DCS official, the Department’s leadership was perceived to be engaged in corruption whilst it was their explicit task as public officials to rid the Department of corruption. These events served only to deepen the legitimacy crisis of the prison system, yet this time the attention was not on the regions and individual prisons (as investigated by the Jali Commission) but directed at the Head Office. Flowing from this, the second consequence was that it placed under suspicion the sincerity and integrity of the DCS senior management’s commitment to address corruption. Inevitably questions must be raised about anti-corruption efforts by the Head Office when, as the SIU found, tenders were being manipulated in the Head Office and bribes paid to some of the most senior officials in the Department, among them none other than the CFO. Third, it must be assumed that the incidents described above did not pass unnoticed by the prison population. Even if only a few senior officials were implicated in corruption, there is a real risk that the prisoners will tar all officials with the same brush and conclude that all

²⁷⁵ Coyle, A. (2002) *Managing prisons in a time of change*, London: International Centre for Prison Studies, p. 21.

officials are corrupt, assuming that this perception does not already exist. Such a perception would make a mockery of the Department's efforts at rehabilitation, which requires a position of moral high ground. Fourth, the scandals reflected a culture of defying oversight. By 2004 the DCS had access to several reports dealing with governance and corruption and making numerous recommendations, yet tenders were thereafter manipulated involving millions of rands.

5. Conclusion

This chapter has dealt with the Department's response after 2004 to date in respect of corruption and maladministration, or how it attempted to establish norms and practices of good governance in the prison system. Following the appointment of the Jali Commission (2001) and thereafter the commencement of investigations by the SIU (2002), the DCS was under increasing pressure to address corruption. The results have been modest in many regards and significant set-backs were experienced. Admittedly, the DCS is a high-risk organisation with regard to fraud and corruption. It procures a large volume of goods and services; it has 240 prisons and more than 40 000 staff; and many staff lack the skill and experience for the positions they fill. Moreover, the Department has a long history of corruption and a general resistance to external advice and oversight.

The chapter commenced with a description of the requirements for an effective anti-corruption strategy and assessed the DCS anti-corruption strategy against these, but also considered how these have been integrated into the Department's overall strategic plan. In this regard, it is concluded that the Department's emphasis on the law enforcement pillar of the anti-corruption strategy has to an extent come at a cost to the other pillars.

Improving governance in the DCS and addressing corruption has not come easily. A significant amount of political and administrative pressure was placed on the Department to initiate governance reforms. In short, it was reform by push and shove. The appointment of the Jali Commission, the investigations by the SIU, DPSA, PSC and initially the Directorate: Special Operations all combined to pressurise the Department to address corruption through investigations and effecting improvements in systemic weaknesses. Gradually gains were made as perpetrators of corruption were sanctioned, financial controls improved and the disciplinary code more effectively enforced.

The history of corruption and maladministration in the DCS should be seen against the general state of the public service by the late 1990s. Over time government incrementally appreciated the seriousness of the situation and the Public Service Anti-Corruption Strategy was developed, which was followed by new anti-corruption legislation. Support from the DPSA and the PSC also assisted the DCS in formulating a more coherent and focused response to corruption and maladministration. It is unlikely that the DCS would have been able to have developed such a response at an earlier stage; there was simply not the political support from national government nor were the necessary supportive policies, legislation and resources in place.

The DCS also developed internal capacity to investigate cases and enforce the disciplinary code and centralised this function in the Head Office, while the prevention function remained decentralised. There is limited evidence that this responsibility has indeed been taken up by the regions and management areas of the Department. Moreover, the DCS placed the emphasis, in general, on corruption resulting in losses to the state and thus paying less attention to corruption where prisoners are the victims. In addition, the DCS has for most of the period after 2004 ignored the influence of the prison gangs as a threat to good governance. More specifically, the DCS anti-corruption strategy overlooked prisoners as either enablers or victims of corruption.

Whether the Head Office has (re-) gained control over the entire Department is not entirely confirmed. There is evidence of senior officials not submitting information to the Head Office and ignoring policies and legislation. Continuing corruption and rights violations create a sense instead that the Head Office has a fluctuating authority relationship with its subordinate structures. Consequently there has frequently been a notable chasm between what policy and law dictate and what occurs in practice. The emphasis on code enforcement must therefore be seen as a strategy employed by the Head Office to exert and establish its authority over the Department. This is, however, an inch-by-inch endeavour with the risk that disciplinary code enforcement may indeed alienate staff.

It also needs to be asked whether the Department has been able to decrease its legitimacy deficit through its focus on corruption and maladministration. Assessed against the legal, philosophical and sociological requirements for legitimacy described in Chapter 2 (section 2.3), it is a mixed bag of results. The 1998 Correctional Services Act, which is firmly based on the 1996 Constitution, addressed the first question of whether the power exercised by the

DCS is legally obtained. The laws regulating the prison system give expression to the values and precepts of the Constitution, as the case should be. The new legislation, with effect from 2004, also sets new standards of performance and, as has been shown in this Chapter and to be discussed in the following one, power is not always exercised within the bounds of the law.

At a philosophical level the 2004 White Paper is an attempt to provide the justification for the prison system, stating that rehabilitation is the core business of the Department. This construct is, however, eroded by several contradictions at the sociological level. The setbacks described (especially related to corruption) in this chapter as well as continuous human rights violations (discussed in Chapter 5) have continued to undermine the credibility of the aspirations of the 2004 White Paper. In respect of the legitimacy deficit it can thus be concluded that there is now a legal and policy framework in place, on the one hand, but on the other, successful implementation of this framework has been beleaguered by capacity constraints (an issue prevalent across the public service) as well as deliberate and criminal actions on the part of DCS officials. Notwithstanding these concerns, it has been demonstrated that concerted actions on multiple fronts, even when induced through pressure, can be effective in addressing corruption and maladministration.

In respect of the White Paper it has also been shown that there were substantial problems with the manner in which it was developed. Moreover, the appropriateness of the White Paper to guide reform has been called into question. Aligning the budget to the White Paper has proven to be less than straightforward, with the result that it is not the goals of the White Paper which drive expenditure but rather the Department's historical patterns of expenditure. These patterns, in other words, continue to dictate implementation (or the lack thereof).

Developing new policies and procedures, setting up systems, creating internal structures and so forth are all part of re-institutionalisation. It is, as evidenced by events since 2004, an essential but tedious and time-consuming enterprise. Over time, information management and reporting thereon (e.g. Annual Reports) have become more sophisticated and probably akin to something normally seen in the private sector. These activities do not attract media attention, nor are their results immediately, or even soon, visible. On the other hand, scandals and embarrassing incidents have an immediate impact on reform efforts. They rapidly change positive, or confirm negative, perceptions of the Department and its management, placing at risk the broader reform effort. It is likely to be the case that public perceptions of the prison

system remain strongly coloured by the results of investigations, with the most sensational scandals having the strongest impact.

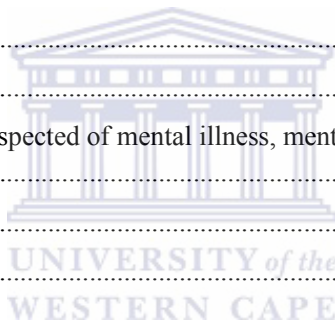
In coming to grips with the new constitutional order, the Department has, after 2001, demonstrated a deeper understanding of its constitutional obligations with reference to good governance principles. Even if this was the result of external pressure, a number of advances have been made to regain control and address practices that violated good governance requirements articulated in the Constitution.



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Chapter 5 Improving human rights standards

1. Introduction

As discussed in Chapter 4, it was especially since 2004 that the Department, supported by other structures such as the Special Investigations Unit (SIU), made a concerted effort to improve governance and strategically re-align it. While it was argued in the preceding chapter that advances were made in respect of addressing corruption, it will be contended here that compliance with human rights standards did not receive the same attention. This chapter will explore the state of human rights reform in the prison system and provide an assessment of the current situation. From the extant literature it is evident that the situation is far from desirable, and human rights violations and related concerns have been reported on a broad range of issues. It is not possible to deal with all of these within the scope of this thesis. A number of thematic issues have been identified, as they are regarded as key to analysing the reform challenges facing the prison system. These are briefly outlined below.

As contextual background to the discussion on human rights prison, it must be noted that, as mentioned in Chapter 3, overcrowding is a persistent phenomenon in the South African prison system. It will be shown that since 2005 there has been a notable decline in the size of the prison population, thus alleviating to some extent the immediate pressure on operations. Ideally this should have yielded positive results across a broad range of human rights areas, but the results are not conclusive.

The personal safety of prisoners continues to be under threat from inter-prisoner violence, sexual assault by prisoners, and assaults by officials. Deaths in custody, due to both natural and unnatural causes, remain unacceptably high, raising concerns about the quality of health care in prisons as well as the quality of investigations into unnatural deaths and the efforts that are undertaken to prevent such deaths. The compromised personal safety of prisoners poses fundamental questions about the Department's ability to ensure safe and humane custody, as required by the Constitution and the Correctional Services Act (111 of 1998).

Furthermore, this chapter discusses the use of segregation, mechanical restraints and force with reference to the mandatory reports that must be submitted by Heads of Prisons to the Judicial Inspectorate for Correctional Services when any such incidents occur. Nevertheless, compliance with this mandatory reporting is poor, which indicates a lack of knowledge and understanding among Heads of Prisons of the requirements of the Correctional Services Act. In the late 1990s super-maximum security prisons were much in vogue with the Department, and as a result two such facilities were established; however, their continued existence and utility-value needs to be questioned against constitutional standards.

Much of the litigation against the Department brought by prisoners after 2004 centred on parole. The first civilian parole boards established after 2004 held much promise, but their poor management and training resulted in numerous problems, inconsistent decision-making, and litigation. This had a material impact on sentence administration.

The chapter, in the last three sections, deals with three particular groups of prisoners who are highly vulnerable to rights violations, namely, women, children and unsentenced prisoners. In respect of all of these categories, some improvements on the legislative front are noted, but at implementation level there remains much room for improvement. The chapter commences with an overview of the legislative framework, making specific reference to human rights standards and the required conditions of detention.

2. Overview of the legal framework

While Chapter 2 has already dealt in general overview with the recognition of prisoners' rights in a constitutional democracy, a number of more specific points need to be raised with regard to the legal framework governing conditions of detention. The Constitution sets clear standards in respect of all arrested and detained persons, standards which are derived from the right to dignity articulated in section 10.¹ The emphasis here will be placed on the enumerated rights applicable to conditions of detention, as opposed to the rights pertaining to fair and just criminal procedure, or due process rights.²

¹ Steytler, N. (1998) *Constitutional Criminal Procedure – a commentary on the Constitution of the Republic of South Africa*, Durban: Butterworths, p. 183.

² Section 12(1) protects against arbitrary detention, and section 12(1)(b) against detention without trial. Section 35(1) sets out the basic rights of accused persons, such as the right to remain silent, be informed of the charges,

The first is the right to be free from torture and not to be treated or punished in a cruel, inhuman or degrading way.³ The second set of rights in respect of conditions of detention states that every detainee has the right to be detained under “conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”.⁴ Notably, these are minimum requirements, as evidenced by the use of the wording “at least”.⁵ The third set of rights focuses on contact with the outside world to prevent *incommunicado* detention by guaranteeing contact and communication between the detained person and his spouse or partner, next of kin, chosen religious counsellor, and chosen medical practitioner.⁶ The Constitution also makes specific provision for detained children,⁷ requiring, first, that their detention should be avoided or otherwise be for the shortest possible period, and, second, that they be detained separately from adults under conditions “that take account of the child’s age”.⁸

The Correctional Services Act (111 of 1998), in Chapter 3, operationalises the normative provisions of the Constitution by articulating especially detailed standards regulating conditions of detention and the treatment of prisoners. The legal prescripts are further supported by the Regulations to the Correctional Services Act and the Standing Orders (known as the B-Orders). It is not necessary to describe these here as it has been done elsewhere,⁹ but, in overview, progressive standards aligned to international human rights law¹⁰ cover the following areas: admission procedure; accommodation; nutrition; hygiene; clothing and bedding; exercise; health care; contact with community; religion, belief and opinion; deaths in prison; development and support services; access to legal advice; reading

not to be coerced to make a statement, to be brought before a court within 48 hours (or as soon as possible thereafter), and to be released from detention if permitted by the interests of justice.

³ s 12(1)(d-e) Act 108 of 1966.

⁴ s 35 (2)(e).

⁵ Steytler, N. (1998) pp. 192-194. Also Schwikkard, P. J. (2005) Arrested, detained and accused persons. In Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th Ed) Cape Town: Juta, pp. 772-776.

⁶ s 35(2)(f).

⁷ A child is a person under the age of 18 years.

⁸ s 28(1)(g).

⁹ Muntingh, L. (2010) *A guide to the rights and responsibilities of prisoners as described in the Correctional Services Act and regulations*, Bellville: Community Law Centre.

¹⁰ For example, the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules.

material; children; mothers of young children; complaints and requests; disciplinary infringements; procedures and penalties; safe custody; searches; identification; security classification; segregation; mechanical restraints; use of force; non-lethal incapacitating devices; and the use of firearms. Further standards are set in respect of sentenced and unsentenced prisoners, standards which outline the general approach and the prisoners' sentence status.

Building on earlier decisions,¹¹ the emerging jurisprudence on conditions of detention has dealt with the right to dignity,¹² solitary confinement,¹³ access to medical care,¹⁴ access to electricity,¹⁵ transfers to C-Max prison,¹⁶ and the transfer of children sentenced to a reform school from prison to reform schools.¹⁷ There is also a substantial body of unreported cases.¹⁸ The overall conclusion to be drawn is that the courts have been eager to adopt a progressive and expansive interpretation of prisoners' rights, especially where their conditions of detention and the actions of the DCS have posed a threat to, or already violated, the right to dignity. Seen collectively, the Constitution, the Correctional Services Act (and its subordinate legislation) and case law provide clear, firm and well-motivated standards regulating prisoners' rights and their conditions of detention. While overcrowding has remained a persistent problem, it has not been the subject of litigation in South African courts. However, in recent years there have been a number of decisions from the European Court of Human

¹¹ *Whittaker and Morant v. Roos and Bateman* 1912 AD 92. *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A). *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

¹² *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C).

¹³ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

¹⁴ *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C), *EN and Others v Government of the RSA and Others* (2007) ((1) BCLR 84 (SAHC Durban 2006) *S v Vanqa* 2000 (2) SACR 371 (Tk). *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (CPD). *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

¹⁵ *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342(W).

¹⁶ *Nortje en ander v Minister van Korrektiewe Dienste en ander* 2001 (3) SA 472 (SCA).

¹⁷ *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E).

¹⁸ De Vos, P. (2004) *Prisoners' rights litigation in South Africa since 1994 – a critical evaluation*. CSPRI Research Report No. 3, Bellville: Community Law Centre.

Rights¹⁹ and it is anticipated that in due course these will cross-pollinate thinking on the issue in South Africa.

3. Overcrowding

3.1 Overcrowding in the 2004 White Paper

As previously noted, prison overcrowding has been a long-standing problem, and since 1965 (the earliest date for which information is available) there has been a shortfall between the demand for prison space and the available accommodation. The 2004 White Paper states that the “Department regards overcrowding as its most important challenge, as it has significant negative implications on the ability of the Department to deliver on its new Core Business”.²⁰ With the new “core business” being rehabilitation, the White Paper’s analysis is thus somewhat restricted in that it falls short of identifying overcrowding primarily as a human rights issue, and, more specifically, of identifying the right to be free from torture and other ill treatment. In a number of decisions, the European Court of Human Rights (ECHR) has indeed confirmed that overcrowding is a threat to the right to be free from torture and other ill treatment.²¹ More particularly, the ECHR has held that once the available space per prisoner falls below a certain level, such a situation will invariably raise questions about the absolute

¹⁹ *Bakmutskiy v. Russia*, ECHR Application no. 36932/02, Strasbourg, 25 June 2009; *Kalashnikov v. Russia*, ECHR Application no. 47095/99, Strasbourg, 15 July 2002; *Orchowski v. Poland*, ECHR Application no. 17885/04, Strasbourg, 22 October 2009.

²⁰ Department of Correctional Services (2004 b) *White Paper on Corrections in South Africa*, Pretoria: Department of Correctional Services, p. 57 para 2.9.2.

²¹ *Orchowski v. Poland*, ECHR Application no. 17885/04, Strasbourg, 22 October 2009, *Kalashnikov v. Russia*, ECHR Application no. 47095/99, Strasbourg, 15 July 2002, *Bakmutskiy v. Russia*, ECHR Application no. 36932/02, Strasbourg, 25 June 2009.

prohibition of torture and other ill treatment.²² Other research has also emphasised the human-rights impact of overcrowded prisons.²³

Overcrowding should, however, be understood not only with reference to a space norm per prisoner. In addition to the provision of basic necessities (e.g. food, clothing, safety and shelter), conditions of detention should be assessed against other factors such as the adequacy of staff supervision, the availability of recreational opportunities, the amount of time spent outside of cells, and any other factor affecting the experience of imprisonment.²⁴ Nonetheless, the smaller the space available per prisoner, the more important the space norm becomes when assessing conditions of detention, overcrowding and the possible violation of the right to be free from torture and other ill treatment.²⁵

Albrecht, in a comprehensive review of the literature on prison overcrowding, concludes that overcrowded prisons have a negative impact on all conditions of imprisonment and intended consequences of imprisonment.²⁶ This overall negative impact is manifested in a number of ways, as summarised hereafter. Restricted living space, associated loss of privacy and human dignity erodes the legitimacy of the prison regime. Overcrowding further reduces the general services that are rendered to comply with the standards set for access to medical treatment, sanitary infrastructure, educational, training or rehabilitative programmes. Substandard

²² “In consequence, all situations in which a detainee is deprived of the minimum of 3 m² of personal space inside his or her cell, will be regarded as creating a strong indication that Article 3 of the Convention has been violated.” Para 123, *Orchowski v. Poland*, ECHR Application no. 17885/04, Strasbourg, 22 October 2009. Article 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

²³ Giffard, C. and Muntingh, L. (2006) *The effect of sentencing on the size of the South African prison population*, Cape Town: Open Society Foundation (SA); Steinberg, J. (2005) *Prison overcrowding and the Constitutional right to adequate accommodation in South Africa*, Johannesburg: Centre for the Study of Violence and Reconciliation; Chung, S.Y. (2000) Prison Overcrowding: Standards in Determining Eighth Amendment Violations, *Fordham Law Review*, Vol. 68 No. 6, pp. 2351-2400. <http://ir.lawnet.fordham.edu/flr/vol68/iss6/9> Accessed 25 November 2011; Liebling, A. and Maruna, S. (eds) (2005) *The effects of imprisonment*, Devon: Willan Publishing.

²⁴ Chung, S.Y. (2000).

²⁵ Albrecht, H. (2011) Prison Overcrowding - Finding Effective Solutions. In United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) *Report of the Workshop. Strategies and Best Practices Against Overcrowding in Correctional Facilities. Twelfth United Nations Congress on Crime Prevention and Criminal Justice. Salvador, Brazil, 12-19 April 2010*. Tokyo: UNAFEI, p. 69.

²⁶ Albrecht, H. (2011), p. 87.

medical services and a generally unhealthy environment places prisoners at an increased risk of infectious diseases such as tuberculosis (TB),²⁷ hepatitis (B and C) and HIV, but also limits the extent to which transmission prevention policies can be implemented and thus places the general population at risk when infected prisoners are released. In general, pre-trial detention in overcrowded prisons poses severe health risks.²⁸ Overcrowding and TB is a lethal combination, and recent South African research established that at overcrowding levels of 230% in communal cells (not uncommon in some prisons), coupled with poor TB case identification, results in TB transmission risks of 90% per annum.²⁹ Elevated suicide rates have also been associated with overcrowded prisons, as well as higher levels of prison violence.³⁰ Low staff-to-inmate ratios have implications for personal safety, the implementation of visits by families, and the control of contraband. Overcrowding is also associated with the overuse of imprisonment (as a sentence and pre-trial option). Young males with limited education from socio-economically disadvantaged areas are over-represented in the prison population, thus reinforcing social inequality. The serving of a prison sentence in overcrowded conditions has also been associated with higher rates of recidivism and re-entry problems. Furthermore, overcrowding may affect fair trial rights, as observed by the UN Working Group on Arbitrary Detention, which stated: “Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed.”³¹

²⁷ In a recent judgment a former awaiting-trial prisoner successfully sued the Minister of Correctional Services after he was detained for four years at Pollsmoor Prison, a severely overcrowded prison, and contracted TB (*Dudley Lee v Minister of Correctional Services*, Western Cape High Court, Case No. 10416/04 Unreported decision).

²⁸ Schönteich, K. (2011) *Pre-trial detention and health – unintended consequences, deadly results*, New York: Open Society Foundations.

²⁹ Johnstone-Robertson, S. et al (2011) Tuberculosis in a South African prison – a transmission modelling analysis, *South African Medical Journal*, Vol. 101, No. 11, p. 809.

³⁰ The link between violence and overcrowding is not directly causal, and research has found that overcrowding creates the environment for other adverse consequences which in turn have a closer link with prison violence. It appears that overcrowding is also mediated by inmate turnover, the type of inmate management, and programme availability (French, S. and Gendreau, P. (2006). Reducing prison misconducts: what works! *Criminal Justice and Behaviour*, Vol. 33 No.2, p.188).

³¹ E/CN.4/2005/6, para 69.

Prison overcrowding should thus be understood, first, as threatening to the right to be free from torture and other ill treatment; second, as contributing to the legitimacy deficit of the prison system; and, third, as foreshadowing consequences for the outside community. The 2004 White Paper's narrow analysis of overcrowding obscured the broader impact of prison overcrowding. The generalised assertion in the White Paper that overcrowding threatens the new core business of the Department fails to unpack the human experience of prison overcrowding. Moreover, since the DCS has limited control over the size of the prison population, blame for overcrowding is consequently displaced to other stakeholders in the criminal justice system, notably the police and the courts.

3.2 The post-2004 prison population size

At the time that the 2004 White Paper was adopted (May 2004), South Africa's prisons were severely overcrowded. Of the 186 533 prisoners, 57% were detained in prisons that were 175% or more full. In these prisons the available space per prisoner had been reduced to 1.9m² per prisoner or less,³² which is well below the official norm of 3.344m².³³ In the severely overcrowded prisons (175% or more occupied), 40% of prisoners were awaiting trial compared to 27% awaiting-trial prisoners in the total population. By February 2011 the situation had improved significantly on a national level. The proportion of prisoners detained in severely overcrowded facilities (175% or more full) had dropped to 34% from 57% in 2004. Moreover, the total prison population declined from 186 533 to 162 162. Awaiting-trial prisoners declined marginally from 51 734 to 49 695, or by 3.9%. Nationally, the occupancy level had dropped from 162.5% in May 2004 to 137.3% in February 2011, while capacity increased with 3 367 new bed spaces.³⁴

The 2004 White Paper proposed a number of measures to reduce prison overcrowding. Noteworthy is that these all focused on awaiting-trial prisoners even though the 2004 White Paper identified the mandatory minimum sentences as a contributing factor to overcrowding.³⁵ These measures were: the planned reduction of the detention cycle time of

³² General calculations such as these obscure the practical situation at ground level. In these prisons it may indeed be the case that, as a result of the separation of certain categories of prisoners, the space norm is better than 1.9m² in some cells, but in other cells it may be less.

³³ *Standing Orders of the Department of Correctional Services (B-Orders)* Order 2 Ch 2 para 2.1.

³⁴ Statistics supplied by the Judicial Inspectorate for Correctional Services.

³⁵ Criminal Law Amendment Act 105 of 1997.

awaiting-trial detainees; involvement in the Saturday courts project, then operational at 92 courts countrywide; the establishment of a Departmental Task Team to liaise with a task team working on overcrowding within the Security cluster at implementation level; the utilization of sections 62(f)³⁶ and 63A³⁷ of the Criminal Procedure Act by Heads of Prison in court applications to facilitate the release of prisoners; and the use of section 81 of the Correctional Services Act³⁸ to allow the release, under specific conditions, of awaiting-trial prisoners who have been granted bail but could not afford to pay due to the prisoner's personal social circumstances.³⁹

The results of these proposed measures were less than encouraging. The number of awaiting trial prisoners in custody has remained fairly stable since May 2004, and there is no reason to conclude that the detention cycle time has decreased⁴⁰ (see section 12.3 below) or that section 62(f) has been used more extensively. While section 63A held promise, it appears that it has

³⁶ Section 62(f) allows a court to place a person awaiting trial under correctional supervision as part of his or her bail conditions.

³⁷ Section 63A enables a Head of Prison who is of the view that the size of the prison population has taken on such proportions that it poses a threat to human dignity, physical health or safety of the prisoners, to apply to a court in respect of certain prisoners to have their bail conditions amended or released on warning in lieu of bail. The following prisoners could be considered: the person is charged with an offence for which the police could have granted bail; the offence is listed under Schedule 7 to the Criminal Procedure Act and there are no other charges; and the person has been granted bail but cannot afford to pay it.

³⁸ 81. Special measures for reduction of prison population

(1) If the Minister is satisfied that the prison population in general or at a particular prison is reaching such proportions that the safety, human dignity and physical care of the prisoners are being affected materially the matter must be referred to the National Council.

(2) The National Council may recommend the advancement of the approved date for placement of any prisoner or group of prisoners under community corrections and the Minister may act accordingly.

(3) Community corrections granted in terms of subsection (2) is subject to such conditions as may be imposed by the Correctional Supervision and Parole Board under whose jurisdiction the prisoners may fall or the Commissioner in terms of section 75 (7).

(4) In the case of unsentenced prisoners the Minister may release any such prisoner or group of such prisoners subject to such conditions as may be determined by the Minister with the concurrence of the Minister of Justice.

³⁹ Department of Correctional Services (2004 b) p. 58, para 2.9.3.

⁴⁰ At the end of May 2004 there were 21 754 awaiting trial prisoners in custody for longer than three months and by February 2011 this figure stood at 23 733. The slight increase is in all likelihood due to the seasonal increase after the courts had been in recess over the December–January period.

not been successful in facilitating the release of awaiting-trial prisoners due to the apparent complicated administrative procedure involved.⁴¹ A more likely explanation is that Heads of Prison fear litigation should they submit to a court that the conditions in their prison threaten the human dignity, safety and health of prisoners. The Saturday courts dealt with significant numbers of cases until 2004/5 when the project was discontinued.⁴² In short, the measures proposed in the 2004 White Paper to deal with overcrowding fell flat, save for the section 81 provision which is discussed below.

At the beginning of the 2005/6 financial year, the prison population stood at a massive 187 394 or 163% occupancy. Using section 81 of the Correctional Services Act, the Minister sought advice from the National Council on Correctional Services and then approached Cabinet with a proposal. Some changes were made by Cabinet and then submitted to the President for approval.⁴³ The President ultimately approved a maximum of six months special remission of sentence to all prisoners, probationers, parolees and day parolees irrespective of the crime committed. A further maximum of 14 months special remission of sentence was granted to all prisoners, probationers, parolees and day parolees serving sentences for crimes other than aggressive, sexual, fire-arm and drug related crimes.⁴⁴ The 2005 special remissions programme saw the release of nearly 32 000 sentenced prisoners in the latter half of that year.⁴⁵ The prison population dropped from more than 187 000 to 157 000 by 31 December 2005.⁴⁶ Similar mass releases have been implemented in the past and have been shown

⁴¹ Office of the Inspecting Judge (2009) *Annual Report of the Judicial Inspectorate for Correctional Services 2008/9*, Cape Town: Office of the Inspecting Judge, p. 10.

⁴² For example, in 2002/3 the Saturday Courts handled nearly 30 000 cases but by 2004/5 this had declined to 11751 and the project then officially stopped (National Prosecuting Authority (2006) *Annual Report of the National Prosecuting Authority 2005/6*, Pretoria: National Prosecuting Authority, p. 19.)

⁴³ PMG report on the meeting of the Portfolio Committee on Correctional Services of 23 August 2005, <http://www.pmg.org.za/minutes/20050822-department-report-special-remissions-briefing> Accessed 25 November 2011.

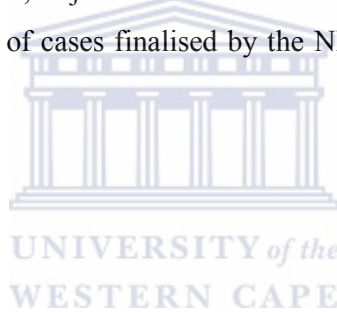
⁴⁴ PMG report on the meeting of the Portfolio Committee on Correctional Services of 23 August 2005, <http://www.pmg.org.za/minutes/20050822-department-report-special-remissions-briefing> Accessed 25 November 2011.

⁴⁵ Office of the Inspecting Judge (2006) *Annual Report of the Judicial Inspectorate for Correctional Services 2005/6*, Cape Town: Office of the Inspecting Judge, p. 4. Department of Correctional Services (2006) *Annual Report 2005/6*, Pretoria: Department of Correctional Services p. 14.

⁴⁶ Office of the Inspecting Judge (2006), p. 4.

domestically and internationally to have a short-lived impact on reducing overcrowding.⁴⁷ However, contrary to previous experiences with mass releases, the total prison population did not bounce back to previous levels, but increased only marginally by 3% from December 2005 till February 2011. This requires closer analysis.

The simple reason for the stabilisation of the prison population is that fewer prisoners, sentenced and unsentenced, were being admitted to prison, as shown in Figure 4 below. From 2004/5 to 2010/11, sentenced admissions declined by 51% and unsentenced admissions by 18%. At least two factors seem to have contributed to this. First, notwithstanding concerns about reported crime statistics, there had been a notable decline in the number of violent crimes reported.⁴⁸ Second, apart from spikes in 2008/9 and 2009/10, the total number of prosecutions in all three tiers of the criminal justice system has been in decline. For example, from 2004/5 to 2010/11 the number of cases finalised⁴⁹ by the National Prosecuting Authority (NPA) declined by 13%, or just more than 50 000 cases.⁵⁰ Figure 1 clearly shows a correlation between the number of cases finalised by the NPA and the number of sentenced admissions to DCS.



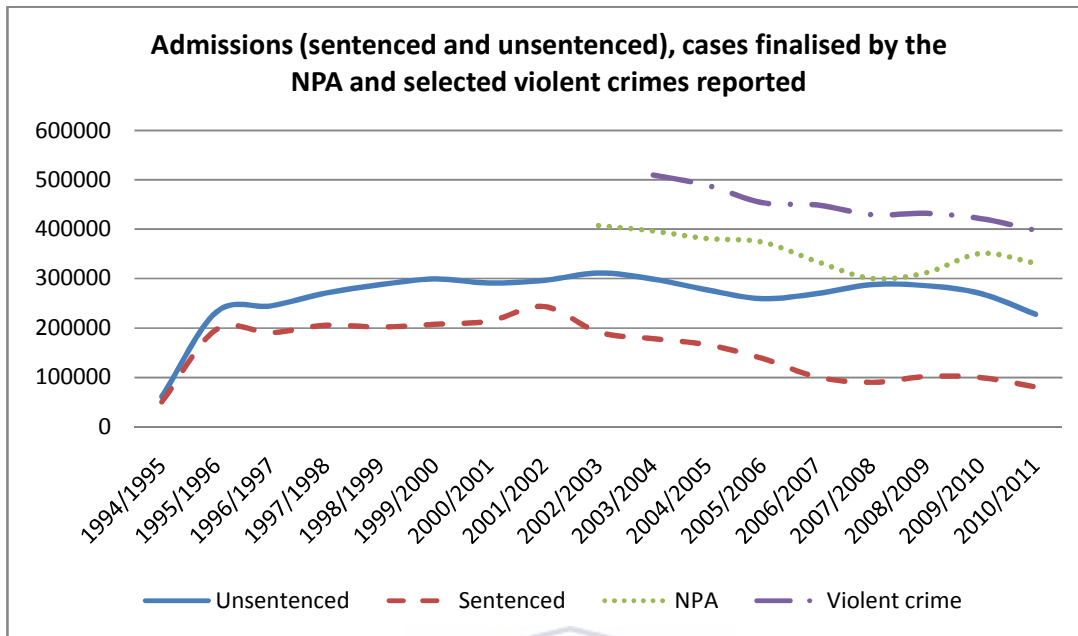
⁴⁷ Dissel, A. and Ellis, S. (2002) *Reform and stasis: Transformation in South African prisons*, Johannesburg: Centre for the Study of Violence and Reconciliation. Albrecht, H. (2011), p. 106.

⁴⁸ Reported crimes for the following categories, as collected by SAPS, were used to create the index: murder, attempted murder, aggravated robbery, and all sexual and assault with intention to cause grievous bodily harm (SAPS crime statistics <http://www.issafrica.org/crimehub/pgcontent.php?UID=1000062> Accessed 28 November 2011).

⁴⁹ These are cases with a verdict and exclude diverted cases.

⁵⁰ National Prosecuting Authority Annual Reports 2004/5 to 2010/11.

Figure 1



The overall picture is thus that the prison population has stabilised and overcrowding been alleviated. But this was unexpected and unplanned: it was not the result of any particular intervention on the part of the government. The combined effect of a reduction in reported (violent) crimes and a reduction in the number of sentenced and unsentenced people admitted to prison has ensured that the prison population did not quickly return to previous levels, as has historically been the case with amnesties and remissions. There is, however, good reason to believe that efficiency and efficacy problems in the criminal justice system also account for the decline in sentenced admissions. It remains the case that only a small proportion of violent crimes are successfully prosecuted. For example, it is estimated that a suspect is tried in court in only one-third of all contact crimes⁵¹ and then there is a further attrition at that stage too.

It can thus be accepted that even if overcrowding had not been resolved entirely after 2005 and that many prisons remain occupied above capacity, the negative effects of overcrowding on the prison system should have declined. The level of overcrowding had been reduced substantially and had thus created an environment more conducive for implementing the policies emanating from the 2004 White Paper. Crime levels remain unacceptably high, and

⁵¹ SA Police Services (2011) *Annual Report 2010/11*, Pretoria: SA Police Services p. 9.

if efficiency and effectiveness in the criminal justice system were to improve markedly, specifically crime solving and prosecution services, there may indeed be an increase in the number of people being admitted to prison again. For the foreseeable future it remains the case that the overwhelming majority⁵² of prisoners will continue to be detained in conditions in which they have less personal space available to them than legally permitted by the Department's Standing Orders (i.e. 3.344m²). More specifically, once the space norm is reduced to less than 3m² per prisoner it must serve as a strong indication of a possible violation of the right to be free from torture and cruel, inhuman and degrading treatment or punishment.

4. Deaths in custody

The Correctional Services Act, in section 15, sets out the requirements for dealing with prisoner deaths. All deaths in custody must be reported to the Office of the Inspecting Judge by the Heads of Prisons; this information forms part of a collection of mandatory reports to be made to the Inspecting Judge, who may then conduct, or instruct the National Commissioner to conduct, an investigation into the death. The obligation to inform the next of kin of the deceased prisoner rests with the Head of Prison. In the event that a medical practitioner cannot certify that the death was due to natural causes, the Head of Prison must report such a death in terms of section 2 of the Inquests Act (58 of 1959). It has been the practice of DCS to report, in its Annual Reports, on deaths due to both natural and unnatural causes, with the latter referring to murders, accidents and suicides. The following subsections will deal with both natural and unnatural deaths. In respect of deaths due to natural causes, particular attention is paid to HIV and AIDS, the occurrence of deaths over time, and medical parole. It will be argued that little action had been taken to prevent natural deaths and that when prisoners become terminally ill, the provisions for medical parole remain severely underutilized.

4.1 Deaths due to natural causes

⁵² On a national level, 86% of prisoners are detained in prisons that are occupied more than 100% (Statistics made available by the Judicial Inspectorate of Correctional Services).

4.1.1 Overall trends and HIV and AIDS

Figure 2 below shows the number of reported deaths due to natural causes from 1996/7 to 2010/11. It is evident that the number of deaths increased rapidly from a low base of 211 in 1996/7 and reached a peak in 2004/5 of 1 689 deaths; thereon it declined steadily, and by 2010/11 had reached a ten-year low. Although the HIV-status of deceased prisoners is not disclosed in the available reports, it is commonly accepted that the rapid increase of deaths due to natural causes was the result of HIV and AIDS.⁵³ A sample of death certificates studied by the Judicial Inspectorate for Correctional Services found that the main causes of death indicated on the certificates were TB, respiratory failure, pneumonia and right ventricular dysplasia (RVD). TB and pneumonia are strongly associated with AIDS deaths in prisons.⁵⁴

HIV prevalence appears to be slightly higher amongst prisoners than the general South African population, a pattern consistent with findings in other parts of the world.⁵⁵ A 2006 DCS-commissioned HIV/AIDS and syphilis prevalence survey amongst sentenced prisoners found that 19.8% were HIV-positive, slightly above the national infection rate of 16.25%.⁵⁶ Furthermore, of the prisoners who tested HIV-positive, nearly 60% were below the age of 35 years and the highest infection rate (46.6%) was in the 26-35 year age-category. The results of the 2006 survey indicated that the HIV infection rate in the prison population is much closer to the infection rate in the general population, and earlier estimates by Goyer and Gow that as many as 60% of prisoners may be HIV-positive⁵⁷ were shown to be unfounded. This lower-than-expected prevalence rate may suggest that the primary mode of infection is through unsafe sex prior to entering prison rather than sexual contact within prison.⁵⁸

⁵³ Muntingh, L. and Tapscott, C. (2009) HIV/Aids and the prison system, in Rohleder, P. Et al (eds) *HIV/Aids in South Africa 25 years on* London: Springer, pp. 305-321.

⁵⁴ Egamberdi, N. (2010) *HIV and Prisons in sub-Saharan Africa: opportunities for action*, Vienna: UNODC, p. 2.

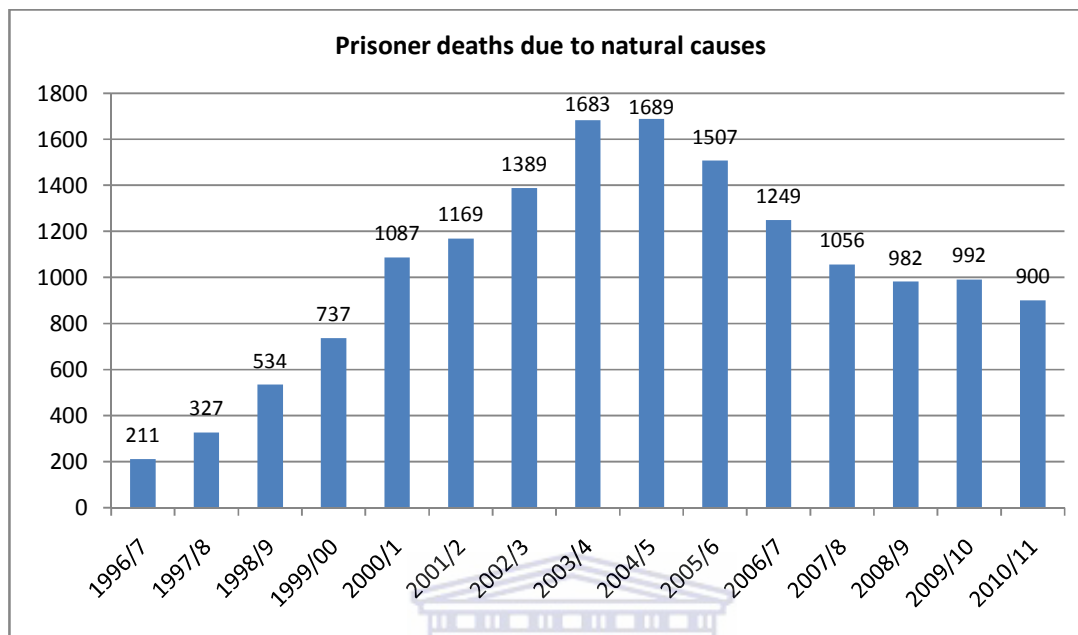
⁵⁵ Egamberdi, N. (2010), p. 1.

⁵⁶ Department of Correctional Services. (2008 b) *Unlinked, anonymous HIV and syphilis surveillance study among staff employed by, and offenders in the custody of, the Department of Correctional Services in South Africa*. Pretoria: Lim'Uvune Consulting.

⁵⁷ Goyer, K.C. and Gow, J. (2001). Confronting HIV/AIDS in South African prisons. *Politikon*, 28(2), 195-206.

⁵⁸ UNODC (2006) *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings – A Framework for an Effective National Response*, Vienna: UNODC/WHO/UNAIDS.

Figure 2



The substantial decline in the number of deaths after 2004/5 has not been studied independently and a possible explanation is presented here. First, the special remission of sentence programme in 2005 (discussed above in section 3.2) saw the release of nearly 32 000 sentenced prisoners. This consequently removed them from the possibility of dying in prison regardless of their state of health or HIV-status. Second, the reduction in the prison population undoubtedly eased the overcrowding situation, and the level of occupation after the 2005 remission has by and large been maintained (as was discussed above in section 3.2). In short, less crowded prisons make for healthier prisoners and a reduced risk of especially pneumatic infections such as TB. Third, after the *EN and Others* decision in the KwaZulu-Natal High Court (as discussed in more detail in Chapter 6, section 2.2.3), the DCS took a number of steps to address HIV and AIDS amongst prisoners. It established accredited ARV sites, and by 2009/10 there were 21 such sites in the DCS.⁵⁹ The number of prisoners on ARV increased rapidly from 2 323 in 2006/7 to 7 640 in 2009/10, although this figure dropped to 4 427 the following year.⁶⁰ Since 2006/7 large numbers of prisoners (in excess of 40 000 per year) also received information on voluntary counselling and testing (VCT) and a

⁵⁹ Department of Correctional Services (2010 a) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 75.

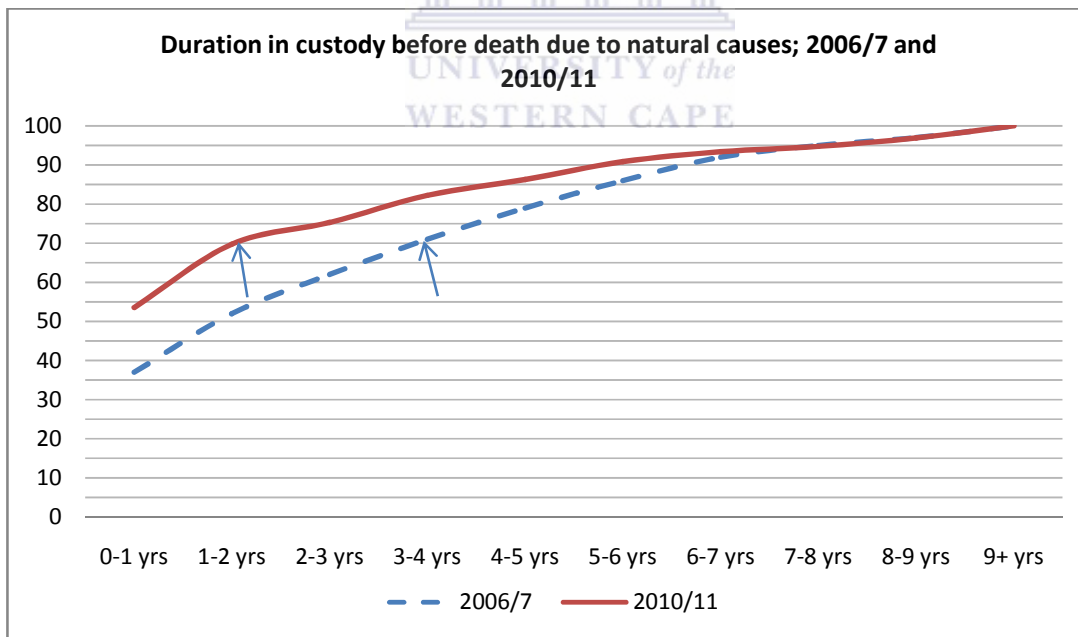
⁶⁰ DCS Annual Reports for the relevant years.

substantial share of them (approximately 10 000 per annum) were tested.⁶¹ Even though stigma remains associated with the disease and its treatment⁶² and the Department admits that it underestimated the ARV uptake,⁶³ the overall impression gained is that notable advances have been made in reducing prisoner deaths due to AIDS after 2006. Regrettably, the DCS only commenced with these steps once it was taken to court and compelled to implement the relevant policies making ARV available to qualifying prisoners.

4.1.2 Distribution of deaths over time

Prisoner deaths due to natural causes are not spread evenly across the duration of imprisonment. The Judicial Inspectorate has undertaken two analyses of trends in 2006/7 and 2010/11, respectively, and the results are presented in Figure 3 below. The 2006/7 sample found that 70% of deaths occurred cumulatively after four years in custody. The 2010/11 sample found that this level was reached after only two years in custody.

Figure 3

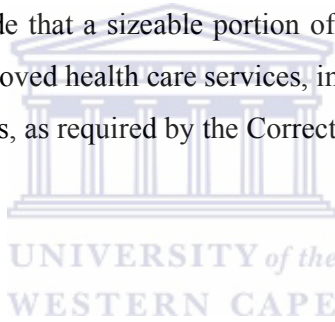


⁶¹ For example, in 2010/11 more than 53 000 prisoners received VCT and 10 226 were tested (Department of Correctional Services (2011 a) *Annual Report 2010/11*, Pretoria: Department of Correctional Services, p. 56).

⁶² Muntingh, L. and Tapscott, C. (2009).

⁶³ Department of Correctional Services (2011 a) p. 56.

While the total number of deaths had declined significantly, it appears that the time lapse to death has also shortened significantly. Regardless of an exact explanation for this trend, it appears that people are admitted to prisons with a compromised health status (not only arising from HIV infection but also as a consequence of asthma, tuberculosis, diabetes and other illnesses) and that, due to inadequate health care services in the prisons, superficial health status examinations and unhealthy detention conditions, the state of health of many prisoners deteriorates rapidly, leading to their death after a relatively short period in custody. Basic health care facilities are also absent from a number prisons, as was found by the Judicial Inspectorate for Correctional Services in an infrastructure audit conducted in 2007/8.⁶⁴ A further indication of the quality of health care is the alarming volume of complaints lodged by prisoners with the Judicial Inspectorate for Correctional Services regarding health care – these amounted to nearly 40 000 in 2010/11.⁶⁵ The reduction in the number of natural deaths should therefore not be interpreted as a sign that the prison health care system is in a good state. There is reason to conclude that a sizeable portion of deaths due to natural causes are indeed preventable through improved health care services, improved access to health care and proper health status examinations, as required by the Correctional Services Act.



4.1.3 Medical parole

Prior to being amended in 2011 by Act 5 of 2011, the Correctional Services Act (11 of 1998) made provision for the release on medical parole of a terminally ill sentenced prisoner who is in the final phase of an illness or condition so that he would be able to die a dignified and

⁶⁴ The following prisons, from a sample of 93 inspected, were found to be without any health care infrastructure or health-care personnel: Brits; Rustenburg Medium B; Bergville; Estcourt; Kranskop; Empangeni; Ingavuma; Melmoth; Mtunzini; Nkandla; Mafikeng; Brandfort; Bethulie; Lindley; Victoria West; Zastron; and Drakenstein Medium A (Office of the Inspecting Judge (2008) *Annual Report of the Judicial Inspectorate 2007/8*, Cape Town: Office of the Inspecting Judge, p. 19.). Sifunda, S., Reddy, P. et al (2006) Access point analysis on the state of health care services in South African prisons: A qualitative exploration of correctional health care workers' and inmates' perspectives in Kwazulu-Natal and Mpumalanga, *Social Science & Medicine*, Vol.63 pp. 2301–2309.

⁶⁵ Office of the Inspecting Judge (2011) *Annual Report of the Judicial Inspectorate 2010/11*, Cape Town: Office of the Inspecting Judge, p. 33.

consolatory death.⁶⁶ However, medical parole became embroiled in controversy for two reasons, both of which call the decision-making procedure into doubt. First, although the number of prisoners dying of natural causes soared, as shown above in Figure 2, the number of prisoners released on medical parole remained, with one exception in 2007, less than 100 per year.⁶⁷ The vast discrepancy between the number of deaths due to natural causes and the number of medical parole releases raised questions about its application. In 2008/9 the Judicial Inspectorate established that, based on a sample of deaths due to natural causes, 86% of deceased prisoners were receiving medical treatment at the time of death and that the seriousness of their medical condition was thus known to the DCS. However, only 14% of them were considered for medical parole, and all passed away before the process was finalised.⁶⁸ Civil society organisations, the Judicial Inspectorate and the Portfolio Committee on Correctional Services were deeply concerned about the apparent underutilisation of medical parole.⁶⁹ Despite questioning from external stakeholders, the Department had not been able to provide a satisfactory explanation for the discrepancy between natural deaths and medical parole releases. Nonetheless, the overall impression was that the DCS was slow to initiate the application process for medical parole. The reluctance of the DCS to initiate the process of medical parole, coupled with the parole boards' own interpretation of how to apply the law, contributed to the discrepancy.

This was well illustrated in the *Stanfield* decision.⁷⁰ The applicant was denied medical parole even though diagnosed with a terminal lung cancer for which no further treatment was

⁶⁶ s 79 “Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.”

⁶⁷ CSPRI submission to the Portfolio Committee on Correctional Services regarding deaths in prison and medical parole, PMG Report on the meeting of the Portfolio Committee on Correctional services of 5 August 2008, <http://www.pmg.org.za/report/20080805-briefing-south-african-human-rights-commissioncivil-society-prison-re> Accessed 10 January 2012. Office of the Inspecting Judge (2009) p. 26.

⁶⁸ Office of the Inspecting Judge (2009) pp. 24-25.

⁶⁹ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 12 August 2008, <http://www.pmg.org.za/report/20080812-medical-parole-minister-and-department-correctional-services%E2%80%99-report> Accessed 31 December 2011.

⁷⁰ *Stanfield v Minister of Correctional Services and Others* [2003] ZAWCHC 46; [2003] 4 All SA 282 (C) (12 September).

available and having, according to the treating physicians, limited life expectancy. He turned to the Cape High Court after the parole board refused to release him on medical parole. According to the parole board, he was not visibly sick, was able to take care of himself, and, above all, continued to smoke. The Court placed the emphasis on the right to dignity and was most displeased with the parole board's handling of the case:

The third respondent's failure to respect the applicant's inherent right to human dignity came to the fore, firstly, in his assessment of the applicant's physical condition for purposes of section 69 of the [1959] Act. By restricting his understanding of such condition to the applicant's external or outward appearance, which is clearly only temporary and will undoubtedly undergo a radical change in the near future, the third respondent chose to ignore, or downplay, the fact that he is suffering from an inoperable and incurable disease that will inevitably cause his death within a few months. To insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity. On the contrary, the overriding impression gained from the third respondent's attitude in this regard is that the applicant must lose his dignity before it is recognised and respected.⁷¹

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In 2009 the second controversy emerged. Mr. Schabir Shaik, the former financial advisor to then Deputy President Jacob Zuma, was convicted of fraud and corruption in June 2005 and sentenced to 15 years' imprisonment. He appealed to the Supreme Court of Appeal, but was unsuccessful and started serving his term of imprisonment in November 2006.⁷² However, shortly thereafter he reportedly developed health problems and was transferred to a private medical facility.⁷³ Here he remained until 3 March 2009, when he was released on medical

2003)

⁷¹ *Stanfield v Minister of Correctional Services and Others* [2003] ZAWCHC 46; [2003] 4 All SA 282 (C) (12 September 2003), para 124.

⁷² 'Cell doors clang shut for Shaik' *IOL*, 9 November 2006, <http://www.iol.co.za/news/south-africa/cell-doors-clang-shut-for-shaik-1.302477> Accessed 12 January 2012.

⁷³ 'Shaik still being treated at hospital' *IOL*, 15 December 2006, <http://www.iol.co.za/news/south-africa/shaik-still-being-treated-at-hospital-1.307658> Accessed 12 January 2012.

parole.⁷⁴ In effect he served two years and four months of his 15-year prison term, and most of that in a private medical facility.⁷⁵ His release provoked an uproar from the public and the media; given his close connections with the ANC leadership, political interference was suspected. His behaviour while supposedly terminally ill (e.g. playing golf, being seen at his favourite restaurant, and allegedly assaulting a journalist) added fuel to the flames of speculation that the decision to release him had been subject to political manipulation. Regardless of numerous calls for a review of the decision, investigations by the media, and Shaik's own misbehaviour, his medical parole was not revoked, although he was briefly detained in 2011.⁷⁶ The Shaik saga placed the entire medical parole system under suspicion. As the events unfolded, a firm impression was created in the public mind that medical parole is a remote possibility for ordinary prisoners who are terminally ill but an open avenue for a politically connected élite seeking to avoid imprisonment.

In 2011 the provisions in the Correctional Services Act 111 of 1998 dealing with medical parole were amended to broaden its scope and also set out the relevant procedure.⁷⁷ The changes were in all likelihood prompted by the Shaik case. The originally narrow scope for medical parole (i.e. the prisoner being in the final phase of any terminal illness or condition)⁷⁸ was extended to include a sentenced prisoner "suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care".⁷⁹ Sentenced prisoners therefore need not be in the "final phase" of a terminal illness or condition, but merely suffering from a

⁷⁴ 'Shaik walks free' *IOL*, 3 March 2009, <http://www.iol.co.za/news/south-africa/shaik-walks-free-1.436176>
Accessed 12 January 2012.

⁷⁵ Although the Correctional Services Act (s 12(3)) provides that a prisoner can consult with and be treated by his private medical practitioner at his own cost, the Act does not provide for or prohibit that he be transferred to a private medical facility. The Standing Orders (Order 3, Chapter 3) also does not provide for a situation where a prisoner offers to pay for his residence at a private medical facility. Provision is, however, made for a situation in which there is no space available at a public hospital and where a transfer to a private facility can be arranged; in this case, the transfer will be at state expense.

⁷⁶ 'Shaik to be released on Wednesday' *IOL*, 16 March 2011, <http://www.iol.co.za/news/south-africa/kwazulu-natal/shaik-to-be-released-on-wednesday-1.1042708>.

⁷⁷ The amended provisions were not yet in operation at the time of writing (December 2011).

⁷⁸ Mujuzi, J. (2009) Releasing Terminally Ill Prisoners on Medical Parole in South Africa. *South African Journal of Bioethics and Law*, Vol. 2 No. 2.; Muntingh, L. (2006) Medical parole: prisoners' means to access anti-retroviral treatment, *AIDS Law Quarterly*, Vol. 10, pp. 8-10.

⁷⁹ s 79 (1)(a).

terminal illness or condition. The scope is further broadened by including sentenced prisoners who can no longer take care of themselves due to illness, disease or injury; however, there is no requirement that the condition must be terminal. This provision, for example, would deal with sentenced prisoners who had become physically disabled during imprisonment. The amendment also sets out a procedure for addressing unsentenced prisoners who had become terminally ill or incapacitated, one requiring the Head of Prison to make an application to the relevant court to amend the bail conditions of the prisoner.⁸⁰

While the amendment broadened the scope of medical parole, it also introduced a new criterion which could possibly restrict it again, namely, the risk of reoffending upon release.⁸¹ The risk should be assessed against a number of factors, these being, “amongst others”:⁸² whether the presiding officer was aware of the medical condition for which medical parole is being sought; any remarks by the presiding officer; the type of offence(s) and the balance of the sentence remaining; the previous criminal record⁸³ and any of the factors applicable to any sentenced prisoner being considered for parole.⁸⁴ A further requirement of the amended section 79 is that there should be appropriate arrangements for supervision, care and treatment of the medical parolee in the community.⁸⁵ Section 79(2) places the onus firmly on the prisoner (himself, his doctor or family member) to initiate the application process for medical parole according to specified procedural requirements. Prior to the amendment there was no direction in this regard.⁸⁶

⁸⁰ s 49F Act 5 of 2011.

⁸¹ s 79(1)(b).

⁸² The amended section 79 prefaces the list of factors to be considered with the words “amongst others”, and hence it does not limit the factors to be considered by those listed in the amended section 79.

⁸³ s 79(5).

⁸⁴ These are: the offence or offences for which the prisoner is serving a term of imprisonment together with the judgment on the merits and any remarks made by the sentencing court in question at the time of the imposition of sentence if made available to the Department; the previous criminal record of such prisoner; the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such prisoner; and the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced. If the prisoner had been declared a habitual criminal, there should be a reasonable probability that the prisoner will in future abstain from crime and lead a useful and industrious life, or the prisoner is no longer capable of engaging in crime, or for any other reason, it is desirable to place the prisoner on parole (s 42(2)(d)).

⁸⁵ s 79(1)(c).

⁸⁶ Muntingh, L. and Ballard, C. (2011 a) Correctional Matters Amendment Bill (41 of 2010), *CSPRI Newsletter*, No. 38, June.

It appears, then, that the amended section 79 makes it even more difficult for a prisoner to be released on medical parole, since it combines the health status of the offender, the risk of re-offending and penal concerns.⁸⁷ This framework is at odds with the *Stanfield* decision,⁸⁸ which found that the central issue when considering medical parole is the right to dignity of the prisoner which is non-derogable; it also found that any limitation must comply with the requirements in the limitations clause of the Constitution.⁸⁹ The *Stanfield* court found that other concerns are subservient to the right to dignity, such as the length of sentence remaining or the seriousness of the offence. The amended section 79 was, at the time of writing (December 2011), not yet operational, but for the reasons set out above its constitutionality is open to challenge since it clearly goes against the *Stanfield* decision.

4.2 Deaths due to unnatural causes

Deaths due to unnatural causes refer to murders, accidents and suicides. Until the publication of the 2009/10 Annual Report of the Judicial Inspectorate for Correctional Services, very little was known about the profile of these deaths (e.g. proportional distribution between suicides, accidents and murders) because only an aggregate figure was reported by the DCS in its Annual Reports. The Judicial Inspectorate's Annual Reports for 2009/10 and 2010/11 provided more detailed information on 103 of these deaths.⁹⁰ The causes of death are summarised in Table 1 below. Just over 60% of unnatural deaths were due to suicide, with the overwhelming majority of these caused hanging. Homicides constitute a third, and this is equally distributed between three subcategories, namely, homicide by a prisoner, by an official, and by prisoners and officials.⁹¹

Table 1

Cause of death	Percentage
All suicide	60.2

⁸⁷ Muntingh, L. and Ballard, C. (2011 a).

⁸⁸ *Stanfield v Minister of Correctional Services and Others* () [2003] ZAWCHC 46; [2003] 4 All SA 282 (C) (12 September 2003).

⁸⁹ s 36.

⁹⁰ Office of the Inspecting Judge (2010) *Annual Report of the Judicial Inspectorate 2009/10*, Cape Town: Office of the Inspecting Judge, pp. 59-76. Office of the Inspecting Judge (2011) pp. 57-75.

⁹¹ The latter category usually refers to instances in which officials intervened in fights between inmates but acted with excessive force and, in so doing, inflicted fatal injuries.

Accidents	3.9
Homicide by inmate	11.7
Homicide by inmates and officials	9.7
Homicide official only	8.7
Other	1.9
Unknown	3.9

Suicides and other forms of self-harm have been studied extensively elsewhere⁹² but remain severely understudied in South Africa, with the result that only the most rudimentary data are available. Of the 62 suicide cases, it was known in 55% of the cases that the prisoner posed a suicide risk, which indicates that officials either failed to take suicide threats and personal circumstances seriously, or were not able or willing to respond appropriately to the situation. Of the prisoners who committed suicide by hanging, half did so after eight or less months in custody, indicating that this is a critical period for self-harm.

At policy level, there is little to indicate that suicide prevention is a priority for the Department, save for a brief mention in the 2010/11 Annual Report noting the need to review “current strategies”.⁹³ The current strategies presumably refer to the Standing Orders, which deal with suicide prevention in an elementary manner⁹⁴ but nonetheless provide the basis for an effective response.⁹⁵ Since more than half of all successful suicides were known to pose a suicide risk, it seems more likely that the requirements in the Standing Orders were either not complied with at all or complied with only in part.

The capacity of the DCS to deal with prisoners’ mental health, especially those exhibiting serious behavioural problems, is severely constrained by the lack of psychologists. At the end of the 2010/11 financial year, more than half of the funded posts (113 in total) were vacant; in other words, there was effectively one psychologist for every 2 900 prisoners.⁹⁶ That being said, the responsibility to prevent suicides and other forms of self-harm rests with all

⁹² Liebling, A. and Maruna, S. (eds) (2005).

⁹³ Department of Correctional Services (2011 a) p. 48.

⁹⁴ For comparative purposes see: World Health Organisation (2000) *Preventing suicide - a resource for prison officers*, Geneva: Mental and Behavioural Disorders, Department of Mental Health, World Health Organization.

⁹⁵ Department of Correctional Services, B-Order 2: Chapter 6 – Section duties, Section 19 - Combating Suicide among ‘Prisoners’.

⁹⁶ Department of Correctional Services (2011 a) p. 202.

custodial staff, as acknowledged in the Standing Orders, and is not the sole preserve of the few psychologists employed by the Department.

In respect of the homicide cases involving officials, there had not been a single criminal prosecution at the time that the Judicial Inspectorate published the two relevant Annual Reports.⁹⁷ Even though the descriptions provided in the Judicial Inspectorate for Correctional Services annual reports are brief, a number of traits are clear.⁹⁸ The deaths implicating officials were the result of aggravated assaults inflicted either as punishment or in retaliation for an assault on an official. It also appears that these assaults were committed by groups of officials on single prisoners. In several of the cases it was noted by the Judicial Inspectorate that the assaults continued after the prisoner was subdued and/or the situation stabilised, thus exceeding the use of minimum force requirements in the Correctional Services Act.⁹⁹ The most common weapon used by officials was a baton, but prisoners were also subjected to kicks, teargas and electroshock equipment.¹⁰⁰ In a number of cases the deceased was denied prompt medical attention even though the Correctional Services Act is clear that any prisoner who is subjected to the use of force must immediately undergo a medical examination.¹⁰¹ It is also apparent that when disciplinary action was taken against officials, the proceedings took

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⁹⁷ Office of the Inspecting Judge (2010), Office of the Inspecting Judge (2011).

⁹⁸ Submission by CSPRI to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011.

<http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 21 December 2011.

⁹⁹ s 32 of the Correctional Services Act.

¹⁰⁰ The appropriateness of having and using electroshock equipment in prisons is increasingly under question. (Omega Research Foundation and the Institute for Security studies (2011) Submission on the Prevalence of Torture in Correctional Centres, Jointly Submitted to the Portfolio Committee on Correctional Services, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011.

<http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 21 December 2011.)

¹⁰¹ s 32(5) of the Correctional Services Act.

extremely long to be finalised, that the charges were inappropriate,¹⁰² and that the sanctions imposed were light.¹⁰³

The overall trends described above with reference to suicides and homicides give little reason for optimism as the current situation foments a culture of indifference and impunity. The Department has also not provided an adequate explanation for the lack of suicide prevention initiatives or the failure to investigate deaths properly. Notwithstanding domestic¹⁰⁴ and international legal obligations¹⁰⁵ to investigate deaths in custody, homicides implicating officials reveal a pattern in which investigations are slow, disciplinary charges minor, sanctions imposed light, and criminal prosecutions unlikely.

5. Assaults and torture

South Africa does not have legislation criminalising torture, as required by Article 4 of the UN Convention against Torture (UNCAT), and this remains a notable failure of compliance with the Convention. Assaults on, and torture of, prisoners are disturbingly common in South Africa's prisons, yet the DCS has failed to deal with them appropriately. DCS Annual Reports, as well as the Annual Reports of the Judicial Inspectorate for Correctional Services, have dutifully noted the number of assaults reported by prisoners, be these perpetrated by officials or fellow prisoners. For example, in 2009/10 a total of 2 189 complaints were lodged by prisoners with the Judicial Inspectorate for Correctional Services, alleging assault by an

¹⁰² Even though little information is provided on the charges against implicated DCS officials, it appears that these are lesser charges such as misconduct, disregarding security rules, negligence, falsifying registers and altering the scene of a crime.

¹⁰³ The following sanctions were imposed in respect of the cases reported in 2009/10: one month suspended without pay – 8 officials; final written warning – 4 officials; written warning – 2 officials; demotion – 1 official; and dismissal – 1 official.

¹⁰⁴ Inquest Act 58 of 1959.

¹⁰⁵ UNCAT Article 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." UNCAT Article 13: "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

official on a prisoner.¹⁰⁶ For the same period the DCS reported that 317 assaults per 10 000 prisoners (or in excess of 5 000 assaults) were recorded, although this figure is not disaggregated and therefore includes inter-prisoner violence.¹⁰⁷ Despite the high number of reported assaults, few officials were subject to disciplinary procedures in connection with assaults.¹⁰⁸ However, prisoners and former prisoners increasingly direct themselves to the courts for relief, and by end of the 2010/11 financial year the Department's financial statements reflected contingent liabilities amounting to a colossal R976 million (US\$ 143.5 million) as a result of claims alleging "Bodily Injury/Assault".¹⁰⁹ Moreover, the number of claims against the Department increased by 43% from 2009/10 to 2010/11, a third of these claims being for assault.¹¹⁰

Allegations of torture have also attracted the attention of the UN Committee against Torture (CAT). In response to South Africa's initial report required under UN Convention against Torture (UNCAT),¹¹¹ it expressed concern in 2006 about the high number of deaths in detention as well as the growing number of allegations of torture and ill treatment.¹¹² The Committee was concerned, too, about the lack of investigation of the alleged ill-treatment of detainees and with the apparent impunity of law enforcement personnel. CAT also requested additional information from the South African government to be submitted within 12 months; this information did not materialise, and nor did the next periodic report, which was due on 31 December 2009.¹¹³

In 2006, when CAT was assessing South Africa's initial report, it was informed of an incident at St Albans prison (Port Elizabeth, Eastern Cape) in July 2005, during which

¹⁰⁶ Office of the Inspecting Judge (2011) p. 37.

¹⁰⁷ Department of Correctional Services (2011 a) p. 47.

¹⁰⁸ In 2010/11 a total of 208 officials faced disciplinary action under the category 'Assault, attempt or threatens to assault, another employee or person while on duty'. (Department of Correctional Services (2011 a) p. 222).

¹⁰⁹ Department of Correctional Services (2011 a) p. 193.

¹¹⁰ Department of Correctional Services (2011 c) *Annual Litigation trends analysis report – 1 April 2010 until 31 March 2011*. Report presented to the Portfolio Committee on Correctional Services on 18 October 2011.

¹¹¹ CAT/C/52/Add.3; HRI/CORE/1/Add. 92

¹¹² CAT/C/ZAF/CO/1 para 20.

¹¹³ Report status by country: South Africa

<http://www.unhcr.ch/tbs/doc.nsf/NewhvVAlISPRByCountry?OpenView&Start=1&Count=250&Expand=162.1#162.1> Accessed 3 December 2011.

officials staged a mass assault on prisoners, reportedly in retaliation for the fatal stabbing of a warder.¹¹⁴ In deliberations with CAT, the South African government evaded the allegations and stated that, as the matter was subject to a civil claim, it was sub judice.¹¹⁵ The mass assault was particularly brutal.¹¹⁶ In its aftermath, the prisoners were denied access to medical treatment as well as legal representation. The latter was remedied only after a successful High Court application.¹¹⁷

One prisoner, a Mr. McCullum, assisted by legal counsel, made numerous attempts to have the mass assault investigated and to seek relief. These efforts amounted to nothing, and he subsequently directed an individual complaint to the UN Human Rights Committee (HRC).

¹¹⁴ Muntingh, L. and Fernandez, L. (2006) *Civil Society Prison Reform Initiative (CSPRI) submission to the UN Committee Against Torture in response to 'Republic Of South Africa – First Country Report on the implementation of the Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment'*, Bellville: Community Law Centre, para 57.

¹¹⁵ CAT/C/SR.739 para 57.

¹¹⁶ The following is an extract from the decision by the United Nations Human Rights Committee (HRC) in the McCullum matter and describes the events at St Albans prison: *On 17 July 2005, the author [McCallum], together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M., intervened and forcibly removed the author's shirt. In the corridor, Warder M. kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognized five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P. requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them. Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them into their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus. As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain. At some point, Warder P. approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, faeces and blood and some inmates fell over each other.* (CCPR/C/100/D/1818/2008)

¹¹⁷ 'Court victory for St Alban's prisoners'. *The Herald*, 24 April 2006.

On 2 November 2010 the HRC released its decision, finding that his right to be free from torture, as protected by Article 7 of the International Covenant on Civil and Political Rights (ICCPR), had been violated.¹¹⁸ Even though the decision attracted some media attention, the DCS did not respond at the time. However, nearly a year later, when the matter was brought to the attention of the Portfolio Committee on Correctional Services by the South African Human Rights Commission (SAHRC), the DCS did respond.¹¹⁹ It placed an advertorial in the major newspapers claiming that the Department had not been given the opportunity to respond, and that if they had been, the outcome may have been different. This was, of course, untrue, as the HRC had on five occasions invited the South African government to respond.¹²⁰ Nonetheless, government gave the undertaking that the investigation will be reopened.¹²¹ The Portfolio Committee on Correctional Services subsequently took up the broader issue of torture and held public hearings on the prevalence of torture in November 2011, a step indicating some growing awareness of the absolute prohibition of torture.¹²²

The McCullum decision is significant for a number of reasons, since it developed into a small crisis and pointed to numerous failures in the safeguards for protecting prisoners. First, it demonstrated the shambolic nature of the government's internal systems for communicating and coordinating with treaty monitoring bodies. If the failure to cooperate with the HRC were a deliberate one, it reeks of malfeasance.¹²³ Second, the Department's actions since South

¹¹⁸ ICCPR Art 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹¹⁹ Telephonic interview with Ms J. Cohen, SA Human Rights Commission, Parliamentary Programme, 3 December 2011.

¹²⁰ CCPR/C/100/D/1818/2008 para 4.

¹²¹ Response by South African Government to the findings of the United Nations Human Rights Committee in the matter of McCullum, 29 September 2011. Statement by Department of Correctional Services, issued by Government Communication Service

<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=21945&tid=44442> Accessed 21 October 2011.

¹²² PMG report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011, <http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 28 December 2011.

¹²³ At the time of writing, the DCS was embroiled in a class action of 231 prisoners and former prisoners who were the victims of the St Albans mass assault. The DCS was evidently frustrating all efforts at redress and the

Africa ratified UNCAT in 1998 reflect an attitude of indifference to the broader issue of torture. Notwithstanding the White Paper's repeated references to prisoners' constitutional rights (one of which is the right to be free from torture), little evidence exists that the DCS has taken any tangible steps to prevent and reduce assaults by officials on prisoners. Third, at policy level there is still no policy on the prevention and eradication of torture in the DCS, and the concept of torture has not yet entered the Department's terminology. Fourth, instead of holding perpetrators of torture accountable and ensuring their criminal prosecution (even if on assault and attempted murder charges), the DCS leadership has rather opted to shield them from prosecution and create obstacles for victims seeking redress. With reference to the McCullum case, the DCS senior management was already aware of the incident by 2006, disclosing as much to CAT, but failed to address the issues at hand. Fifth, when the McCullum case was reported to various institutions (e.g. SAPS and the Judicial Inspectorate for Correctional Services), there was a general failure to respond and investigate. It is unknown whether this was due to a lack of willingness or lack of capacity to investigate the allegation. Nonetheless, the McCullum case demonstrated the institutional and systemic failure to deal with allegations of torture in a manner that is compliant with Articles 12 and 13 of UNCAT.

The absence of legislation criminalising torture, combined with the Department's poor response to allegations of torture and ill treatment, have left prisoners vulnerable to violations in this regard. Notwithstanding the absolute prohibition of torture and the high number of alleged assaults reported annually to the Department and the Judicial Inspectorate, there is little evidence to indicate that the Department has taken any meaningful and tangible steps to abide by its obligation to promote and protect the constitutional right of prisoners to be free from torture and other ill treatment.

6. The mandatory reports to the Judicial Inspectorate for Correctional Services

The drafters of the Correctional Services Act (111 of 1998) were alive to the fact that the Judicial Inspectorate for Correctional Services would have limited capacity and not be able to

claimants ultimately had to obtain a court order to compel the Department to release the necessary evidence pertaining to the assault as is required by the discovery procedure (*The Herald*, 23 November 2011).

monitor all activities relating to the treatment of prisoners. Furthermore, in respect of serious incidents and high risk areas, it would be important to have the Department's version of events on record should there be further investigations. Consequently, a structured statutory monitoring mechanism in respect of certain operations was established, and the Correctional Services Act requires the DCS (i.e. Head of Prison) to report to the Office of the Inspecting Judge on a specified number of issues. The submission of these reports is mandatory and deals with aspects of prison operations generally considered as high risk areas for rights violations. Accordingly, a Head of Prison must report the following to the Inspecting Judge: all deaths of prisoners;¹²⁴ the segregation and extended segregation of prisoners;¹²⁵ the use of mechanical restraints;¹²⁶ and all instances where force was used.¹²⁷ The Correctional Services Amendment Act (25 of 2008) effected two changes to the mandatory reports requirements. First, the amendment removed the penalty "solitary confinement" from the Act, which was prior to the amendment requiring a mandatory report from the Head of Prison to the Inspecting Judge. Prior to the amendment, the penalty of solitary confinement was subject to a mandatory review by the Inspecting Judge, who had to confirm or set aside the decision after reviewing the record of proceedings. Implementation may only have commenced after confirmation by the Inspecting Judge. The second change introduced the requirement that when force was used, a report must also be submitted to the Inspecting Judge by the Head of Prison.

Compliance with the legislative provisions has not been at the desired level, even in respect of deaths in custody.¹²⁸ It furthermore remains questionable whether the mandatory reports are effective in preventing rights violations and abuses. In the remainder of this section, segregation, mechanical restraints and the use of force are discussed.

6.1 Solitary confinement and segregation

¹²⁴ s 15(2).

¹²⁵ s 30(6).

¹²⁶ s 31(3)(d).

¹²⁷ s 32(6).

¹²⁸ Office of the Inspecting Judge (2010) pp. 29-33.

Even though the disciplinary punishment of solitary confinement has been removed from the legislation by the 2008 amendment, it is necessary to describe it as there is reason to conclude that it still occurs under the guise of segregation. Originally the distinction between solitary confinement and segregation was clear: solitary confinement was a punishment following a disciplinary procedure, while segregation was a mechanism used for a range of other purposes. Segregation is therefore permissible under the following conditions: if a prisoner requests to be placed in segregation;¹²⁹ to give effect to the penalty of the restriction of amenities; if prescribed by a medical practitioner; when a prisoner is a threat to himself or others; if recaptured after escape and there is reason to believe that he will attempt to escape again; and at the request of the police in the interests of justice.¹³⁰

While the difference between effective solitary confinement and segregation appears now to be one only in name, an important distinction has nevertheless crept in under the noble mantle of correcting offending behaviour. Prior to the amendment, the Act was clear that the limit was 30 days and there was no possibility of an extension.¹³¹ Following the amendment, the Act states that in the event of serious and repeated transgressions, a prisoner may be placed in segregation “in order to undergo specific programmes aimed at correcting his behaviour”, with a loss of gratuity up to two months and a restriction of amenities for up to 42 days.¹³² What exactly constitutes a programme is not clear, nor are minimum requirements laid down in the Act. Moreover, segregation should be used only “as far as it may be necessary” with the aim of giving effect to the restriction of amenities¹³³ and should not be ordered as a form of punishment or disciplinary measure.¹³⁴ In short, detaining a prisoner in a single cell for punishment is permitted when done with the purpose of restricting his access to amenities, and if necessary this could be done for 42 days. While the practice goes by a different name, it is evident that it can be used in exactly the same manner as solitary

¹²⁹ See also s 7(2)(e) Act 111 of 1998.

¹³⁰ s 30(1).

¹³¹ s 24(5)(d) prior to the amendment by Act 25 of 2008.

¹³² s 24(5)(d) read with 24(5)(b and c)

¹³³ Amenities refer to exercise, contact with the community, reading material, recreation and incentive schemes (Definitions, Correctional Services Act).

¹³⁴ s 30(9).

confinement. This vagueness has created the space for super-maximum security prisons and their hard and austere regimes, as elaborated in section 7 below.¹³⁵

Prior to the amendment, the Inspecting Judge had either to confirm or set aside the penalty of solitary confinement, but this mechanism has been weakened. Prisoners subjected to segregation may refer the matter to the Inspecting Judge, who must make a decision thereon within 72 hours.¹³⁶ Instead of a mandatory review, there is now a voluntary review mechanism which relies on the prisoner having knowledge of this review mechanism, being able to lodge such an application (e.g. by having access to writing materials or telephone), and being permitted to do so. As it turned out later, less than 1% of reported segregation cases were referred to the Inspecting Judge for review.¹³⁷ It must therefore be assumed that segregated prisoners are not informed of their right to refer their case to the Inspecting Judge or that they are prevented from doing so.

When solitary confinement was still a punishment option and required mandatory reporting, the Judicial Inspectorate for Correctional Services referred to it as “a case of chronic under-reporting”. In 2007/8 the Inspecting Judge received 159 solitary confinement review applications but 1 528 reports of prisoners undergoing segregation for displaying violence or being threatened with violence.¹³⁸ The implication was that many prisoners were being held in solitary confinement but with few of them accorded the due process of a disciplinary hearing as prescribed by the Act.¹³⁹ After the 2008 amendment, under-reporting in respect of segregation continued even though the situation improved.¹⁴⁰ Figure 3 below provides a profile of the 6 022 segregation cases for 2008/9.¹⁴¹ The most frequent reason (33.7%) for segregating a prisoner was because he threatened or displayed violence, or was threatened with violence. Segregation for the purpose of giving effect to a penalty of restriction of amenities constituted 17.5% of the cases.

¹³⁵ Buntman, F. and Muntingh, L. (2012 forthcoming) Super-maximum prisons in South Africa. In Ross, J. (ed) *Globalization of Supermax Prisons*. Chapel Hill: Rutgers University Press.

¹³⁶ s 30(7).

¹³⁷ Office of the Inspecting Judge (2010) p. 27.

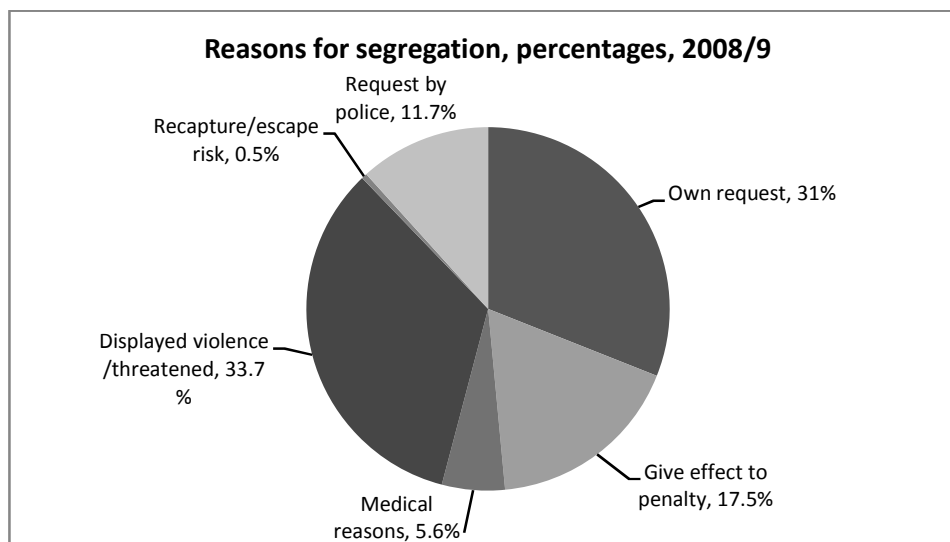
¹³⁸ Office of the Inspecting Judge (2008) *Judicial Inspectorate for Correctional Services Annual report 2007/8*, Cape Town: Office of the Inspecting Judge, pp. 28-29.

¹³⁹ s 24. Office of the Inspecting Judge (2009) *Judicial Inspectorate for Correctional Services Annual report 2007/8*, Cape Town: Office of the Inspecting Judge, p. 28.

¹⁴⁰ Office of the Inspecting Judge (2010) p. 27.

¹⁴¹ Office of the Inspecting Judge (2009) p. 29.

Figure 4



The amendment to the legislation rid the prison system of the stigma associated with the concept “solitary confinement”, a practice questioned (if not condemned) internationally.¹⁴² Nonetheless, the status of solitary confinement is recognised in international human rights law and has been the focus international instruments and commentaries by treaty monitoring bodies. This status is important for controlling its use. For example, Principle 7 of the UN Basic Principles for the Treatment of Prisoners states that “efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged”, while the Human Rights Committee stressed that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Art. 7 (prohibition of torture)”.¹⁴³ Regional instruments have also prescribed that “solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified

¹⁴² General Comment 20 on the ICCPR para. 6. *The Istanbul statement on the use and effects of solitary confinement* defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic. [Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.] A/HRC/13/39/Add.5 para 55.

¹⁴³ General Comment No. 20: Replaces General Comment 7 concerning the prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992. CCPR General Comment No. 20 para. 6. See also the Istanbul Statement: ‘As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort.’

period of time, which shall be as short as possible.”¹⁴⁴ However, following the 2008 amendment to the Correctional Services Act, detention in a single cell for punishment purposes continues but with a weaker oversight regime than was the case with solitary confinement, where all instances were subject to mandatory review by the Inspecting Judge. Solitary confinement possessed a particular legal status which has now been lost, given that confinement in a single cell for punishment or disciplinary reasons is grouped together with a host of other reasons for segregation. It was because solitary confinement posed such risks to the individual’s well-being that it was tightly controlled and safeguards built into the 1998 Correctional Services Act. However, segregation, accompanied by programmes to correct offending behaviour, appears to be terminologically less ominous and protective measures have been diluted.

6.2 Use of mechanical restraints

The use of mechanical restraints is provided for in the Correctional Services Act in section 31, which was amended by Act 25 of 2008. Mechanical restraints may be used to protect the safety of a prisoner or other person, to prevent damage to property, or if there is a reasonable suspicion that the prisoner may escape.¹⁴⁵ Mechanical restraints may also be used when requested by a court.¹⁴⁶ A prisoner may, however, not appear in court in mechanical restraints unless so ordered by the court.¹⁴⁷ In addition to these general provisions, the Act provides for the use of mechanical restraints when a prisoner is in segregation. In such instances, the use of mechanical restraints must be authorised by the Head of Prison and reported to the National Commissioner and the Inspecting Judge.¹⁴⁸ On the authority of the Head of Prison,

¹⁴⁴ Art. 60.5, European Prison Rules (revised 2006). See also *Prisons in Cameroon - Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*. The African Commission on Human and Peoples’ Rights, Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa, From 2 to 15 September 2002, ACHPR/37/OS/11/437; Communication 54/91, 13th Annual Activity Report of the African Commission on Human and Peoples’ Rights (1999-2000)(Annex V) para 115. African Commission on Human and Peoples’ Rights Communications: 64/92: *Krishna Achuthan (on behalf of Aleke Banda) / Malawi*; 68/92: *Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi*; 78/92: *Amnesty International / Malawi*.

¹⁴⁵ s 31(1).

¹⁴⁶ s 31(1).

¹⁴⁷ s 31(2).

¹⁴⁸ s 31(3) (b-d).

the mechanical restraints may be used for a period of seven days on a prisoner in segregation. The use of mechanical restraints under such circumstances may be extended by the National Commissioner for a maximum period of 30 days.¹⁴⁹ However, such extension is subject to consideration of a report by a psychologist or medical practitioner. A prisoner under mechanical restraints in segregation may appeal the decision to the Inspecting Judge, who must make a decision within 72 hours.¹⁵⁰ The use of mechanical restraints is not permitted as a form of punishment, and mechanical restraints in addition to handcuffs and leg irons may be used only when the prisoners is outside of the cell.¹⁵¹ The Regulations to the Correctional Services Act specify the permitted mechanical restraints in addition to handcuffs and leg irons, namely, belly chains, plastic cable ties, electronically activated high-security stun belts and patient restraints.¹⁵²

6.2.1 Long-term use of mechanical restraints

The UN Standard Minimum Rules for the Treatment of Prisoners restrict the use of mechanical restraints to specific situations, such as the transportation of prisoners, and then for no longer than what is strictly necessary.¹⁵³ The European Prison Rules prohibit the use of chains and irons, and also restrict the use of physical restraints to a narrow set of situations.¹⁵⁴ The specific use of mechanical restraints for relatively short periods of time, especially when

¹⁴⁹ s 31(3)(c).

¹⁵⁰ s 31(5).

¹⁵¹ s 31(6-7).

¹⁵² Regulations to the Correctional Services Act, Regulation 18(1), Government Gazette, Vol. 469, No. 26626, 30 July 2004.

¹⁵³ UNSMR Rule 33.

¹⁵⁴ 68.1 The use of chains and irons shall be prohibited.

68.2 Handcuffs, restraint jackets and other body restraints shall not be used except:

- a. if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise; or
- b. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property, provided that in such instances the director shall immediately inform the medical practitioner and report to the higher prison authority.

68.3 Instruments of restraint shall not be applied for any longer time than is strictly necessary.

68.4 The manner of use of instruments of restraint shall be specified in national law. (European Prison Rules, Council of Europe, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

prisoners are outside of the secure environment of the prison building is understandable and reasonable. Neither the UNSMR nor the European Prison Rules raise objections in this regard. However, the long term use of mechanical restraints inside a prison, and moreover, when the prisoner is held in a segregation cell, is a different matter.¹⁵⁵

The long-term use of mechanical restraints has not been tested in South African courts but has been the subject of a 1999 decision from the Namibian Supreme Court in *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another*.¹⁵⁶ In *Namunjepo* four of the five appellants were recaptured after escaping from custody and the fifth had attempted to escape. They were subsequently placed in leg irons and had been in that situation for between five and six months. The Court found this practice to be unconstitutional and in violation of the right to be free from torture, cruel, inhuman and degrading treatment or punishment. Making reference to the slave trade and denigrating prisoners as “hobbled animals”, the Court noted:

Whatever the circumstances the practice to use chains and leg-irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray. It is furthermore still a strong reminder of days gone by when people of this continent were carted away in bondage to be sold like chattels. To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow beings and is in itself a humiliating and undignified experience.¹⁵⁷

The Correctional Services Act provides for mechanical restraints during segregation to be used initially for a period of seven days on the authority of the Head of Prison, with the possibility of extension by the National Commissioner for a further 30 days, thus totalling 37 days. Even though the Act states that the National Commissioner must approve the extension

¹⁵⁵ In April 2006 a female prisoner at Pollsmoor Female Prison set her cell on fire and subsequently died. She was kept in mechanical restraints and in segregation, and had been chained to the grille gate of the cell for two days after behaving disruptively (PMG Report on the meeting of the Portfolio Committee on Correctional Services of 6 June 2006, <http://www.pmg.org.za/minutes/20060608-investigations-zonderwater-and-pollsmoor-incidents-department-report> Accessed 3 February 2012).

¹⁵⁶ SA 3/98 [1999] NASC 3; 2000 (6) BCLR 671 (NmS).

¹⁵⁷ *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* SA 3/98 [1999] NASC 3; 2000 (6) BCLR 671 (NmS), p. 23.

to a maximum of 30 days, this competency has been delegated to Area Commissioners,¹⁵⁸ one rank higher than the Head of Prison and his immediate supervisor. The extension of the use of mechanical restraints is thus handled by mid-level managers working in the same management environment, thereby limiting the chances for review by more senior officials who are at a greater distance from the daily milieu of a particular prison. The situation creates significant risks for abuse of this provision, over and above the fact that the extended use of mechanical restraints has been outlawed in Europe and neighbouring Namibia.

6.2.2 The use of electroshock equipment

The electric stun belt is a physical restraint which has been severely criticised elsewhere and in South Africa. Fitted on the wearer like a belt, a stun belt is a device that can be activated remotely to inflict a substantial electric shock and instantly incapacitate the prisoner. Most models deliver a shock of up to 50 000 volts and can be repeatedly activated.¹⁵⁹ One survivor described the electric shock as so severe that he thought he was going to die, and the long-term physical side-effects include urination, defecation, heartbeat irregularities and seizures.¹⁶⁰ The device also causes mental suffering, in that the wearer is all too aware that it can be activated at any moment. In 2009 the DCS purchased 900 such stun belts at a cost of R2.7 million (US\$ 400 000).¹⁶¹



¹⁵⁸ Regulations to the Correctional Services Act, Government Gazette Vol. 469, No. 26626, 30 July 2004, p. 90.

¹⁵⁹ *Submission on the Prevalence of Torture in Correctional Centres. Jointly Submitted to the Portfolio Committee on Correctional Services by the Institute for Security Studies and the Omega Research Foundation*, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011, <http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 21 December 2011.

¹⁶⁰ *Submission on the Prevalence of Torture in Correctional Centres. Jointly Submitted to the Portfolio Committee on Correctional Services by the Institute for Security Studies and the Omega Research Foundation*, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011, <http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 21 December 2011.

¹⁶¹ 'Prisoners in for a shock' *IOL*, 9 February 2009, <http://www.iol.co.za/news/south-africa/prisoners-in-for-a-shock-1.433834> Accessed 18 December 2011.

Internationally, the use of stun belts has been criticised by human rights groups,¹⁶² and US jurisprudence has left it only a narrow scope, namely for use when the prisoner is appearing in court (i.e. outside the secure environment of the prison building).¹⁶³ In 1997 the UN Special Rapporteur on Torture, Nigel Rodley, had already expressed deep concerns about the use of stun belts and other electroshock equipment.¹⁶⁴ The CAT, in its concluding observations on the US's first report, recommended banning the use of stun belts as a method of restraining prisoners as "their use almost invariably leads to breaches of article 16¹⁶⁵ of the Convention".¹⁶⁶ Other electroshock equipment, such as riot shields, is also used by the DCS, and the Jali Commission was appalled by its use at Pretoria C-Max to inflict ritualised torture on new admissions to the prison.¹⁶⁷ Against the backdrop of these findings, the purchase of stun belts by the Department in 2009 appears to have been ill-advised. The continued use of electroshock equipment in prisons poses significant risk for prisoners' right to be free from torture and other ill treatment, and this purchase of additional equipment was a retrogressive step, flagrantly disregarding guidance both from the Special Rapporteur on Torture and the growing body of research on the topic.

6.2.3 Compliance with mandatory reporting on the use of mechanical restraints

The Judicial Inspectorate has consistently noted that the use of mechanical restraints is severely under-reported, with only 57 such cases reported in the 2009/10 financial year.¹⁶⁸ In the following year, 67 cases were reported and only seven prisoners appealed the decision.¹⁶⁹ The Inspecting Judge saw this as indicative of "the general disregard by many heads of

¹⁶² Citing a report compiled by Amnesty International 'The stun belt: Torture at the push of a button', World Socialist website, 19 June 1999, <http://www.wsws.org/articles/1999/jun1999/stun-j19.shtml> Accessed 18 December 2011.

¹⁶³ *People v. Mar*, 02 S.O.S. 4412.

¹⁶⁴ Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, E/CN.4/1998/38 para 193.

¹⁶⁵ Article 16 prohibits other ill treatment that does not amount to torture.

¹⁶⁶ UN Committee against Torture (2000) *Conclusions and Recommendations of the Committee against Torture: United States of America*. 15/05/2000. A/55/44, paras.175-180. (Concluding Observations/Comments) Para 180

¹⁶⁷ Jali Commission, Vol. II Chapter 25.

¹⁶⁸ Office of the Inspecting Judge (2010) p. 33.

¹⁶⁹ Office of the Inspecting Judge (2011) p. 28.

centres of their statutory responsibility in this regard.”¹⁷⁰ Consequently the Inspectorate was unable to provide any meaningful report about the use of mechanical restraints by the Department, but did express concern about media reports of sick inmates, some terminally ill, who were reportedly handcuffed to their beds because they allegedly posed a security risk.¹⁷¹

Although the Correctional Services Act is clear that when mechanical restraints are used on a prisoner it must be reported to the Inspecting Judge, by and large Heads of Prison fail to meet this statutory obligation. Given the low number of appeals against the use of mechanical restraints referred to the Inspecting Judge, it is more than likely that prisoners in mechanical restraints in segregation are not aware of the fact that they can appeal to the Inspecting Judge. It may also be the case that they are not informed of this right.

The legislative provisions and practices in respect of mechanical restraints thus appear to be out of step with the growing consensus that it should have both a narrow scope of application and be restricted to the shortest possible periods of use. Using mechanical restraints when prisoners are already in segregation cells seems strikingly at odds with jurisprudence and other guidelines on the issue. Moreover, the decision to extend the use of mechanical restraints for up to 30 days is subject to weak internal and external oversight. Heads of Prison generally fail to inform prisoners of their right to appeal to the Inspecting Judge and also fail to report such cases to the Inspecting Judge. If subjected to scrutiny by the Constitutional Court, the extended use of mechanical restraints while in segregation will, it is argued, very likely not pass muster.

The level of compliance with mandatory reports has shown that Heads of Prison can easily ignore the requirements. This raises concerns about using such a mechanism to monitor areas of operations prone to rights violations. On the one hand, the mechanism relies on the honesty and integrity of Heads of Prisons to report certain incidents in the face of the known risk that such actions may alienate their staff; on the other, there is no mechanism of enforcement available to the Judicial Inspectorate if it is later established that a Head of Prison failed to comply with a mandatory reporting requirement. As such, the mandatory reporting mechanism remains inherently weak.

6.3 Use of force

¹⁷⁰ Office of the Inspecting Judge (2010) p. 33.

¹⁷¹ Office of the Inspecting Judge (2010) p. 33.

The Correctional Services Act states that an official may not use force against an inmate, unless it is necessary for self-defence; the defence of another person; preventing an inmate from escaping; and the protection of property.¹⁷² Furthermore, only the minimum amount of force may be used to achieve the objective, namely self-defence, the defence of another person, preventing escape, or the protection of property. Force may only be used with the permission of the Head of the Prison, unless it is an emergency and the official believes that he or she would obtain it should he or she waited for permission.¹⁷³ After force was used, the prisoner(s) concerned must undergo a medical examination and receive the appropriate treatment as prescribed by the correctional medical practitioner.¹⁷⁴ When force was used, this must be reported to the Head of Prison as soon as possible¹⁷⁵ and the Office of the Inspecting Judge.¹⁷⁶ The mandatory reporting on the use of force to the Inspecting Judge was added following the 2008 amendment of the Correctional Services Act.¹⁷⁷

Compliance with the requirement to report the use of force to the Inspecting Judge is sadly lacking. In 2009/10 the Inspecting Judge reported that only nine such cases were reported despite the fact that the unlawful use of force is common in South African prisons.¹⁷⁸ During the same period the Inspectorate recorded 2 189 complaints from prisoners alleging that they were assaulted by officials.¹⁷⁹ In the following year (2010/11), 2 276 complaints alleging assault by officials on prisoners were recorded, but only ten reports on the use of force were submitted by Heads of Prison to the Inspectorate.¹⁸⁰

The overall impression gained is that Heads of Prison are either entirely ignorant of the statutory duty to report the use of force to the Judicial Inspectorate, or deliberately flouting this duty. The former is probably more likely. In addition, the Department's Annual Reports do not present any information, making the mandatory reports the only avenue for obtaining a more accurate description of how and when force is used. Whether or not force is used

¹⁷² s 32(1)(c).

¹⁷³ s 32(2).

¹⁷⁴ s 32(5).

¹⁷⁵ s 32(2).

¹⁷⁶ s 32(6).

¹⁷⁷ s 25(d) of Act 25 of 2008.

¹⁷⁸ Office of the Inspecting Judge (2010) p. 33.

¹⁷⁹ Office of the Inspecting Judge (2010) p. 37.

¹⁸⁰ Office of the Inspecting Judge (2011) pp. 28 and 32.

lawfully or unlawfully, the Department appears to be particularly secretive about it. This is an intolerable situation, and it requires urgent action to ensure transparency and accountability through effective investigations and the institution of criminal prosecutions where necessary. Failure to do so would only further entrench the culture of impunity.

6.4 Overview of issues

The preceding discussion highlighted a number of concerns relating to the treatment of prisoners and made specific reference to segregation, the use of mechanical restraints and the use of force. While these practices are provided for and controlled by law and international instruments, the concerns centre on the right to be free from torture and other ill treatment as well as the fact that compliance is generally poor with the legislative requirement that Heads of Prisons report such incidents. Moreover, legislative amendments have created weaknesses with respect to the use of segregation, and the legislative provisions for the extended use of mechanical restraints appear to be at odds with the prohibition of cruel, inhuman and degrading treatment or punishment. This situation leaves prisoners vulnerable to the injudicious, if not unlawful, use of segregation, mechanical restraints and force. Furthermore, the lack of transparency regarding the use of segregation, mechanical restraints and force makes it difficult to monitor the situation and address problem areas.

The requirement of mandatory reports was presumably included in the Correctional Services Act to monitor state actions associated with torture and other ill treatment and prohibited by the Constitution. Requiring mandatory reports on the use of force, use of mechanical restraints and segregation is reasonable, and reflects a desire on the part of the legislature to monitor human rights standards in the prison system. Notwithstanding these intentions, it has also become apparent that the mandatory reporting requirements are not being complied with and, furthermore, that there is no effective enforcement mechanism upon which the Judicial Inspectorate can call.

7. Super-maximum facilities

As noted in Chapter 3 (section 4.1.2), South Africa has two super-maximum security prisons, C-Max in Pretoria (Gauteng), with a capacity of 281 prisoners, and Ebongweni in Kokstad

(KwaZulu-Natal), with capacity for 1 440. Both house only male sentenced prisoners. C-Max became operational in 1997 and Ebongweni, in 2002. Both prisons were created to house South Africa's most dangerous and disruptive prisoners, and initial estimates were that space for 7 000 such prisoners would be needed.¹⁸¹ Despite these estimates, the prisons remain under-utilised.¹⁸² They were originally intended exclusively for sentenced prisoners, but in practice they have deviated from this intention. Particularly so at Ebongweni, there has been an increase in the number of unsentenced prisoners, with more than 80 unsentenced prisoners having been detained there since 2007. Kokstad's remote location also makes it difficult for unsentenced prisoners to access their legal representatives.¹⁸³

The super-maximum security facilities were intended to be rigidly run prisons adhering to the highest standards of security, order, discipline and control; at the same time they would also comply with human rights requirements as shaped specifically by the 1993 Supreme Court of Appeal decision in *Minister of Justice v Hofmeyr*.¹⁸⁴ The *Hofmeyr* decision dealt extensively with prisoners' rights and paid particular attention to solitary confinement.¹⁸⁵ The plaintiff contested his conditions of confinement when he was detained for five months under the then apartheid state of emergency regulations. He averred that, with two brief exceptions, he had

¹⁸¹ The Jali Commission outlined the typical profile of a super-maximum inmate as a sentenced prisoner serving a long term of imprisonment and one who has committed crimes inside prison or attempted escape.

“The criteria for admission of inmates to C-Max Prison are contained in a Departmental document, referenced 1/3/13 dated 5 November 1998. In terms of this document the following criteria are used by the Department for the transfer of prisoners to C-Max Prison:

- Prisoners sentenced to longer than twenty (20) years within the last three (3) months.
- Prisoners who have been found guilty of escaping/attempted to escape or aided an escape.
- Prisoners who have been declared dangerous persons by the Court.
- Prisoners who have assaulted/murdered a DCS official, a SAPS [South African Police Services] official or fellow inmate.
- Prisoners who are troublesome and who do not show any improvement in their behaviour even after they have been demoted to C Group.
- Prisoners who are actively involved in prison gangsterism.
- Prisoners who have been convicted for hijackings and who have murdered/assaulted their victims, are members of notorious crime syndicates, or are serial killers/rapists.” (Jali Commission pp. 354-355)

¹⁸² As at the end of February 2011 Ebongweni was 37% full and C-Max 45% (figures supplied by Judicial Inspectorate for Correctional Services).

¹⁸³ ‘Awaiting-Trial Men Tell of Rights Abuses in Far-Away Prison’. *The Star*, 1 August 2010.

¹⁸⁴ Buntman, F. and Muntingh, L. (2012 forthcoming).

¹⁸⁵ 1993 (3) SA 131 (A).

been unlawfully separated from all other prisoners in circumstances amounting to solitary confinement. Furthermore, he had been subjected to unlawful treatment in a number of other ways, including insufficient exercise, no access to books, magazines, newspapers, and food from outside the prison, insufficient access to write and receive letters, and insufficient access to radio or television broadcasts. Hofmeyr successfully sued the Minister of Justice in the Cape High Court, and the decision was upheld by the Supreme Court of Appeal on appeal. The judgment cites in approving terms the findings of the lower court:

[T]he segregated manner in which plaintiff was detained for the bulk of his period of detention, the fact that he was not allowed some form of indoor exercise, that he was not allowed access to books and magazines from outside the prison and that he was not allowed some form of access to radio broadcasts constitute wrongful and unlawful conduct as alleged by plaintiff.¹⁸⁶

The SCA clearly stated that “[t]he plain and fundamental rule is that every individual’s person is inviolable. . . . The detention to which the plaintiff was subjected constituted an infraction of his basic rights and, in particular, of his right to bodily integrity.”¹⁸⁷

The regime developers of C-Max were thus acutely aware of the *Hofmeyr* decision and its implications for solitary confinement, access to the media, and prisoners’ association with each other, as was confirmed by its designer.¹⁸⁸ Moreover, the Interim Constitution afforded detailed rights to prisoners and this was later expanded upon by the 1996 Constitution, even though the 1998 Correctional Services Act was not yet operational.¹⁸⁹ The design and regime of both C-Max and Ebongweni had to be guided by the Interim Constitution and the *Hofmeyr* decision.

¹⁸⁶ 1993 (3) SA 131 (A) p. 60.

¹⁸⁷ 1993 (3) SA 131 (A) p. 64.

¹⁸⁸ Buntman, F. and Muntingh, L. (2012 forthcoming) Interview with Mr. F. Venter on 9 July 2010, Johannesburg.

¹⁸⁹ The Interim Constitution, in section 25(1)(b), made it clear that: “Every person who is detained, including every sentenced prisoner, shall have the right . . . to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense.” The 1996 Constitution added “access to exercise” as an additional right (section 35(2)(e)).

As the first to become operational, it was predominantly C-Max that attracted the attention of human rights groups and the South African Human Rights Commission (SAHRC). In C-Max, security measures included prisoner isolation, cordoned-off exercise yards, plastic cutlery, specially developed hand- and leg-irons, video surveillance, warders armed with stun guns, electrified riot shields, bullet and stab-proof vests, and the denial of permission for prisoners to shave or smoke.¹⁹⁰ According to the SAHRC Chairperson at the time, “We concede there are dangerous offenders and high-risk prisoners, and that you need a system to deal with them. But we think C-Max goes beyond what you require. It's difficult to imagine how the almost solitary-confinement conditions of C-Max encourage rehabilitation.”¹⁹¹ The Jali Commission in turn expressed a similar view about both C-Max and Ebongweni.¹⁹²

While the DCS proclaims that rehabilitation is its core business, the messages about how the super-maximum facilities were to meet this goal were mixed. It was the then Minister of Correctional Services (Balfour), who in 2007 told the Security and Constitutional Affairs Select Committee that “not all offenders could be rehabilitated or corrected . . . [the DCS is] not dealing with angels”; C-Max and Ebongweni were, he said, “the destination of the completely incorrigible”.¹⁹³ The Minister’s understanding of the super-maximum facilities was evidently different from their design aims. The regimes for both facilities were structured according to a multi-stage programme, ranging from a more to a less restrictive regime based on the behaviour of the prisoner. The intention was that a problematic prisoner would progress through the programme and, if successful, be returned to the general prison population. The intention was not that a prisoner would serve his entire sentence at one of these facilities.

¹⁹⁰ SAIRR (1998) *Annual Survey 1997/98*. Johannesburg: South African Institute for Race Relations, p. 71; ‘C-Max prison hatched in secret’. *Mail and Guardian*, 14 November 1997, <http://mg.co.za/printformat/single/1997-11-14-cmax-prison-hatched-in-secret> Accessed 17 January 2012.

¹⁹¹ ‘Rights groups slam new prison units’ IOL, 2 June 2000, <http://www.iol.co.za/news/politics/rights-groups-slam-new-prison-units-1.39352?ot=inmsa.ArticlePrintPageLayout.ot> Accessed 3 December 2011.

¹⁹² Jali Commission, p. 367.

¹⁹³ PMG Report on the meeting of the Security and Constitutional Affairs Select Committee on 7 November 2007, <http://www.pmg.org.za/minutes/20071106-sexual-offences-bill-deliberations-correction-services-ab-briefing> Accessed 5 December 2011.

The Jali Commission held a different view, arguing that the purpose of the DCS is to rehabilitate prisoners and that if rehabilitation is not possible at super-maximum facilities, then there is no justification for their existence. Based on its analysis, the Jali Commission concluded that these prisons were “merely institutions of solitary confinement”.¹⁹⁴ It remained unconvinced by official explanations for detaining prisoners at C-Max, and observed instead that C-Max Prison is “being used as a form of punishment for those who attack officials . . . [rather than to] correct general bad behaviour within our prisons”.¹⁹⁵

Notwithstanding the efforts of the designers of C-Max to strike a balance between super-maximum security requirements and constitutional prescripts, problems soon emerged around the treatment of prisoners and related matters. While policy dictated that C-Max inmates could have contact with each other only as a privilege earned through good behaviour, in actuality prisoners and staff were frequently in violent altercations with each other. Between September 1997 and February 2005, 64 official-on-prisoner assaults, 26 prisoner-on-official assaults, and 63 prisoner-on-prisoner assaults were reported.¹⁹⁶ C-Max was thus not as well controlled as policy would have it.

When the Jali Commission investigated C-Max, it found that the treatment of prisoners fell far short of what the Constitution and the legislation required, and drew attention to the systematic assault of prisoners upon admission:

The treatment of prisoners at Pretoria C-Max Prison upon admission is a clear indication that the members of the Department have no respect for prisoners’ human rights. Evidence has established that prisoners are assaulted for no apparent reason upon admission. This treatment is normally referred to as an initiation process. Prisoners at Pretoria C-Max have already been sentenced by courts of law and there is no need for further punishment on admission. This is a further indication that members of the Department do not subscribe to the ethos of human rights for prisoners.¹⁹⁷

¹⁹⁴ Jali Commission, p.351.

¹⁹⁵ Jali Commission, p. 381.

¹⁹⁶ Jali Commission, p. 359.

¹⁹⁷ Jali Commission, Vol. II, Chapter 25, pp. 95-96.

What is perhaps more worrying is that the unravelling of the supposedly strict adherence to both security and human rights standards began as early as 1998, and hence not long after C-Max had become operational; according to the Jali Commission, the trend continued into 2003.¹⁹⁸

Despite all the security hardware (e.g. close circuit television) for making C-Max “escape-proof”, its vulnerability to human failure was best illustrated by the escape of one Annanias Mathe. He was a notorious criminal ultimately convicted of 64 charges of rape, indecent assault, attempted murder, aggravated robbery and housebreaking,¹⁹⁹ but managed to escape from C-Max prior to conviction (he was later recaptured). At first the DCS claimed he had escaped “Houdini-like” by using Vaseline petroleum jelly to slide through a narrow window measuring 20 cm by 20 cm. Subsequent investigations revealed that his escape was in fact the result both of his own ingenuity, bribing prison staff and of negligent oversight by officials.²⁰⁰ An earlier attempted escape from C-Max, on 7 November 2004 – made possible by firearms smuggled in by officials – resulted in the death of two officials.²⁰¹ If the latter incident already suggested that the super-maximum prison had a soft underbelly, Mathe’s escape amply confirmed this weakness in the integrity of its staff.

Ebongweni super-maximum prison has not been immune from internal problems either. The Judicial Inspectorate for Correctional Services reported as follows on the August 2009 death of a 59-year-old prisoner:

Deceased brutally assaulted by officials with batons, electric shields and booted feet and then failed to provide adequate and timeous medical attention. Independent

¹⁹⁸ Jali Commission, Vol. II, Chapter 25, p. 82.

¹⁹⁹ ‘Mathe guilty on 64 charges’. *News24.com*, 3 June 2006, <http://www.news24.com/Africa/News/Mathe-guilty-on-64-charges-20090603> Accessed 5 December 2011.

²⁰⁰ Buntman, F. and Muntingh, L. (2012 forthcoming).

²⁰¹ The murder in July 2010 of a C-Max official, after he testified in court about a 2004 attempted escape with fatalities, underscores the threat that corruption holds to the security of super-maximum prisons. (‘C-Max Prison Official Shot Dead’. *East Coast Radio*, 22 July 2010, <http://www.ecr.co.za/kagiso/content/en/east-coast-radio/east-coast-radio-news?oid=836529&sn=Detail&pid=5882&C-max-prison-official-shot-dead> Accessed 3 December 2011.)

pathologist found death consistent with smothering, i.e. obstruction of mouth and nose.²⁰²

Evidence has also been found at Ebongweni of a female warder engaging in sexual relations with a prisoner for payment.²⁰³

The two super-maximum prisons continue to exist but they are threatened on a number of fronts. First, their regimes depend heavily on what amounts to solitary confinement and minimal human contact; from a constitutional perspective this remains suspect and open to attack, a view expressed by both the SAHRC and the Jali Commission. Second, the integrity failures of staff at these prisons have resulted not only in security breaches but in gross rights violations, corruption, the death of officials, and inter-prisoner violence. If the super-maximum prisons are intended to be the ultimate penal institutions in South Africa, these failures only deepen their legitimacy deficit. Third, both prisons remain underutilised and have not demonstrated that they contribute to safer prisons or fewer escapes. Ultimately the conditions of detention at the two prisons must be measured against the right to dignity, on the one hand, and, on the other, the substantial limitation of this right for a few prisoners for the alleged benefit of the greater majority of prisoners.

8. Sexual violence²⁰⁴

In Chapter 3 sexual violence in prisons was briefly described and is explored here in more detail. Other authors have undertaken extensive work on the subject which need not be

²⁰² Office of the Inspecting Judge (2010), pp. 69-70.

²⁰³ 'Warder had sex with inmate for R1 000.' *IOL*, 30 July 2010, (US\$ 135), http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20100730145253490C610957 Accessed 4 December 2011.

²⁰⁴ This section is largely based on Muntingh, L. and Satardien, Z. (2011 a) Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex, *SA Journal for Criminal Justice*, Vol. 24 No. 1; and Muntingh, L. and Satardien, Z. (2011 b) Sexual violence in prisons – Part 2: The duty to provide safe custody and the nature of prison sex, *SA Journal for Criminal Justice*, Vol. 24 No. 2.

repeated.²⁰⁵ The focus will rather be on sexual violence as a human rights issue, and this contribution assesses the extent to which the DCS has responded to an age-old problem.

The extent and prevalence of sexual violence in prisons is uncertain, but there have been attempts to quantify it.²⁰⁶ Sexual victimisation in prisons is notoriously under-reported and often deliberately hidden, but research from the United States indicates that between 7% and 12% of male inmates are raped an average of nine times during their term of imprisonment.²⁰⁷ The risk of sexual victimisation is not equally distributed across the prison population, and the evidence indicates that sexual victimisation is profile-driven - inmates displaying certain characteristics are more vulnerable to aggression, making them more likely to be “turned” into the feminine role.²⁰⁸ Prisoners who are least able to defend themselves, lack credibility with prison staff or are disliked by other prisoners and staff, as well as those who are easily ostracised, are most at risk of victimisation.²⁰⁹ Other factors that increase the risk of sexual victimisation are lack of knowledge of the prison and gang system, youthfulness, economic circumstances, weaker physical attributes, reluctance to engage in violence, conviction for a crime lacking the element of violence, and aesthetically pleasing looks, are all factors which contribute to a prisoner’s risk-profile and possible assignment to the female gender.²¹⁰

In general terms it has been noted that the marginalisation of prisoners’ rights and the political

²⁰⁵ Gear, S. and Ngubeni, K. (2002) *Daai Ding: Sex, sexual violence and coercion in men’s prisons*, Johannesburg: Centre for the Study of Violence and Reconciliation; Steinberg, J. (2004) *Nongoloza’s Children: Western Cape Prison Gangs During and After Apartheid*, Johannesburg: Centre for the Study of Violence and Reconciliation; Mashabela, P. (2003) *Victims of Rape and Other Forms of Sexual Violence in Prisons*, Paper Submitted for XIth International Symposium on Victimology, 13-18 July 2003, South Africa; Jali Commission, Chapter 8; Gear, S. (2007) *Fear, violence & sexual violence in a Gauteng juvenile correctional centre for males*, CSVR Criminal Justice Programme Briefing Report No. 2, Johannesburg, CSVR; Man, C.D. and Cronan, J.P. (2001/2) Forecasting sexual abuse in prison: The prison subculture of masculinity as a backdrop for ‘deliberate indifference’, *Journal of Criminal Law and Criminology* Vol. 92, 157.

²⁰⁶ Gear, S. (2007).

²⁰⁷ Robertson, J.E. (2003) Rape among incarcerated men: Sex, coercion and STDs, *Aids Patient Care & STDs*, Vol. 17 No. 8, p. 423.

²⁰⁸ Man, C.D. and Cronan, J.P. (2001/2), p. 157; Gear, S. and Ngubeni, K. (2002), pp.14-32.

²⁰⁹ Dumond, R.W. (2006) The impact of prisoner sexual violence: Challenges of implementing public law 108-79 The Prison Rape Elimination Act of 2003, *Journal of Legislation*, Vol. 32, p. 150.

²¹⁰ Man, C.D. and Cronan, J.P. (2001/2), p. 157-174; Gear, S. and Ngubeni, K. (2002), pp.14-32.

marginalisation of male rape, place prisoners in an especially vulnerable situation.²¹¹ This stands in sharp contrast to the non-derogable protections afforded by the Constitution,²¹² namely to be free from all forms of violence,²¹³ and the right to be free from torture and ill treatment.²¹⁴

8.1 The nature of sex in prisons

According to Muntingh and Satardien, the nature of sex in prisons is shaped by three issues.²¹⁵ The first is the loss of power by prisoners due to their confinement, which places them at risk of victimisation by fellow prisoners as well as by officials, whether through action or omission. The overwhelming majority of South African prisoners are detained in frequently overcrowded communal cells.²¹⁶ Generally prisoners spend very little time outside their cells,²¹⁷ and once locked up for the night, the prison operates on a skeleton-staff complement to provide supervision. Should officials need to respond to an emergency, unlocking a cell is a time-consuming process regulated by security concerns.²¹⁸ While prisoners may be locked up for the greater part of the day, the overwhelming impression is that they are unsupervised, or minimally supervised.²¹⁹ Inside the cells, confinement is regulated by the unofficial regime imposed by prison gangs, especially in prisons where gangs are entrenched. Non-gang members lack status and protection, making them vulnerable to many forms of exploitation.²²⁰

Second, the duty to ensure safe custody and the protection of prisoners falls squarely upon the

²¹¹ Muntingh, L. and Satardien, Z. (2011 a), p. 5.

²¹² Section 37 of the Constitution of the Republic of South Africa, 1996 deals with states of emergency and includes a table of non-derogable rights. The protection afforded by the Constitution in respect of certain fundamental rights may thus not be derogated from even during a state of emergency.

²¹³ Section 12(1)(c) of the Constitution of the Republic of South Africa, 1996.

²¹⁴ Section 12(1)(d) and 12(1)(e) of the Constitution of the Republic of South Africa, 1996.

²¹⁵ Muntingh, L. and Satardien, Z. (2011 a).

²¹⁶ By February 2011, 53% of the South African prisoners were accommodated in prisons that were 150% or more full (statistics supplied by Judicial Inspectorate for Correctional Services).

²¹⁷ Prisoners are normally unlocked at 07h30 and locked up again by 15h00 or earlier. However, this does not mean that they are necessarily outside of their cells during that period; it is more likely that the minimum of one hour outside exercise per day, as required by law, is in fact the norm.

²¹⁸ See the procedure set out in the Department of Correctional Services: B-Order 2 Chapter 12 (2004).

²¹⁹ Muntingh, L. and Satardien, Z. (2011 a), p. 12.

²²⁰ Gear, S. and Ngubeni, K. (2002), pp. 5 and 16.

DCS,²²¹ as noted in Chapter 2 (section 3.2.3). This duty is recognised in international law, which links the right to human dignity to the right to be free from torture and other ill treatment,²²² and is further built upon in regional human rights treaties; in addition, there are specific principles and rules on deprivation of liberty.²²³ South African courts have also ruled unambiguously that prisoners are entitled to all personal rights and personal dignity not temporarily taken away by law through imprisonment.²²⁴ The right to dignity therefore gives rise to the right to freedom and security of a prisoner as well as the right not to be tortured in any way or treated in a cruel, inhuman or degrading manner. The DCS has a clearly legislated

²²¹ Sections 12 and 35(2) of the Constitution 108 of 1996; sections 2(b) and 4(2)(a) of Correctional Services Act 111 of 1998.

²²² Article 10 of the International Covenant on Civil and Political Rights (ICCPR): ‘1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.’ Available at <http://www2.ohchr.org/english/law/ccpr.htm>. Accessed on 3 February 2011. See also Article 5(2) American Convention on Human Rights (ACHR), available at http://www.hrcr.org/docs/American_Convention/oashr.html, accessed on 3 February 2011, and Article 5 of the African Charter on Human and Peoples’ Rights (ACHPR), available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf, accessed on 3 February 2011. See also Articles 12 and 13 of the Third Geneva Convention, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68>, accessed on 3 February 2011, as well as Common Article 3 to the Geneva Conventions, available at <http://www.icrc.org/ihl.nsf/WebART/375-590006>, accessed on 3 February 2011.

²²³ See Principle 1 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>, accessed on 15 March 2011: ‘All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.’ and Rule 60 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, accessed on 3 February 2011: ‘The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.’

²²⁴ See *Whittaker and MorantvRoos and Bateman* 1912 AD 92 at para 123, *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at para 20, *Goldberg v Minister of Prisons* 1979 (1) SA 14 at para 39 C-E, *S v Williams* 1995 (3) SA 632 (CC) at para 76-77, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 142, *Stanfield v the Minister of Correctional Services* 2004 (4) SA 43 (C) at para 89.

duty to provide safe custody to prisoners in its care and to conform to the requirements of international law and constitutional demands.²²⁵ It must therefore act proactively to prevent the transgression of human dignity through torture or ill treatment.²²⁶ Any failure to provide custody consistent with conditions that ensure human dignity,²²⁷ whether through action or inaction,²²⁸ is a breach of that duty and constitutes a violation of prisoners' rights.

Third, sex in prisons appears to exist on a continuum of consent and coercion, with consent often manufactured under the threat of coercion.²²⁹ First-time prisoners are often tricked and manipulated into providing sex in exchange for cigarettes, protection or other commodities.²³⁰ Lacking in "street-smartness", they accept a gift or protection only to discover that this must be "paid for" later. Fearing violence, an individual may give consent, but this is not out of free will but rather the will to survive. It appears, moreover, that sexual violence and coercion range from opportunistic events of victimisation to long-term "prison marriages" between men.²³¹ Untangling consent and coercion, not only in relation to a particular incident but in the broader context of sex in prisons, raises complex questions in respect of law enforcement, the protection of victims and the prosecution of offenders.



8.2 The Sexual Offences Act and its implications for the Department

In 2007²³² the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter the SOA) came into operation. The SOA has consolidated all sexual offences under one statute, and although not originally drafted with adult men and male prisoners in mind, it does substantially affect the DCS, the prison system and prisoners. New offences

²²⁵ Preamble to the Correctional Services Act 111 of 1998.

²²⁶ Committee Against Torture, General Comment 2, CAT/C/GC/2/CRP.1/Rev. 4 para [2]-[3] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>, Accessed on 31 December 2011.

²²⁷ Section 2 of the Correctional Services Act 111 of 1998.

²²⁸ The state has a positive duty to protect citizens from preventable harm and is liable for wrongful omissions that result in harm. *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). The police have a positive duty to protect individuals in custody from assault. *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C).

²²⁹ Muntingh, L. and Satardien, Z. (2011 a), p. 13.

²³⁰ Gear, S. and Ngubeni, K. (2002), pp. 19 - 21.

²³¹ Gear, S. and Ngubeni, K. (2002), p. 40.

²³² The date of commencement was 16 December 2007.

have been defined which can be applied equally to prison settings in order to help marginalised prisoners and protect them from sexual offences.²³³ Some of the broader categories of sexual offences, such as those where an offender compels another to commit a sexual offence or those which cause a person to witness a sexual offence, are particularly relevant to prisoners, who live in violent and communal conditions of confinement. The SOA can be used to combat sexual violence and abuse in prison settings as it creates a wide reach, covering key players in the prison system such as officials and gang leaders. The SOA provides a platform for the recognition of sexual violence and enables prosecutions in a prison setting. Male victims are given recognition in law; more appropriate redress is provided for; suffering and trauma are acknowledged; and increased awareness should result in improved protection.

Muntingh and Satardien recommend that specific emphasis be placed on the efficacy of channels for lodging complaints, on expediting complaints, and obtaining satisfactory levels for the collection of evidence relevant to the assault in question.²³⁴ Moreover, attention should be paid to eradicating staff interference in investigations and the coercion and intimidation of victims and witnesses when matters are investigated; the focus should be on appropriately protecting victims and witnesses who report corruption and sexual violence.²³⁵ Responses to prisoner rape must under no circumstances be indifferent, and successful responses require the consideration of more effective alternatives, given that current solutions often deter victims from coming forward. It would also be important for prisoners to have access to reporting facilities outside DCS mechanisms and be able to report rape or other sexual offences directly to the police. Interference by DCS officials in frustrating police investigations must be minimised in order to eradicate an environment where victims feel helpless in reporting a crime or where they legitimately fear that reporting the offence will only aggravate their situation.²³⁶

²³³ For a detailed commentary, see Smythe, D., Pithy, B. (eds) and Artz, L. (2011) *Sexual Offences Commentary Act 32 of 2007*, Cape Town: Juta.

²³⁴ Mashabela, P. (2003), p. 12; Muntingh, L. and Satardien, Z. (2011 a).

²³⁵ Jali Commission Report, p. 425.

²³⁶ Describing the factors that contribute to, or frustrate, successful investigations and prosecutions, the Jali Commission Report cited intimidation of witnesses in DCS custody and attributed the low rate of successful prosecutions to the withdrawal of charges and prisoners not being brought to trial by the DCS (pp. 423-429).

Furthermore, newly-admitted prisoners, first-time prisoners, weaker, younger and more vulnerable offenders, including homosexual prisoners, should be screened and initially isolated from more experienced prisoners. This would enable personnel to inform these categories of prisoners about prison culture as well activities, behaviours, practices or situations they should avoid or be aware of in the prison environment.²³⁷ Perpetrators of sexual violence should receive appropriate discipline, including rehabilitation programmes that address both the direct and indirect factors leading to their sexually violatory conduct.²³⁸ Importantly, officials – including their political heads – who fail prisoners at various stages of the criminal justice process should be held accountable for their involvement in the commission of sexual offences.²³⁹

8.3 Overview of issues

Even though the Jali Commission covered sexual violence extensively in its final report,²⁴⁰ the official position of the DCS has been one of general denial and, at best, uncomfortable acceptance. It was only in 2008 that the DCS publicly acknowledged that sexual violence in prisons, including male rape, was a problem.²⁴¹ In 2010 it was reported that the DCS is in the process of developing a policy framework on the prevention of sexual violence in prisons and

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²³⁷ The Jali Commission, p. 449.

²³⁸ The Jali Commission, p. 451.

²³⁹ The Centre for Child Law, which was at the forefront of launching a civil claim on behalf of a child who was raped at the hospital section of Durban Westville prison, said the Constitution required children to be detained separately from adults. ‘This matter gives the impression of an uncaring system. The officials who dealt with this child at various stages of the criminal justice process failed him at every turn. It is time that officials were held accountable, as well as their political heads,’ said Centre for Child Law co-ordinator Ann Skelton in an article dated 18 May 2008. Available at <http://www.iol.co.za/news/south-africa/boy-15-sold-for-jail-rape-1.400901>. Accessed on 28 December 2011.

²⁴⁰ Jali Commission, p.393.

²⁴¹ ‘How do we stop rape in prisons?’ *IOL*, July 1 2008, <http://www.iol.co.za/news/south-africa/how-do-we-stop-rape-in-prisons-1.406478> Accessed 18 December 2011. The DCS Offender Rape Seminar took place on 30 June 2008, and in his opening remarks, the then DCS National Commissioner Vernie Peterson said the Department is developing a policy on sexual violence. In 2008 Pollsmoor Prison invited the US-based NGO Stop Prisoner Rape to conduct a week-long seminar with staff from 7-11 July 2008. The author was present at this workshop.

that certain procedures have been put in place.²⁴² The policy framework has reportedly been finalised, but since it is not available in the public domain, it is not possible to assess it. It is unclear what steps have been taken to address sexual violence and whether the policy framework has been introduced and supported with training. Notwithstanding these recent developments, the Department has since 2004 failed in general to deal effectively with sexual violence in prisons. The limited progress that has been made appears to have come about thanks to pressure from civil society organisations such as the Centre for the Study of Violence and Reconciliation, Sonke Gender Justice and Just Detention International. The inadequate response to sexual violence in prisons must be regarded as one of the most important reform failures after 2004.

9. Parole

South Africa's parole system has its roots in a long-standing practice of hiring out convict labour for public works projects as well as use by private contractors, a practice inherited from the British. Over time it became more formalised through new legislation (e.g. Act 8 of 1959) and the adoption of recommendations made by various commissions of inquiry (e.g. the Viljoen Commission, 1976).²⁴³

Post-1994 the administration of parole has been marred by confusion and controversy, with prisoners ever more directing themselves to the courts for relief.²⁴⁴ If anything, the legitimacy

²⁴² PMG report on the meeting of the Portfolio Committee on Correctional services of 14 April 2010, <http://www.pmg.org.za/report/20100414-feedback-department-matters-related-their-accountability-management-n>. Accessed 8 February 2011.

²⁴³ Van Zyl Smit, D. (1992) *South African Prison Law and Practice*. Durban: Butterworth Publishers, pp. 20-43.

²⁴⁴ *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O); *Mazibuko v Minister of Correctional Services and Others* 2007 (2) SACR 303 (T); *S v Madizela* 1992 (1) SACR 124 (N); *Van Gund v Minister of Correctional Services and Others* 2011 (1) SACR 16 (GNP); *Groenewald v Minister of Correctional Services and Others* 2011 (1) SACR 231 (GNP); *Motsemme v Minister of Correctional Services and Others* 2006 (2) SACR 277 (W); *Mans v Minister van Korrektiewe Dienste en Andere* 2009 (1) SACR 321 (W); *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* 2009 (1) SACR 157 (T); *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D) 2001 (3); *S v Nkosi and Others* 2003 (1) SACR 91(SCA); *Saunders v Minister of Correctional Services and Others* (unreported) TPD case no. 14015/2000; *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE); *Ngenya and Others v Minister of Correctional Services and Others* (unreported) WLD Case no. 29540/2003. *S v Segole*(1999) JOL 5349 (W) *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (C); *S v Botha* 2006(2)

crisis in the prison system has extended to the parole system. It is not the intention here to deal with the detailed technical and legal provisions of parole, as this has been done elsewhere and is in itself a field of specialised study.²⁴⁵ The aim is rather to assess the main thematic issues that have emerged and how these have shaped, or failed to shape prison system reform.

Parole is central to the life and experiences of sentenced prisoners, creating an incentive for good behaviour while imprisoned but also serving as an important management tool in the hands of their custodians. To be released on parole is not a right that prisoners hold but rather a privilege.²⁴⁶ However, sentenced prisoners have the right to be considered for parole at a specified point in time.²⁴⁷ Importantly, the possibility of release on parole must always be there, even for those sentenced to life imprisonment and terms of imprisonment that exceed normal life expectancy.²⁴⁸ Furthermore, sentenced prisoners have a legitimate claim to have certainty in sentencing, and that the decision to release a sentenced prisoner on parole should be procedurally and substantively fair. In the following section, legal certainty is explored in detail, with the focus being placed on the confusion created by a 1998 policy directive, the

SACR 110 (SCA); *S v Williams*; *S v Papier* 2006 (2) SACR 101(C); *S v Pakane and Others* 2008(1) SACR 518 (SCA); *Lombaard v Minister of Correctional Services and Others and two similar cases* 2009(1) SACR 157(T); *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C); *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA); *S v Sidyno* 2001 (2) SACR 613 (T).

²⁴⁵ Bruyns, H.J. and Cilliers, C.H. (2009) A review of imprisonment and deterrence programmes as a strategy to reduce prison populations, *Acta Criminologica* Vol.22 No. 1.; Cilliers, C.H. (2006) New horizons for parole applications in South Africa”, *Acta Criminologica*, Vol.19 No. 3.; Lidovho, G.J. (2003) A critical look at the past and current release policy of the Department of Correctional Services, *SA Journal of Criminal Justice*, Vol.16; Louw, F.C.M. and Luyt, W.F.M. (2009) Parole and parole decisions in South Africa, *Acta Criminologica* Vol.22, No. 2.; Moses, L.J.J. (2003) Parole: Is it a right or a privilege? *SA Journal for Human Rights*, Vol.19; Mujuzi, J.D. (2009) Releasing terminally ill prisoners on medical parole in South Africa, *SA Journal for Bio-ethics and Law* Vol. 2 No. 2; Mujuzi, J.D. (2011) Unpacking the law and practice relating to parole in South Africa, *Potchefstroom Electronic Law Journal*, Vol. 14 No. 5.

²⁴⁶ *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D) 2001 (3).

²⁴⁷ ss 42 and 73 Correctional Services Act 111 of 1998.

²⁴⁸ In *S v Nkosi and Others* (2003(1) SACR 91(SCA)) the four appellants received terms of imprisonment of 120, 65, 65 and 45 years, respectively, for murder and attempted murder. The Court concluded that if the sentence were to be served in full, there would be no possibility of release on either serving one half of the sentence or on expiry of the sentence. Such a sentence would, the Supreme Court of Appeal concluded, amount to cruel, inhuman and degrading punishment. Consequently, their sentences were converted to life imprisonment. (Mujuzi, J.D. (2011) p. 208).

specification of a non-parole periods by the courts, and the now-repealed incarceration framework.

9.1 Legal certainty

In October 2004 the remaining provisions of the Correctional Services Act (111 of 1998) came into force and effectively introduced a second parole regime operating in parallel with the already existing one. In order to remain compliant with constitutional requirements pertaining to just administrative action,²⁴⁹ it is made abundantly clear in the transitional provisions of the Correctional Services Act (111 of 1998) that the two systems will operate in parallel.²⁵⁰ Those prisoners sentenced prior to 1 October 2004 would be governed by the 1959 Correctional Services Act, and those thereafter, by the 1998 legislation. This was because the 1998 legislation imposed a harsher parole regime. The central issue is the so-called non-parole period, namely the period that a sentenced prisoner must serve before he can be considered for parole and thus release. Prior to 2004 and with effect from March 1992, the rule of thumb was that prisoners serving a determinate sentence had to serve at least one-third of their sentences before they could be considered for parole. The law required that one half must be served but that this could be reduced to one-third by earning credits for good behaviour. This applied to the overwhelming majority of prisoners. However, a number of factors could see this period being increased, specifically the offence of escaping from custody.²⁵¹ The 1998 Act required, in general, that a prisoner serving a determinate sentence must serve at least one half before he can be considered for parole.

9.1.1 The lasting confusion created by the 1998 Guidelines

In an effort to bring greater clarity and hence consistency to parole decisions, the DCS issued new parole guidelines on 23 April 1998.²⁵² The guidelines were intended to increase the non-parole period, especially for prisoners convicted of violent offences, and were at least

²⁴⁹ s 33 of Act 108 of 1996.

²⁵⁰ s 136(1).

²⁵¹ Prisoners who had escaped or attempted to escape or assisted with an escape, and are recaptured, would have added to their non-parole period the number of days they spent out of custody; the sentence imposed for the escape to be served in full if less than two years; an additional six months for every escape; and three-quarters of the sentences imposed for offences committed while being a fugitive (Van Zyl Smit, D. (1992), p. 362).

²⁵² Jali Commission, p. 484.

partially motivated by public concerns about crime.²⁵³ The guidelines listed “negative” and “positive” factors to be taken into account. Amongst the negative factors, it was required that prisoners convicted of serious violent crimes had to serve three-quarters of the sentence before being considered for parole, and prisoners who had escaped, four-fifths.²⁵⁴ The policy made a material alteration to the one-third requirement and did so retrospectively. This policy would cause lasting confusion and ultimately result in extensive litigation against the Department.

The 1998 Act, coming into force in October 2004, changed the general requirement for prisoners serving a determinate sentence to one-half of the sentence to be served instead of one-third. Again there were exceptions,²⁵⁵ such as prisoners sentenced under the minimum sentences legislation (Act 105 of 1997) who had to serve four-fifths of the term before being considered for parole.²⁵⁶

The retrospectivity of the 1998 guidelines was addressed in 2001 in *Combrink v Minister of Correctional Services*.²⁵⁷ The Court found that prisoners sentenced prior to 1998 had a legitimate expectation that the parole provisions applicable at the time of sentencing would apply to them. The 1998 guidelines altered this retrospectively to the detriment of the applicants who would, in terms of the policy guidelines, have had to serve three-quarters and four-fifths, respectively, instead of “one half less credits” before they could be considered for parole. In short, the application of the guidelines violated the Constitutional guarantee of administrative action that is lawful, reasonable and procedurally fair.²⁵⁸

Notwithstanding the *Combrink* decision as well as others, the 1998 guidelines appear to have had a lasting effect on the decision-making of parole boards. In *Botha v Minister of Correctional Services*, the Department presented evidence that, following a number of

²⁵³ Interview with Prof J. Sloth-Nielsen, former member of the National Council on Correctional Services, Cape Town, 9 January 2012.

²⁵⁴ Jali Commission, p. 484-485.

²⁵⁵ For a detailed description of these exceptions, see Muntingh, L. (2010).

²⁵⁶ s 73(6)(b)(v) Correctional Services Act 111 of 1998. This provision was repealed in 2011.

²⁵⁷ 2001(3) SA 338(D).

²⁵⁸ s 33 Act 108 of 1996. Also *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE).

decisions between 1999 and 2003,²⁵⁹ the parole boards were supposed to disregard the 1998 guidelines.²⁶⁰ Evidence of the lasting confusion would still be found in 2011.²⁶¹ If this was communicated to the parole boards, it was either done so poorly or the parole boards chose to ignore it.

It was not long before prisoners who felt themselves “done in” by the lengthening of the non-parole period turned to the courts for relief. Numerous decisions were handed down to clarify the legal situation regarding parole; even so, this remains an evolving field of jurisprudence.²⁶² The decisions also showed that the parole system was in disarray and that parole boards often refused to grant parole for reasons that had no basis in law.

The prevailing confusion in parole board decision-making was best illustrated in the 2006 case of *Motsemme v Minister of Correctional Services*.²⁶³ Not only did the parole board apply the law incorrectly, it also ignored several court orders to re-assess the case properly and apply the law correctly.²⁶⁴ Motsemme was sentenced in 1996 to 17 years imprisonment. He was initially told that he would need to serve one-third, but in 2002 was informed that due to the 1998 guidelines (which were no longer applicable following the *Combrink* decision) he would have to serve three-quarters: that is, 12 years and nine months as opposed to five-and-a-half years. The applicant used his time in prison well and acquired a post-graduate degree in law; he also demonstrated himself to be a model prisoner, being motivated and an exemplary candidate for parole. In 2004 he instituted legal proceedings, and several court

²⁵⁹ *Combrink and Another v Minister of Correctional Services and Others* 2001 (3) SA 338 (D); *Saunders v Minister of Correctional Services and Others* (unreported) TPD case no. 14015/2000; *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE); *Ngenya and Others v Minister of Correctional Services and Others* (unreported) WLD Case no. 29540/2003. *S v Segole*(1999) JOL 5349 (W) *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (C).

²⁶⁰ *S v Botha* 2006 (2) SACR 110 (SCA) para 9. Also *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* 2009 (1) SACR 157 (T).

²⁶¹ *Groenewald v Minister of Correctional Services and Others* 2011 (1) SACR 231 (GNP).

²⁶² *Combrink and another v Minister of Correctional Services and Another* 2001(3) SA 338(D); *Motsemme v Minister of Correctional Services and others* 2006(2) SACR 277(W); *S v Botha* 2006(2) SACR 110 (SCA); *S v Williams*; *S v Papier*2006(2) SACR 101(C); *S v Pakane and Others* 2008(1) SACR 518 (SCA); *Lombaard v Minister of Correctional Services and Others and two similar cases* 2009(1) SACR 157(T); *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384(C); *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE).

²⁶³ 2006(2) SACR 277(W).

²⁶⁴ Sloth-Nielsen, J. (2005 b) Parole Pandemonium, *CSPRI Newsletter*, No. 14, p. 1.

appearances with different judges ensued. Evidence before the Court indicated that the parole board was of the opinion he had not yet served a long enough term in prison and that the offences he committed (robbery and unlawful possession of arms and ammunition) were serious. The parole board failed to acknowledge that the 1998 guidelines were unlawful, as per the *Combrink* decision handed down some three years earlier, and that Motsemme had indeed been rehabilitated. Moreover, this had been confirmed in documents placed before the parole board.²⁶⁵ Motsemme's release was, after the fifth appearance, ordered by the court.

It is open to speculation how many other prisoners at the time were affected in the same way yet found themselves without the good fortune of having Motsemme's skills and resolve. But whatever the scope and scale of its impact, the situation most certainly created a material failure in the administration of sentences – a matter which, as specified in the Correctional Services Act, is the first objective of the prison system.²⁶⁶

9.1.2 A non-parole period specified by the courts

Section 73(6)(a) of the Correctional Services Act (111 of 1998) stipulates that:

a prisoner serving a determinate sentence may not be placed on parole until such a prisoner has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.

However, this provision came into force only on 1 October 2004, and at the same time that a corresponding provision in the Criminal Procedure Act came into force stating that:

²⁶⁵ Sloth-Nielsen summarises it as follows: 'After detailing his LLB and LLM studies, teaching of other inmates, positive attitude and exemplary behaviour in prison, his high level of motivation, his effective efforts to resolve the underlying motivation for the original offences, the completion of a variety of courses and receipt of a prize for rehabilitation, and establishment of a hand skills project for other inmates out of his own pocket, the report says he shows "maturity and selflessness and with this and other positive factors in his favour, the CMC believes he is an ideal candidate for placement on parole. He has become a very responsible and respectful individual who may no longer pose any further danger to society ... he has obtained maximum benefit from his imprisonment and his paroling will no doubt lead to further rehabilitation. Nothing we believe would negatively impact upon his suitability of (sic) parole.'" (Sloth-Nielsen, J. (2005 b), p. 1).

²⁶⁶ s 2(a).

276B(1)(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole

(b) Such a period shall be referred to as the non-parole period and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.²⁶⁷

Read together, the provisions create a mechanism whereby courts can stipulate, or rather order, that the DCS not consider a prisoner for parole until the specified non-parole period has lapsed. This applies only to sentencing after 1 October 2004. Prior to section 276B being in force there was no mechanism in place by which courts could order a non-parole period.²⁶⁸ Importantly, should courts wish to specify a non-parole period, they should do so with reference to section 276B of the Criminal Procedure Act and not section 73(6)(a) of the Correctional Services Act.²⁶⁹ The changes to the parole provisions should also be seen against a general desire on the part of government to establish a regime prescribing stiffer sentences for serious crimes.

The situation with regard to a court specifying a non-parole period is a confusing one, since the chronology of evolving jurisprudence does not follow a neat time-line. Prisoners were sentenced prior to the amendment of laws, and the commencement of amendments was delayed. In *S v Botha* the Supreme Court of Appeal had to assess the validity of the trial court's recommendation that the applicant had to serve two-thirds of the sentence before being considered for parole. The appellant was sentenced before October 2004 (with s 276B of the Criminal Procedure Act not in force) and the appeal judgment delivered in 2006. In *Botha* the Supreme Court of Appeal regarded subordinate courts specifying a non-parole period as an undesirable incursion into the affairs of the executive, another branch of government.²⁷⁰ Furthermore, where a court specified a non-parole period, this should be regarded as "just a recommendation" to the DCS and not an instruction.²⁷¹ The *Botha* court wanted to see a strict separation of powers between the judiciary and the executive.²⁷² An

²⁶⁷ It should be noted that s 276B was inserted by Act 87 of 1997 but its coming into force was delayed until the full Correctional Services Act came into force in October 2004.

²⁶⁸ *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA); *Stander v S* (547/11) [2011] ZASCA 211.

²⁶⁹ *S v Williams*; *S v Papier* 2006(2) SACR 101(C).

²⁷⁰ *S v Botha* 2006 (2) SACR 110 (SCA) para 25-27.

²⁷¹ Mujuzi, J.D. (2011), p. 218. *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O).

²⁷² Mujuzi, J.D. (2011), p. 217.

earlier decision also followed this approach when the trial court recommended that the prisoner serve at least 30 years before he is considered for parole. On appeal, the Supreme Court of Appeal concluded that it merely indicated the trial judge's view of the period that ought to expire before parole is considered and not intended to bind the executive.²⁷³ A similar conclusion was reached in *S v Sidyno*.²⁷⁴

Even if courts are, after October 2004, legally mandated to order a non-parole period and thus bind the executive, questions still arise as to its desirability. In *Stander v S* the Supreme Court of Appeal in a 2011 judgment concluded that this should only be done in exceptional circumstances.²⁷⁵ Citing several judgments, the Court was acutely aware of the separation of powers doctrine and the importance of avoiding tension between the judiciary and the executive. In general it regarded the DCS to be in a far better position and better equipped to deal with the question of release. The philosophical points underlying the earlier judgments were not discarded when statutory provision was made for courts specifying a non-parole period to be served. To make such an order, a court must therefore consider specific evidence with regard to, for example, the seriousness of the offence, the prospects for rehabilitation and the risk that the offender pose to the community. This incursion into the domain of the executive, as per *Botha*, should thus be made with great circumspection.

While any court can make a recommendation, as compared to an order with reference to section 276B of the Criminal Procedure Act, with respect to a non-parole period, parole boards should regard it as such: a non-binding recommendation expressed by the court at some point in time (which could have been several years earlier). From the many cases that prisoners took to court about the non-parole period, the overwhelming impression is that the parole boards interpreted these recommendations too narrowly and were willingly bound by them.

9.1.3 The incarceration framework

²⁷³ *S v Maseko* 1998 (1) SACR 451(T) cited in Mujuzi, J.D. (2011), p. 216.

²⁷⁴ *S v Sidyno* 2001(2)SACR 613(T) in Mujuzi, J.D. (2011), p. 216.

²⁷⁵ *Stander v S* (547/11) [2011] ZASCA 211. Also *Van Gund v Minister of Correctional Services and Others* 2011 (1) SACR 16 (GNP)

Relying somewhat tenuously on a number of court decisions,²⁷⁶ the DCS came to the conclusion in 2007 that the courts had “no control” over the decision to release a prisoner on parole and that this was entirely the prerogative of the executive.²⁷⁷ The DCS did, however, not refer to the findings of the South Law Reform Commission report on sentencing and its recommendation with regard to parole.²⁷⁸ Again with the aim of establishing consistency in parole decisions, it introduced, through the Correctional Services Amendment Act (25 of 2008), the “incarceration framework”. The framework would be developed by the National Commissioner in consultation with the National Council on Correctional Services (an advisory body to the Minister) and “ratified”²⁷⁹ by the Minister of Correctional Services. Regulations to give effect to the incarceration framework would be developed and submitted to the Portfolio Committee on Correctional Services for approval. The Correctional Services Amendment Act (25 of 2008) required that the incarceration framework:

- (a) must prescribe sufficient periods in custody to indicate the seriousness of the offences;
- (b) must apply to all sentenced offenders generally;
- (c) must provide for consistent application of its provisions;
- (d) may provide for different periods in relation to the same offence, depending on the measure of good behaviour or co-operation of a sentenced offender during incarceration; and
- (e) may provide for any ancillary or incidental administrative matter necessary for the proper implementation or administration of the incarceration framework.²⁸⁰

When the Portfolio Committee on Correctional Services in its deliberations on the draft Correctional Services Amendment Act (25 of 2008) [Bill 32 of 2007] invited public

²⁷⁶ *S v Botha* 2006 (2) SACR 110 (SCA) and *S v Nkosi and Others* 2003 (1) SACR 91 (SCA).

²⁷⁷ Motivation for the amendment of the Correctional Services Act, 111 of 1998 (Correctional Services Amendment Bill, 2007), PMG Report on the meeting of the Portfolio Committee on Correctional Services of 24 August 2007, <http://www.pmg.org.za/minutes/20070823-correctional-services-amendment-bill-briefing> Accessed 28 December 2011.

²⁷⁸ South African Law Commission (2000) *Sentencing (A New Sentencing Framework)*, Discussion Paper 91, Project 82, Pretoria: SALRC.

²⁷⁹ The notion of domestic subordinate law being “ratified” by a Minister is without precedent in South Africa and its meaning is thus unclear.

²⁸⁰ s 73A (2).

comment, the incarceration framework came in for sharp criticism from civil society groups. The first major point of concern was that the incarceration framework would introduce a third parole regime into the already confusing situation where different non-parole periods were already applicable to prisoners sentenced before and after October 2004.²⁸¹ Second, leaving the determination of non-parole periods entirely at the discretion of the executive who would determine this in subordinate legislation (i.e. regulations), which may indeed change from time to time, was unfair to prisoners who needed certainty with regard to the non-parole period they were to serve.²⁸² Third, leaving the specification of the non-parole period entirely in the hands of the executive may indeed conflict with the intentions of the sentencing court. A court may impose a particular term of imprisonment with the knowledge that consideration for release on parole will happen at a known and specified point in time in the future (e.g. at half the term).²⁸³ The incarceration framework would have removed this certainty.

When the Correctional Services Amendment Act 25 of 2008 came into force on 1 October 2009, the sections dealing with the incarceration framework²⁸⁴ were omitted.²⁸⁵ In November 2010 the Correctional Matters Amendment Bill [Bill 41 of 2010] was tabled in Parliament and proposed the repeal of the sections in the Correctional Services Amendment Act (25 of 2008) establishing the incarceration framework. Three reasons were given for this about-face: the introduction of a third parole system would “be highly undesirable and unworkable”; there were concerns about the legality of the framework; and it was said that “no version of

²⁸¹ Sloth-Nielsen, J. (2007) *Submission to the Parliamentary Portfolio Committee on Correctional Services relating to parole and the proposed amendments concerning parole in the Correctional Services Amendment Bill*, Faculty of Law, University of the Western Cape. PMG report on the meeting of the Portfolio Committee on Correctional Services of 4 September 2007, <http://www.pmg.org.za/minutes/20070903-correctional-services-amendment-bill-public-hearings> Accessed 28 December 2011.

²⁸² Muntingh, L. (2007 c) *Submission by the Civil Society Prison Reform Initiative to the Portfolio Committee on Correctional Services on the Correctional Services Amendment Bill [B 32 of 2007]*. PMG report on the meeting of the Portfolio Committee on Correctional Services of 4 September 2007, <http://www.pmg.org.za/minutes/20070903-correctional-services-amendment-bill-public-hearings> Accessed 28 December 2011.

²⁸³ Muntingh, L. (2007 c).

²⁸⁴ ss 48 and 49.

²⁸⁵ Correctional Services Amendment Act (25 of 2008): Commencement, Gazette Number 32608, 1 October 2009.

an incarceration framework could practically achieve the desired outcomes stipulated”.²⁸⁶ The reasons offered were indeed the very same objections raised by civil society in 2007.

Although it was later repealed, the incarceration framework was ill-conceived from the start and should not have been passed into law. It appears that its enactment driven by the then Minister of Correctional Services, Ngconde Balfour; after his departure in 2009, it was possible to remove it from the legislation. The actions of the DCS were again indicative of an organisation that remained unresponsive to the advice given by outsiders. Notwithstanding its repeal, the incarceration framework was an awkward incident and alienated several civil society stakeholders. At a time when legislative simplicity was required to clean up the confusion around parole and prevent further litigation by disgruntled prisoners, the intention was there to devise a system under executive control that would only have aggravated the situation. The failed incarceration framework is also indicative of the less tangible tension between the Department and its charges. If the framework could have been made to work, it would have given unfettered discretion to the executive to grant and withhold parole.

9.2 Structure and functioning of the parole boards



9.2.1 Overview

There are 48 Correctional Supervision and Parole Boards (parole boards) in South Africa, structured according to the respective management areas, and these were created by the Correctional Services Act (111 of 1998) when it came into force in October 2004.²⁸⁷ The parole boards make decisions in respect of the conditional release of sentenced prisoners on parole²⁸⁸ and on correctional supervision for sentenced prisoners serving sentences of two years or longer.²⁸⁹ Prior to the 2008 amendment to the Correctional Services Act, parole

²⁸⁶PMG report on the meeting of the Portfolio Committee on Correctional Services of 10 November 2010, <http://www.pmg.org.za/report/20101110-department-correctional-services-matters-related-enhanced-parole-syst> Accessed 28 December 2011.

²⁸⁷ s 74-75.

²⁸⁸ This includes ordinary parole, day parole and medical parole.

²⁸⁹ s 75.

boards dealt with all sentenced prisoners serving a sentence of twelve months or longer.²⁹⁰ The decision to release sentenced prisoners serving determinate sentences of less than 24 months (the so called non-board cases) is made by the National Commissioner, who has delegated this authority to Heads of Prisons.²⁹¹

The implications of this are not insignificant. More than 72% of sentenced prisoners released in South Africa, according to 2005 figures, have served sentences of less than 24 months and 61% served sentences of less than twelve months.²⁹² The 2008 amendment saw the parole boards' effective control over releases diminish to a little more than a quarter of all releases. Conversely, the overwhelming majority of decisions to release sentenced prisoners serving determinate sentences remain firmly under the control of the executive in the absence of civilian input. In respect of the release on parole of the "non-board" cases, little has changed from what the situation was prior to 2004. As a result of this structural arrangement, there is a paucity of information about the decision-making processes governing "non-board" cases. Since this category serves shorter sentences it is also unlikely they would engage in litigation, which would have brought some measure of transparency.

In respect of prisoners serving life imprisonment, the parole board makes a recommendation to the Minister of Correctional who in turn makes the final decision.²⁹³ The Act also provides for a Correctional Supervision and Review Board with the authority to review parole board decisions that have been referred to it by the Minister of Correctional Services, the National Commissioner or the Inspecting Judge.²⁹⁴ Each parole board consist of a chairperson, deputy chairperson, two representatives from the community and one official appointed by the National Commissioner of Correctional Services. Save for the appointed official, all other members are not officials of the DCS and are appointed for a period of five years.²⁹⁵

²⁹⁰ s 75 as amended by s 52 of Act 25 of 2008.

²⁹¹ Regulations to the Correctional Services Act, Government Gazette, No. 26626, p. 97.

²⁹² Muntingh, L. (2007 c).

²⁹³ s 75(1)(c).

²⁹⁴ s 76.

²⁹⁵ There are conflicting reports with regard to the term of the contract, with some reports indicating a five-year term and others, annual contracts.

Essentially the parole boards make their decisions independently from, but based upon, information submitted to them by the prison-based Case Management Committee (CMC).²⁹⁶

The establishment of civilian parole boards was intended to bring about a greater sense of public participation in the prison system and, perhaps more importantly, to make the community partly responsible for who is released from prison. Fears about public safety and the possibility that dangerous offenders are released without recognising the interests of the public are what partly motivated the establishment of the civilian parole boards. Prior to that (between 1993 and 2004), parole boards did exist but comprised of only DCS officials; the responsibility and accountability for releases thus rested firmly with the DCS.

9.2.2 Problems with the parole boards

In the preceding section it was evident that there were substantial problems with the decision-making of parole boards, resulting in several instances where prisoners sought relief from the courts. The problems with the parole boards did not escape Parliament's attention, and in September 2009 the Portfolio Committee on Correctional Services invited a number of parole board representatives and the DCS to brief it on their achievements and challenges.²⁹⁷ A myriad of problems emerged.

The first was that the DCS was not properly managing the parole boards. This manifested itself primarily in positions on the parole boards being vacant, especially those of chairpersons, with vice chairpersons having to fulfil that function without being remunerated accordingly.²⁹⁸ In the case of some parole boards, the position of chairperson had never been

²⁹⁶ The Case Management Committee (CMC) is an internal DCS Committee whose task it is to prepare a comprehensive report, as required by s 42(2)(d) of the Correctional Services Act 111 of 1998, on each sentenced prisoner. The report is referred to as a profile and is submitted to the parole board with a recommendation from the CMC as to the suitability of the prisoner to be released on parole or correctional supervision.

²⁹⁷ PMG Report on the meeting of the portfolio Committee on Correctional services of 8 September 2009, <http://www.pmg.org.za/report/20090908-briefing-selected-parole-board-chairpersons-challenges-functioning-pa> Accessed 21 December 2011.

²⁹⁸ The recruitment of chairpersons would remain a problem, and in 2010 the existing chairpersons' five-year contracts were extended for a further two months to allow for the delayed recruitment of new chairpersons ('Parole board tenure extended' *News24.com*, 26 July 2010, <http://www.news24.com/SouthAfrica/News/Parole-board-tenure-extended-20100726> Accessed 23 December 2011). By the end of the 2010/11 financial year, new parole boards had been appointed (Department of Correctional Services (2011 a), p. 21.)

filled. Whereas chairpersons were appointed on five-year contracts, there was no clarity in respect of vice chairpersons, and community representatives were appointed on monthly contracts. Furthermore, it appeared that at least some parole board chairpersons were kept in the dark as to their remuneration. Naturally this affected the morale of the parole board members. Administrative, logistical and security support were also raised as concerns. From the information presented to the Portfolio Committee it appears that the parole boards received little, if any, assistance from the DCS when prisoners engaged in litigation, and it was left to the parole boards and the state attorney to prepare and file the necessary court papers. Initially this resulted in significant backlogs,²⁹⁹ but these had been addressed by and large by 2010/11.³⁰⁰

Second, a number of parole board chairpersons doubted the independence of the parole boards as there was, allegedly, undue influence in the decision-making of the parole boards. Reference was made to, for example, a sudden interest from the Head Office in high profile cases and DCS officials insisting on accompanying the parole board members to a hospital when assessing medical parole cases. This was equally demoralising as it affected the boards' independence and legitimacy as well as the esteem in which the community held them.

Third, the reports on individual prisoners submitted to the parole boards by the CMC frequently lacked vital information, such as the history of previous criminal convictions, remarks by the trial court or the sentence plan. This problem was exacerbated by the shortage of professional staff in DCS (e.g. social workers) to prepare the relevant documentation and render the necessary rehabilitation programmes. In the absence of critical information the parole boards found themselves in an extremely difficult situation. A prisoner has a legitimate expectation to be assessed by the parole board and it is no fault of the prisoner that the information is not available; however, the parole board can hardly proceed and make a decision if key information is not included in the report from the CMC.³⁰¹ This added to the backlog of cases.

Fourth, consistency in decision-making was more a concern of the DCS than of the parole boards when addressing the Portfolio Committee in 2009. The core issue appears to be a lack

²⁹⁹ 'Prison parole boards dysfunctional: Bloem'. *SABC News*, 12 May 2007,

http://196.35.74.234/south_africa/crime1justice/0,2172,148933,00.html Accessed 23 December 2011.

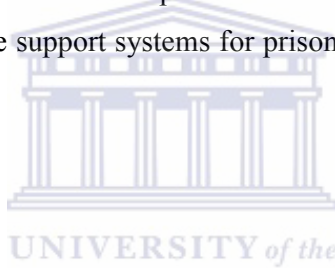
³⁰⁰ Department of Correctional Services (2011 a), pp. 70-71.

³⁰¹ *Groenewald v Minister of Correctional Services and Others* 2011 (1) SACR 231 (GNP).

of skills and knowledge by both the parole board members and CMC members of the relevant legislation and related matters. The legislation governing parole is not simple, and each case requires careful analysis to ensure that the correct decision is reached in a manner that complies with the requirements of just administrative action. It appears that parole board members had received very little initial training, and no evidence was presented to the Portfolio Committee in September 2009 that refresher training courses were undertaken. The inconsistency in decision-making, as described in the preceding sub-section, is therefore not altogether surprising.

In addition to the four problems areas described above, it was also noted that the Department of Justice and the SA Police Services seldom, if ever, participated in parole board meetings as is provided for in law, and this has been confirmed in other research.³⁰² Medical parole cases were also identified as a problem area and concerns raised about the opinions received from medical practitioners; the concerns related to prisoners who are debilitated but not terminally ill and to the lack of post-release support systems for prisoners being considered for medical parole.

9.3 Summary of issues



The first civilian parole boards (2005 to 2010) ran into numerous difficulties. Many of their travails can be ascribed to the deficient manner in which the Department managed the parole boards in terms of their training, conditions of service and general support. In several instances prisoners contested parole board decisions in the courts, and this affirmed, when successful, that the parole boards were poorly trained and not infrequently receiving inadequate advice and support from the Department. A number of high-profile cases fuelled public doubt in the parole system.³⁰³ It also became increasingly clear that the parole boards

³⁰² Louw, F.C.M. and Luyt, W.F.M. (2009), p. 13.

³⁰³ The following are two examples in this regard. In 2005 Mark Scott-Crossley was sentenced to life imprisonment by the Phalaborwa Circuit Court for assaulting and then throwing a former employee into a lion enclosure. He appealed, and on 28 September 2007 the Supreme Court of Appeals in Bloemfontein set aside Scott-Crossley's murder conviction. The sentence of life imprisonment was substituted with five years' imprisonment on the lesser offence of being an accessory after the fact. It was established that the victim was already dead when Scott-Crossley intervened. He was released on parole in September 2010. The case was charged with racial overtones, and for many South Africans his release meant that white and rich people can escape punishment. ('Man who threw worker to the lions walks free'. *Mail and Guardian*, 30 September 2010,

were not properly trained in the Constitutional requirements of just administrative action, and it can be surmised that there must have been prisoners who served longer periods of their sentences in prison than were strictly required. In a number of the court decisions it was not always clear why the Department opposed the applications; good legal advice should have pointed out the weaknesses in the Department's case.

The history of the parole boards after 1994 well illustrates the nexus between governance and human rights. Failure to comply with strict adherence to constitutional and legal prescripts by parole boards, a belligerent attitude in litigation, and inadequately trained parole board members led to decisions that had a direct impact on the right of sentenced prisoners to be considered for parole at the appropriate, legally prescribed time and, unless relevant evidence is presented, then released on parole. Unlawful decisions by parole boards resulted in prisoners being deprived of their liberty for longer than what was strictly necessary.



10. Children

A 1997 survey of children in South Africa's prisons found that the 1 361 sentenced children and 1 175 awaiting-trial children (2536 in total) were in general poorly cared for.³⁰⁴ The weak legislative framework regulating children in conflict with the law at the time, the absence of a legal framework regulating children in prison (the 1998 Correctional Services Act was still

<http://mg.co.za/article/2010-09-30-man-who-threw-worker-to-the-lions-walks-free> Accessed 28 December 2011). Tony Yengeni, a former ANC Chief Whip in the National Assembly, was convicted of defrauding Parliament by not declaring a discount he received on a luxury vehicle. He was sentenced to four years' imprisonment under a specific provision requiring him to serve at least one-sixth of the sentence in prison. He was released in January 2007 under correctional supervision after five months. Shortly thereafter he was seen consuming alcohol whilst under community corrections, and in November 2007 was arrested for driving under the influence of alcohol. It transpired that a police officer interfered with the evidence relating to the drunk-driving case, and although he was prosecuted, the charges against Yengeni were dropped. With good reason, the Yengeni matter created suspicion about political interference in the implementation of sentences ('Commissioner gave order on Yengeni, says cop'. *Mail and Guardian*, 18 June 2009, <http://mg.co.za/article/2009-06-18-commissioner-gave-order-on-yengeni-says-cop> Accessed 28 December 2011).

³⁰⁴ Sloth-Nielsen, J. (1997) *Children in Prison in South Africa – a situational analysis*, Bellville: Community Law Centre.

being drafted at the time), and the sheer volume of children in prisons created problems in nearly every aspect of operations relating to children. Whilst good or at least acceptable practices were identified, the overwhelming impression was that children were detained under conditions that were in line neither with international norms³⁰⁵ nor the Constitution.³⁰⁶ Overcrowding, poor record-keeping, failure to segregate children from adults, violence in prison, poor conditions of detention and so forth were some of the problems noted in the 1997 survey. There was little doubt that children were detained under conditions which the Constitution did not permit.

The remainder of this section deals with legislative developments pertaining to the imprisonment of children and also provides updated information on conditions of detention and services to imprisoned children. It will be argued that while legislative reforms have been progressive, implementation lagged behind.

10.1 Legislative developments

In 2004 the remaining chapters of the Correctional Services Act (111 of 1998) came into force and set new standards with regard to children in prisons. A number of provisions deal specifically with children to give recognition to the special protections under the Constitution.³⁰⁷ The Act firstly defines a child as a person under the age of 18 years, whereas the 1959 Act defined a juvenile as a person under the age of 21 years. It further requires that children be detained separately from adults and in accommodation which is “appropriate to their age”. The latter is, however, not defined. Standards are also set in respect of their diet³⁰⁸ through the regulations, requiring that children should receive a more nutritious diet with increased protein.³⁰⁹ Section 12 of the Act addresses health care of all prisoners and requires, with reference to children, that consent for surgery must be obtained from the child’s

³⁰⁵ For example the UN Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 Entry into force 2 September 1990, in accordance with article 49) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Adopted by General Assembly resolution 45/113 of 14 December 1990).

³⁰⁶ ss 12, 28(1)(g) and 35.

³⁰⁷ Sloth-Nielsen, J. (2004) What does the new Correctional Services Act say about children in prison, *Article 40*, Vol. 6 No. 3.

³⁰⁸ s 8(2).

³⁰⁹ Regulations to the Correctional Services Act, Gazette 26626, 30 July 2004, Regulation 4(1)(c).

guardian, or if it is not possible, that consent can be given by the attending physician. Section 13 of the Act requires the National Commissioner, upon the admission of a child to prison, to inform the relevant authorities who have a statutory responsibility for the education and welfare of children. Furthermore, the National Commissioner must also inform the parent or guardian of the child's imprisonment and/or transfer and the child may not refuse that this be done.³¹⁰

Section 19 of the Act deals in particular with children's access to education as well as social-work services, religious care, recreational programmes and psychological services. Importantly, all children of compulsory school-going age³¹¹ must have access to education and if not of compulsory school going age school, access to education should as far as practicable be provided. Illiterate children, even when not of compulsory school-going age, may also be compelled to attend programmes aimed at literacy.³¹² In addition, a duty is placed on the National Commissioner to ensure, as far as is possible, that children remain in contact with their families.³¹³ In respect of children performing labour in prison, such labour should be limited to activities aimed at obtaining and improving skills for their development.³¹⁴ Dull repetitive tasks, such as cleaning duties, would not meet this requirement.³¹⁵ The amended section 43(4) provides that the National Commissioner may, in consultation with the relevant provincial authorities (Welfare or Education), transfer a child to a child and youth care facility as contemplated in section 191(2)(f) of the Child Justice Act (75 of 2008). Section 69 deals with children placed under community corrections, and it may be required that a child attend certain programmes whilst under community corrections.

The Child Justice Act (75 of 2008), which came into operation on 1 April 2010, further strengthened the legal framework regulating the imprisonment of children. It firstly raised the age of criminal capacity from seven to ten years, thus removing children under the age of ten

³¹⁰ s 13.

³¹¹ Schooling is compulsory for all South Africans from the age of seven (grade 1) to the age of 15, or the completion of grade 9 (s 3(1) South African Schools Act 84 of 1996).

³¹² s 41(2).

³¹³ s 19(3).

³¹⁴ s 40(3)(b).

³¹⁵ Sloth-Nielsen, J. (2004), p. 4.

years from the ambit of criminal sanctioning and the possibility of imprisonment.³¹⁶ Furthermore, children aged between ten and fourteen years are presumed to lack criminal capacity unless the state can prove otherwise. The Child Justice Act also excludes a prison as a place of pre-trial detention for children under the age of 14 years,³¹⁷ and if the child is under the age of 16 years, the Director Public Prosecutions must issue a certificate verifying that there is a prima facie case involving an offence listed under Schedule 3³¹⁸ to the Child Justice Act.³¹⁹ The Child Justice Act lists a number of additional factors to be taken into account³²⁰ and stipulates further that the placement of an awaiting trial child detained in a prison be reviewed every 14 days.³²¹ In respect of sentencing, the Child Justice Act limits the use of imprisonment as a sentencing option to children older than 14 years and adds additional

³¹⁶ 7. (1) A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.

(2) A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.

(3) The common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section.

³¹⁷ s 30(1)(b) Act 75 of 2008.

³¹⁸ Schedule 3 contains the most serious offences such as treason, sedition, murder, extortion, kidnapping, robbery and rape.

³¹⁹ s 30(2) Act 75 of 2008.

³²⁰ s 30(3) (a) the best interests of the child;

(b) the child's state of health;

(c) previous convictions, previous diversions or charges pending against the child;

(d) the risk that the child may be a danger to himself, herself or to any other person or child in a child and youth care centre;

(e) any danger that the child may pose to the safety of members of the public;

(f) whether the child can be placed in a child and youth care centre, which complies with the appropriate level of security;

(g) the risk of the child absconding from a child and youth care centre;

(h) the probable period of detention until the conclusion of the matter;

(i) any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child;

(j) the seriousness of the offence in question; or

(k) any other relevant factor.

³²¹ s 30(4).

protective measures to restrict its use to ensure that it is used as a measure of last resort and only for the shortest possible period.³²²

Collectively the Correctional Services Act and the Child Justice Act brought about vast improvements to the legal framework regulating the use of imprisonment for children and, if imprisoned, the conditions of their detention. Jurisprudential developments have also ensured that children are excluded from the provisions of the much-maligned mandatory minimum sentences legislation,³²³ that non-custodial sentencing options are considered even when a serious offence had been committed,³²⁴ criminal capacity,³²⁵ and pre-sentence reports.³²⁶

10.2 The situation in 2011³²⁷

A 2011 survey of children in South African prisons collected qualitative and quantitative data from 41 prisons. Despite the guidance provided by the Correctional Services Act, the Child Justice Act, the 2004 White Paper on Corrections, DCS policies and case law, the central finding of the survey was that implementation in respect of the services and activities available to children is varied and inconsistent. This referred in particular to information provided at admission, orientation of new admissions, conditions of detention, the segregation of children from adults, access to education, access to recreational activities and preparation for release.

Instances were identified at certain DCS facilities where practices were compliant with the legislation, indicating that the required standards can be met in the current environment and

³²² s 77.

³²³ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2008] JOL 22687 (T); *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA) (3 September 2008) *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E); *S v B* 2006 (1) SACR 311 (SCA).

³²⁴ *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SA 446 (SCA); 2006 (1) SACR 243 (SCA).

³²⁵ *S v Ngobese and Others* 2002 (1) SACR 562 (W).

³²⁶ *S v Van Rooyen* 2002 (1) SACR 608 (C).

³²⁷ This section is based on Muntingh, L. and Ballard, C. (2011 b) *Report on Children in prison in South Africa*, Bellville: Community Law Centre.

context. The Brandvlei Youth Correctional Centre (Western Cape) stood out in particular, echoing similar findings made in the 1997 survey.³²⁸

It was also found that since 2003 the total daily number of children imprisoned in South Africa across all categories declined drastically from 4500 to 846 in February 2011.³²⁹ It was also established that children charged with and convicted of non-violent offences are now far less likely to be imprisoned. Despite these developments, it was also the case that sentence tariffs for children have increased slightly, a trend reflected in the total prison population.³³⁰

The survey established that children remain awaiting trial in DCS facilities for an average of 70 days, a considerable length of time for a child. While policies and law stipulate that children should have access to a range of services (educational, social work, therapeutic, developmental and recreational), this was found not to be the case at all prisons surveyed. Awaiting-trial children of compulsory school-going age are, in particular, excluded from education. Generally, conditions of detention for unsentenced children were below the required standards in several facilities surveyed due to limited infrastructure, overcrowding and staff shortages. However, staff shortages may be the result of the poorly managed shift system discussed in Chapter 4 (section 2.2.4).

Some centres surveyed were able to engage children actively throughout the day, but the overwhelming impression is that children are sitting idle in their cells for most of the time. Even when children are outside their cells, structured recreational, educational and developmental services are limited. It is especially unsentenced children who are feeling the brunt of the idle monotony of daily prison life, with little to engage them in constructive and meaningful activities. Although unsentenced children are innocent until proven guilty, and

³²⁸ Sloth-Nielsen, J. (1997) p. 15.

³²⁹ The decline in the number of children detained and sentenced to imprisonment has not been studied independently, but it is in all likelihood the result of a combination of at least three factors. First, over a number of years the Department of Social Development had created additional Child and Youth Care Centre capacity where children could be detained awaiting trial and therefore not be in a prison. Second, there has been a general and substantial decline in the number of offenders sentenced to imprisonment (see section 2.2 Fig. 1 above), and this is also reflected in the number of children sentenced to imprisonment. Third, it can be argued that given the extensive advocacy and training done by civil society organisations with judicial officers since 1990 on child justice, their attitude towards, and knowledge of, children's rights and the appropriateness of imprisoning children had improved.

³³⁰ Giffard, C. and Muntingh, L. (2006).

thus technically not eligible for rehabilitation services, this should not exclude them from general educational, developmental and recreational activities. There is also a common perception that awaiting-trial child prisoners have a high turnover and can thus not be engaged in sustained educational services. However, it was found, as alluded to above, that on average unsentenced children remain in prison for a period of 70 days. This is a sufficiently long period to engage unsentenced children in meaningful activities.

Generally, sentenced children find themselves in a better situation than their unsentenced counterparts. However, a number of problems areas were noted in respect of conditions of detention, the range and accessibility of services and programmes, and access to education for all children, especially those of compulsory school-going age. In 2008 the Correctional Services Act was amended and subsequently required that only offenders serving a sentence of longer than 24 months need to have a sentence plan.³³¹ This applies regardless of age. Prior to the amendment, the cut-off point was 12 months. Without a sentence plan it is difficult to see how sentenced prisoners, including children, would access educational, training and rehabilitation services. The amendment was extremely unfortunate as it now excludes a larger proportion of sentenced prisoners, and thus children, from access to services emanating from the sentence plan. The implication of the amendment is that that a child has to commit a more serious offence and thus receive a longer sentence in order to gain benefits from the services rendered by DCS. The exclusion is arbitrary and not based on any well-motivated reasons; in all likelihood it would not be justifiable under the limitations clause of the Constitution.³³²

Child safety inside prisons is a further reason for concern. In interviews the 2011 survey established that violence (including sexual violence) and intimidation were fairly common. It was found that that the overwhelming majority of DCS officials working with children (sentenced and unsentenced) had not received training to work with children with specific reference to anti-bullying strategies, suicide prevention or conflict management.

Even though section 19(3) of the Correctional Services Act requires the National Commissioner to take all practicable steps to ensure that children remain in contact with their families, little evidence was found that the Department takes any specific measures to promote contact between children and their families. Children are required to purchase phone cards from their own funds, and it is only at a few prisons that they are supplied with

³³¹ s 38(2).

³³² s 36 Act 108 of 1996.

stationery to write letters to their families. Children who do not have the necessary funds and resources are effectively cut off from their families. It was found that 40% of children had not had any visitors in the three months preceding the data collection undertaken for the survey.

Even though children generally have access to the DCS internal complaints mechanism, their knowledge of the Judicial Inspectorate's Independent Visitors was limited and few understood what their functions are.

Section 6 (3-4) of the Correctional Services Act requires the DCS to provide prisoners with information upon admission about their rights and responsibilities. This relates not only to the regime of the prison but also to due process rights such as access to legal representation. Practices were found to vary widely between different prisons, and most children stated that their main source of information was other children. Children's access to rehabilitative and therapeutic programmes is also inconsistent, with some prisons providing excellent services (e.g. Brandvlei prison) and others having virtually nothing in place to assist children.

10.3 Overview of issues

While the number of children in prison has declined drastically, efforts to render better services that are aligned to the Correctional Services Act appear to be limited. The reduction in numbers should have enabled the rendering of improved services, but in many regards the situation remains similar to that described in the 1997 survey report. A number of individual centres such as Brandvlei and Cradock exhibited greater levels of compliance with the Correctional Services Act, but the majority are characterised by inconsistent practices where policy and law is implemented to a greater or lesser degree. Where conditions of detention and services are of an acceptable nature, it appears that this is the result of individual leadership and commitment by the staff at a particular prison, rather than of a system-wide endeavour to treat children in accordance with legal and constitutional prescripts.

As is the case in respect of other thematic areas, the impression gained is that constitutional and legislative requirements have not driven reform in the prison system. This is particularly true in the case of children. Strict adherence to the requirements of the Correctional Services Act as it pertains to children is not enforced, nor does it seem to be a priority. For imprisoned children, the Constitution has afforded little value.

11. Women

Very little is known about female prisoners, be they adults and children, in South Africa, and the research undertaken has been descriptive in an effort to place women's issues on the prison discourse agenda.³³³ The crimes women commit, especially murder, have received some attention in the literature,³³⁴ as have the reasons for women's involvement in crime.³³⁵ Recent research has also investigated policy recommendations in respect of women's imprisonment.³³⁶ In addition, imprisoned mothers have been the subject of research,³³⁷ and mothers imprisoned with their infants have received notable attention from the Ministry of Correctional Services in recent years.³³⁸ Two notable studies have also been undertaken on female prisoners' experiences in prison as well as on their exposure to violence prior to and during imprisonment.³³⁹ Writings by female prisoners with a literary slant have been

³³³ Gibbons, J. (1998) Women prisoners and South Africa, *The Prison Journal*, Vol. 78 No. 3.

³³⁴ Pretorius, H.G. and Botha, S. (2006) The cycle of violence and abuse in women who kill an intimate partner - a biographic profile, *South African Journal of Psychology*, Vol. 3 No. 2, pp. 242-252; Kramer, S. (undated) *Discourse and power in the self-perceptions of incarcerated South African female sexual offenders*, University of South Africa Institute for Social and Health Sciences, http://www.mrc.ac.za/crime/atsa_kramer.pdf Accessed 27 December 2011; Maritz, S. (2003) *Women who kill: a psycho-legal literature review*, Mini-dissertation in partial fulfilment of the requirements for the degree Master in Psychology, University of Johannesburg.

³³⁵ Artz, L., Hoffman-Wanderer, Y. and Moul, K. (2011) *Women, crime and incarceration – exploring pathways of women in conflict with the law*, Cape Town: Gender, Health and Justice Research Unit.

³³⁶ Gender, Health and Justice Research Unit (2011) *Policy brief – women in prison – health and mental health*, Cape Town, Gender, Health and Justice Research Unit.

³³⁷ Luyt, W.F.M. (2008) Imprisoned mothers in South African prisons with children outside the institution, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 16, p. 304.

³³⁸ Address by the Hon. NN Mapisa-Nqakula – MP, Minister of Correctional Services On the Occasion of the National Women's Consultative Conference: Launch of National Council on Gender Based Violence and the South African Chapter on UN 'Unite to End Violence' Campaign, Birchwood Hotel, Boksburg Gauteng / 1-3 August 2011. 'Better facilities to make jail stay easier for babies'. *The Sowetan*, 1 July 2010, <http://www.sowetanlive.co.za/sowetan/archive/2010/07/01/better-facilities-to-make-jail-stay-easier-for-babies> Accessed 27 December 2011.

³³⁹ Haffejee, S., Vetten, L. and Greyling, M. (2006 a) *Violence and abuse in the lives of women and girls incarcerated at three Gauteng women's prisons*, Johannesburg: CSV Gender Programme, Research Brief, No. 3, Haffejee, S., Vetten, L. and Greyling, M. (2006 b) *Minority Report – the imprisonment of women and girls in Gauteng*, Johannesburg: CSV Gender Programme, Research Brief, No. 4.

published from time to time.³⁴⁰ In short, empirical research on women in prison in South Africa, especially from a rights perspective, is scarce indeed.

The Correctional Services Act 111 of 1998 makes only brief mention of female prisoners with reference to the separation of males from females at all times³⁴¹ and female prisoners admitted with their infants.³⁴² The Department's Standing Orders do not provide much more, although there is a substantive section on women's reproductive health, stipulating the medical and support services that they should receive.³⁴³ Compliance with this has, however, not been assessed. The 2004 White Paper is equally light in respect of female prisoners, noting that female prisoners are often far removed from their families due to the small number of designated female prisons.³⁴⁴ The White Paper further advocates for meaningful training opportunities for female prisoners and the greater use of non-custodial sentencing options. The emphasis in the White Paper is, however, placed on mothers imprisoned with their infants as the key issue in respect of female prisoners.

In this section it will be argued that the rights, concerns and real challenges faced by female prisoners have been neglected by and large and that the care of infants imprisoned with their mothers has dominated the Department's approach to female prisoners. As much as one may lament the fact that infants are on occasion imprisoned with their mothers and that a prison is not the ideal environment for child-rearing, it should also be acknowledged that there are very few such infants in the prison system – 145 at the end of February 2011 for the 3 762 female prisoners.³⁴⁵

³⁴⁰ Schreiner, B. (ed) (1992) *A snake with ice water: prison writings by South African women*, Johannesburg: Congress of South African Writers; Landau, J. (2004) *Journey to myself – writings by women from prison in South Africa*, Cape Town: Footprints.

³⁴¹ s 7(2)(b)

³⁴² s 20

³⁴³ B Order 3, Chapter 3, Section 9.0. Other provisions deal with the wearing of a thali (necklace worn by married Hindu women); the transfer of pregnant females to hospitals at other prisons; the separation of female prisoners; security measures around the keys to female sections; a register for body-cavity searches; the use of teargas in female sections, especially where there are pregnant female prisoners; the prohibition of the use of stun belts on pregnant female prisoners; the provision of toiletries; the clothing to be issued; and females under community corrections to be monitored by female officials.

³⁴⁴ Department of Correctional Services (2004 b) para 11.4.

³⁴⁵ Statistics supplied by the Judicial Inspectorate for Correctional Services.

11.1 Profile

It is not necessary to describe the profile of female prisoners in detail as this has been done elsewhere,³⁴⁶ but a few notable issues need to be raised as background. By October 2007 there were eight prisons designated for women only and 86 where men and women could be detained separately in different sections.³⁴⁷ The majority of female prisoners are held in overcrowded prisons, and at the end of February 2011 occupation levels for six of the eight designated female prisons were as follows: Pollsmoor 204%; Pretoria 196%; Johannesburg 183%; Worcester 173%; Thohoyandou 150%; and Durban 143%.³⁴⁸ Overcrowding has similar effects here as it has in male prisons (see section 3 above), but in this case, given the low and stable number of female prisoners, it is even more perplexing that the construction of female prisons to alleviate overcrowding has never featured in the Department's plans.

Since 1994 the proportion of women in the prison system has remained fairly stable, and by the end of March 2011 they constituted 2.3% of the total population.³⁴⁹ This falls at the lower end of the range for African countries³⁵⁰ and substantially below the rate in developed countries.³⁵¹ As at end February 2011, 29% of female prisoners were awaiting trial compared to 30% of males. However, compared to their male counterparts, awaiting-trial female prisoners are less able to afford bail when this is granted. According to a 2004 survey by the Judicial Inspectorate, a third of female prisoners were granted bail but could not afford it, compared to 7% of male prisoners. Women's inferior socio-economic status in society is thus also felt in prison, and results in avoidable imprisonment.³⁵² With respect to race and gender,

³⁴⁶Judicial Inspectorate of Prisons (2004) *Women in South African Prisons*. A publication prepared by the Judicial Inspectorate of Prisons in Support of the 16 Days of Activism Campaign Unite Against Women and Child Abuse. Cape Town: Judicial Inspectorate of Prisons; Sloth-Nielsen, J. (2005 a) Women and Prisons in South Africa, *CSPRI Newsletter*, No. 9, February 2005, p. 1.

³⁴⁷ Luyt, W.F.M. (2008), p. 304.

³⁴⁸ Statistics supplied by the Judicial Inspectorate for Correctional Services.

³⁴⁹ Statistics supplied by the Judicial Inspectorate for Correctional Services. See also Luyt, W.F.M. (2008), p. 305.

³⁵⁰ Vetten, L. (2008) The imprisonment of women in Africa, In Sarkin, J. (ed) *Human Rights in African Prisons*, Cape Town: HSRC Press, p. 136.

³⁵¹ Sloth-Nielsen, J. (2005 a), p. 1.

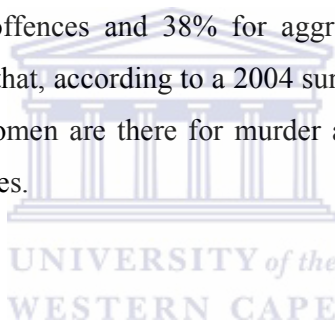
³⁵² Sloth-Nielsen, J. (2005 a), p. 2.

coloured females, as is the case with coloured males, are over-represented in the prison population, a situation that is apparent in Table 2 below.³⁵³

Table 2

Category	Asian	Black	Coloured	White
Prison Population Female	1.9	68.6	21.1	8.5
National population Female ³⁵⁴	2.5	79.5	9.0	9.0
Prison Population Male	0.5	80.5	17.5	1.5
National population Male ³⁵⁵	2.6	79.4	8.9	9.1

Female prisoners tend to be slightly older than males, with 71% above the age of 25 years compared to 66% of males.³⁵⁶ Sentenced female prisoners serve slightly shorter sentences compared to males, with 55% serving sentences of less than five years compared to 31% of males.³⁵⁷ The crime profile for sentenced and unsentenced women in prison shows that 45% are imprisoned for economic offences and 38% for aggressive crimes.³⁵⁸ Noteworthy in respect of the offence profile is that, according to a 2004 survey, nearly a third of imprisoned (sentenced and unsentenced) women are there for murder and attempted murder.³⁵⁹ This is substantially higher than for males.



11.2 Female prisoners' exposure to violence and abuse

A 2006 survey of female prisoners at three South African prisons found that female prisoners had been exposed to violence and sexual violence prior to imprisonment at alarmingly high rates,³⁶⁰ as has been found elsewhere.³⁶¹ Notable in this regard was that 21% experienced

³⁵³ Statistics supplied by the Judicial Inspectorate for Correctional Services.

³⁵⁴ Statistics South Africa (2011) *Mid-year population estimates 2011*, Pretoria: Statistics South Africa, Statistical Release P 0302, p. 3.

³⁵⁵ Statistics South Africa (2011), p. 3.

³⁵⁶ Statistics supplied by the Judicial Inspectorate for Correctional Services, as at end February 2011.

³⁵⁷ Statistics supplied by the Judicial Inspectorate for Correctional Services, as at end February 2011.

³⁵⁸ Statistics supplied by the Judicial Inspectorate for Correctional Services, as at end February 2011.

³⁵⁹ Sloth-Nielsen, J. (2005 a), p. 2.

³⁶⁰ Haffejee, S., Vetten, L. and Greyling, M. (2006 a).

some form of sexual assault, and 15% were raped, before the age of 15 years. Furthermore, 10% were raped after turning 15 years of age, and a further 11% were victims of an attempted rape. Intimate partner abuse was also prevalent, with 63% reporting physical abuse and 33% sexual abuse in their last relationship. Of all the women surveyed, 70% reported emotional abuse in their last relationship. The extent of injuries sustained as a result of abuse was generally severe. Twenty-six percent of those who reported physical abuse suffered dislocations and bone fractures, with a further 15% reporting stabbings and gunshot wounds. Over the course of their lifetime: 62% experienced some form of economic abuse; 81% experienced emotional abuse; 77% experienced physical violence; and 43% experienced some form of sexual abuse.³⁶² The survey also found that the type of abuse suffered (sexual violence versus other forms of abuse such as economic and emotional) was correlated with the crime committed (murder versus other crimes). Abuse inside prison was also reported at the three prisons surveyed, with 47% of respondents reporting emotional abuse and 34% physical abuse in the preceding twelve months. Only 3% reported sexual violence in the preceding twelve months. Of importance too is that 16% had attempted suicide and 23% reported suicide ideation. Self-harm was reported by 11% of respondents.

Against this background, two issues are raised: first, the recognition in case law of women in abusive relationships who kill their abusive partners, and second, the implications of the profile of female prisoners presented above for the DCS and services to female prisoners.

A significant proportion of sentenced South African female prisoners murdered an intimate and abusive partner and did so after suffering years of abuse without receiving the required assistance to end the cycle of abuse.³⁶³ A number of factors contribute to the eventual murder, such as symptoms of post-traumatic stress disorder (PTSD), a state of hyper-vigilance, and

³⁶¹ Scherer, Z.A.P. and Scherer, E.A. (2011) Knowledge and violence experience of female prisoners in their past life, *European Psychiatry*, March 2011 Supplement 1, Vol. 26, p1683-1683; Yik Koon Teh (2006) Female Prisoners in Malaysia, *Journal of Offender Rehabilitation*, Vol. 43 Issue 1, pp. 45-64; Pollock, J.M., Mullings, J. L. and Crouch, B. M. (2006) Violent Women: Findings from the Texas Women Inmates Study, *Journal of Interpersonal Violence*, Vol. 21 Issue 4, pp. 485-502; Artz, L., Hoffman-Wanderer, Y. and Moulton, K. (2011).

³⁶² Haffejee, S., Vetten, L. and Greyling, M. (2006 a), p. 3.

³⁶³ Pretorius, H.G. and Botha, S. (2006) The cycle of violence and abuse in women who kill an intimate partner - a biographic profile, *South African Journal of Psychology*, Vol. 3 No. 2, p. 242.

coercive control by the abusive partner, including needs deprivation, high levels of conflict and substance abuse.³⁶⁴

It was these factors that came to the fore in the Supreme Court of Appeal decision of *S v Ferreira and others*.³⁶⁵ Anita Ferreira found herself trapped in a seven-year relationship with an abusive man from which she could not escape despite several attempts to do so. She hired and paid two young men to kill him, and as this was a premeditated murder, the trial court was obliged to impose life imprisonment. On appeal, the Supreme Court of Appeal found that the history of severe abuse amounted to “substantial and compelling reasons” permitting a deviation from the mandatory minimum sentence of life imprisonment. The Court overturned the life sentence of Ferreira but not of her accomplices, and replaced it with six years’ imprisonment suspending the remainder which she had not already served. There may indeed be several more female prisoners who could benefit from the *Ferreira* decision, and Sloth-Nielsen reported that an identification of possible beneficiaries was under way in 2004.³⁶⁶ It is, however, unknown if it delivered any results. Despite this, South African Courts will subsequently have to recognise that the “pattern of the mind of the abused partner is eventually so overborne by maltreatment that no realistic avenue of escape suggests itself other than homicide”.³⁶⁷

In respect of services (e.g. rehabilitation) to sentenced female prisoners, the profile of female prisoners compels the Department to render services that recognise the high prevalence of sexual victimisation, family violence and intimate partner violence in this group of prisoners. Nevertheless, there is nothing in official documents such as the DCS’s Annual Reports and Strategic Plans to indicate that these characteristics have been taken into account in the development of rehabilitation services specifically geared to female sentenced prisoners. Instead the impression gained is that the mindset around rehabilitation services is permeated by the non-gendered approach characteristic of the Correctional Services Act and the 2004

³⁶⁴ Pretorius, H.G. and Botha, S. (2006), p. 244.

³⁶⁵ *S v Ferreira and others* 2004 (2) SACR 454 (SCA).

³⁶⁶ Sloth-Nielsen, J. (2005 a), p. 3.

³⁶⁷ *S v Ferreira and others* 2004 (2) SACR 454 (SCA) para 10. Also *S v Engelbrecht* 2005 (2) SACR 42 W; Williams, J. (2008) *Violence in intimate relationships: ‘Til death do us part’*, Cape Town: Women’s Legal Centre.

White Paper. This is the predominant approach, and it presents a significant hurdle to the successful rehabilitation and reintegration of sentenced female prisoners.

The Department would thus be well-advised to take note of recent developments that saw the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).³⁶⁸ A more overt focus on female prisoners would require devoting particular attention to their mental health care (Rule 12-13), social reintegration needs (Rule 29), and staff training to give recognition to women's special needs (Rule 29). The prevalence of victimisation amongst female prisoners calls for additional steps to be taken in recognition of their vulnerability to violence in society.

11.3 Female prisoners as mothers

11.3.1 Imprisoned mothers with children outside

The overwhelming majority of female prisoners (83%) in South Africa are mothers, and 45% of them were the breadwinners of the household prior to their imprisonment.³⁶⁹ Of imprisoned mothers, 33% had one child, 25% had two children and 42% had three and more children.³⁷⁰ It has also been found that the children of female prisoners are young, with 68% under the age of 12 years.³⁷¹ While infants imprisoned with their mothers may readily attract media and political attention, the larger and more direct impact of imprisoning women is felt in the households they leave behind. The 2004 survey undertaken by the Judicial Inspectorate found that 74% of these children were placed with family or friends and only 17% were placed in foster care, children's homes or adopted.³⁷² Regular contact with their families is the preserve of the minority of female prisoners, with 55%³⁷³ reporting that they have no contact.³⁷⁴ Luyt reported that, based on a national survey, just less than a third of female prisoners confirmed some form of contact with all their children, while 65% of female prisoners had lost contact with all or at least some of their children. The same author found

³⁶⁸ A/C.3/65/L.5 Adopted by the UN General Assembly 6 October 2010.

³⁶⁹ Haffejee, S., Vetten, L. and Greyling, M. (2006 b), p. 3; Sloth-Nielsen, J. (2005 a), p. 3.

³⁷⁰ Sloth-Nielsen, J. (2005 a), p. 2.

³⁷¹ Luyt, W.F.M. (2008), p. 315.

³⁷² A slightly higher figure, of 22% is reported by Haffejee, S., Vetten, L. and Greyling, M. (2006), p. 3.

³⁷³ Sloth-Nielsen, J. (2005 a), p. 2; Haffejee, S., Vetten, L. and Greyling, M. (2006 b), p. 3.

³⁷⁴ Sloth-Nielsen, J. (2005 a), p. 2.

that 95% of female prisoners had not received any visits from their children. The Gauteng survey found that one in three female prisoners have had not seen their children since they were imprisoned.³⁷⁵

Although different surveys may have reported slightly different results in respect of family contact, the overall conclusion is that the greater majority of female prisoners will lose contact with their children when imprisoned and that very few receive visits from their children. While some women in Luyt's study reported that they prefer not to have their children visit them at prison, other reasons included intimidation of children by officials and older children choosing not to visit their mothers in prison out of shame.³⁷⁶ Overcrowding and the disastrous shift system³⁷⁷ also limit the duration of visits. In addition, concerns have been raised about the suitability of visiting facilities for the children of female prisoners.³⁷⁸

The situation regarding female prisoners as mothers raises a number of concerns, especially ones relating to the impact their imprisonment has on the children who remain behind and separated from their primary caregivers. This has been associated with problem behaviour in children during adolescence and later life.³⁷⁹ The imprisonment of a household member, including a parent, has been found to increase the risk of children in that household for later-in-life imprisonment by five times.³⁸⁰ The impact of imprisonment of a primary caregiver on her children was the substance of the 2007 Constitutional Court decision *M v S*. In this case the Constitutional Court attached particular significance to the interests of M's three children as she was the primary caregiver and, if she were imprisoned, it would have had severely detrimental consequences for them.³⁸¹ In her particular circumstances neither the father of the children nor any other family member was in a position to take care of her children if she was imprisoned for four years (the sentence imposed by the trial court). The best interests of the

³⁷⁵ Haffejee, S., Vetten, L. and Greyling, M. (2006 b), p. 3.

³⁷⁶ Luyt, W.F.M. (2008), p. 319.

³⁷⁷ See Chapter 4 section 2.2.4.

³⁷⁸ Luyt, W.F.M. (2008) p. 318.

³⁷⁹ Agnew, R. (2007) Strain theory and violent behaviour. In D. Flannery, A. Vazsonyi, and Waldman, I. *The Cambridge Handbook of Violent Behaviour and Aggression* (pp. 519-529). Cambridge : Cambridge University Press.

³⁸⁰ Social Exclusion Unit (2002) *Reducing Re-offending by Ex-prisoners: Report by the Social Exclusion Unit*, London: Office of the Deputy Prime Minister (UK).

³⁸¹ *M v S (Centre for Child Law: Amicus Curiae)* 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) 2008 (3) SA 232 (CC).

children³⁸² became the central and thus constitutional issue. The Constitutional Court overturned the term of four years' direct imprisonment imposed by the Cape High Court and replaced it with three years' correctional supervision to enable *M* to continue to take care of her children and avoid the detrimental impact her imprisonment would have had on them.

The findings presented above tend to indicate that the DCS has not delivered on the objectives in the 2004 White Paper relating to the central role that families play in social reintegration and rehabilitation.³⁸³ There is, indeed, little evidence to suggest the Department regards the lack of contact between imprisoned mothers and their children as a problem.

11.3.2 Infants imprisoned with their mothers

The admission of infants to prison with their mothers was possible under the 1959 Correctional Services Act,³⁸⁴ and according to DCS policy these infants could remain with their mothers until the age of two years.³⁸⁵ When the relevant section of the 1998 legislation was enacted (31 July 2004),³⁸⁶ it was stipulated that such infants could remain with their mothers until they reached the age of five years. The 2008 amendment of the Correctional Services Act reduced this period to two years, as was the case prior to 1998.³⁸⁷ The Department motivated this, first, by stating that the age limit was initially set at five years due to a lack of resources to place children elsewhere, and second, based on advice from the Department of Education stating that two years of age is sufficient for the critical bonding

³⁸² s 28(2) Act 108 of 1996.

³⁸³ 3.3.3 In this regard, the Department of Correctional Services recognises the family as the basic unit of society. The family is also the primary level at which correction should take place. The community, including schools, churches and organisations is the secondary level at which corrections should take place. The state is regarded as being the overall facilitator and driver of corrections, with the Department of Correctional Services rendering the final level of corrections. Our successes in crime-prevention and rehabilitation are intimately connected to how effectively we are able to address the anomalies in South African families that put people at risk with the law at the primary level – that is at family level. (Department of Correctional Services (2004 b) para 3.3.3.)

³⁸⁴ Van Zyl Smit, D. (1992), p. 229.

³⁸⁵ PMG Report on the meeting of the Portfolio Committee on Correctional services of 24 August 2007, <http://www.pmg.org.za/minutes/20070823-correctional-services-amendment-bill-briefing> Accessed 28 December 2011.

³⁸⁶ s 20 Act 111 of 1998.

³⁸⁷ s 14 Act 25 of 2008.

period between mother and child.³⁸⁸ The amended legislation also requires that upon admission of such an infant the Department must “immediately” take the necessary steps, in conjunction with the Department of Social Development, to effect the proper placement of the child taking into consideration the best interests of the child.³⁸⁹ Furthermore, the Department remains responsible for the health care and nutrition of the infant, and where practicable, there should be a designated mother-and-child unit to accommodate mothers with their children.³⁹⁰ As far as could be established, two such units have been established at Pollsmoor and Durban Westville prisons and a third is planned for Zonderwater prison.³⁹¹

However, the international norm in respect of the age to which children may remain with their imprisoned mothers is not so firm as was presented by the DCS to the Portfolio Committee on Correctional Services. Even within the European Union there is notable variation.³⁹² In respect of closed prisons, the age limit ranges from nine months (e.g. Netherlands and England and Wales) to three years (Ireland, Italy, Portugal and Spain). Where open prisons are available, the age limit is higher, and in the case of Germany this is set at six years.

In August 2011 draft regulations pertaining to, amongst others, the placement of infants imprisoned with their mothers were placed before the Portfolio Committee on Correctional Services. At the time of writing, these were not yet finalised. It is nonetheless notable that the amendment of the Correctional Services Act in 2008 did not use the opportunity to cross-refer to the Children’s Act 38 of 2005 (as amended by Act 41 of 2007), which describes in

³⁸⁸ PMG Report on the meeting of the Portfolio Committee on Correctional services of 24 August 2007, <http://www.pmg.org.za/minutes/20070823-correctional-services-amendment-bill-briefing> Accessed 28 December 2011.

³⁸⁹ s 20(1) and (1A).

³⁹⁰ S 20 (2-3).

³⁹¹ ‘Minister launches a ‘model’ Mother and Child Unit’. *SA Government Information Press Release*, 18 Aug 2011, <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=20944&tid=40274> Accessed 28 December 2011. Speech by the Hon. N.N. Mapisa-Nqakula – MP, Minister for Correctional Services, on the Occasion of the Unveiling of the Durban Westville Mother and Child Unit, Durban Westville Female Correctional Centre, 26 August 2011, <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=21292&tid=41655> Accessed 28 December 2011.

³⁹² EU Age limits for children living with imprisoned mothers, <http://www.eurochips.org/facts-and-figures/eu-prison-age-limit/> Accessed 28 December 2011.

detail the procedure for placement of children in alternative care as well as for adoption. Notwithstanding these concerns, the Department appears to have taken tangible steps to ensure the proper care of the small number of infants imprisoned with their mothers through amending the relevant legislation and incrementally establishing mother-and-child units.

12. Unsented prisoners

Unsented prisoners (those awaiting the finalisation of their trials) find themselves in a particularly difficult situation. On the one hand, they are presumed innocent until proven guilty,³⁹³ and on the other, they have been deprived of their liberty (effectively a punishment) in the interests of justice.³⁹⁴ To address this tension, the Constitution guarantees the right to conditions of detention that are consistent with human dignity, and notes specifically the right to exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.³⁹⁵ Furthermore, all prisoners, including unsented prisoners, are afforded the right to legal counsel³⁹⁶ and to be visited by their spouse or partner, next of kin, religious counsellor and chosen medical practitioner.³⁹⁷ The minimum standards for detention under humane conditions set out in Chapter 3 of the Correctional Services Act apply equally to sented and unsented prisoners. In short, unsented prisoners are afforded the same basic rights as sented prisoners, notwithstanding that they are excluded from rehabilitation services (corrections) since they are presumed innocent.

The 2011 amendment to the Correctional Services Act (111 of 1998)³⁹⁸ expanded substantially on the legislative framework governing unsented prisoners. In addition to existing provisions dealing with receiving food and drinks, clothing and visitors, Act 5 of 2011 added standards in respect of pregnant unsented prisoners,³⁹⁹ disabled unsented

³⁹³ s 35(3)(h) of the Constitution Act 108 of 1996.

³⁹⁴ s 35(1)(f) of the Constitution Act 108 of 1996.

³⁹⁵ s 35(2)(e) of the Constitution Act 108 of 1996.

³⁹⁶ The provision of legal counsel at state expense is only provided 'if substantial injustice would otherwise result' (s 35(2)(c) of the Constitution Act 108 of 1996).

³⁹⁷ s 35(2)(f) and s 35(3)(f) of the Constitution Act 108 of 1996.

³⁹⁸ Correctional Matters Amendment Act 5 of 2011.

³⁹⁹ s 49A.

prisoners,⁴⁰⁰ aged unsentenced prisoners,⁴⁰¹ mentally ill unsentenced prisoners,⁴⁰² and the referral of terminally ill or severely incapacitated unsentenced prisoners to court,⁴⁰³ the release of unsentenced prisoners into the custody of the police,⁴⁰⁴ and a maximum period (two years) for which an unsentenced prisoner may be detained.⁴⁰⁵ An important change is that in respect of clothing, unsentenced prisoners will, once the amendment comes into operation, be issued with a prisoner uniform which is distinct from those worn by sentenced prisoners. At present unsentenced prisoners are permitted to wear civilian clothes. At the time of writing (December 2011), the amendment act had not yet come into force, but it improves in a number of ways the legal framework regulating unsentenced prisoners. A peculiarity of the amendment is that in some regards it sets clearer and firmer standards for unsentenced prisoners than for sentenced prisoners with reference to pregnant prisoners, disabled prisoners, aged prisoners, and mentally ill prisoners.

The amendment to the legislation governing unsentenced prisoners follows a Cabinet decision in 2009 that the DCS should establish dedicated capacity to manage unsentenced prisoners.⁴⁰⁶ The Department had, until the Cabinet decision, regarded unsentenced prisoners as technically falling outside of its responsibilities: unsentenced prisoners have not been convicted and sentenced, and the Department's core business is the rehabilitation of offenders. The 2004 White Paper notes that the Department continues "to be saddled" with the responsibility of unsentenced prisoners.⁴⁰⁷ Ideally the Department wanted either the police or the Department of Justice and Constitutional Development to be responsible for unsentenced prisoners. The 2009 Cabinet decision brought finality to the issue even though it was highly unlikely that either the police or the Department of Justice and Constitutional Development would ever have taken over this function.

⁴⁰⁰ s 49 B.

⁴⁰¹ s 49 C.

⁴⁰² s 49 D.

⁴⁰³ s 49 E.

⁴⁰⁴ s 49 F.

⁴⁰⁵ s 49 G.

⁴⁰⁶ Department of Correctional Services (2010 a) Annual Report 2009/10, Pretoria: Department of Correctional Services, p. 16.

⁴⁰⁷ Department of Correctional Services (2004 b) para 2.2.2.

Subsequent to the Cabinet decision the Department commenced planning to establish a dedicated remand detention unit and remand detention facilities; it also began the drafting of a White Paper on Remand Detention.⁴⁰⁸ At the time of writing, information about the progress of these activities was unavailable, and it is thus not possible to make an assessment. However, during deliberations on the draft legislation, questions were raised about the cost implications of establishing a dedicated remand unit in the Department and the establishment of dedicated remand detention prisons.⁴⁰⁹ The Department did not offer an adequate response to these questions,⁴¹⁰ and this may cause delays in implementation.

In many respects, unsentenced prisoners have found themselves marginalised in the ideology of the Department. They were not part of the Department's new core business – rehabilitation – and their presence in DCS prisons was patently resented by senior management. Whereas the DCS understood its mandate in respect of sentenced prisoners as having a clear bearing on rehabilitation, this was not the case with unsentenced prisoners, even though the 1998 Correctional Services Act explicitly stated that they were the Department's responsibility.

Three main themes have emerged in relation to unsentenced prisoners: their conditions of detention, unnecessary detention and the duration of detention. It will be argued that, measured against the Constitution, their conditions of detention are frequently worse than those sentenced prisoners, primarily as a result of overcrowding. A further argument is that the detention of a sizeable proportion of the unsentenced prison population is indeed avoidable; by implication, their presence in prison aggravates overcrowding. It will also be shown that a notable proportion of unsentenced prisoners remain in custody for long periods

⁴⁰⁸ Department of Correctional Services (2011 b) *Strategic Plan 2011/-2014/5*, pp. 11 and 13.

⁴⁰⁹ Submission by CSPRI on the Correctional Matters Amendment Bill [B41 of 2010], Submission by the Institute for Security Studies on the Correctional Matters Amendment Bill [B41 of 2010] PMG Report on the meeting of the Portfolio Committee on Correctional Services of 25 January 2011, <http://www.pmg.org.za/report/20110125-correctional-matters-amendment-bill-research-analysis-provisions-cont> Accessed 29 December 2011.

⁴¹⁰ The information provided by the Department only covered the costs incurred at Head Office level for Year 1 and an estimate of the costs to provide clothing to unsentenced prisoners. The information provided did not address the establishment of dedicated remand detention facilities. (Department of Correctional Services (2011 g) *Summary of submissions received and Departmental responses thereto: Correctional Matters Amendment Bill, 41 of 2010*, PMG Report on the meeting of the Portfolio Committee on Correctional Services of 27 January 2011, <http://www.pmg.org.za/report/20110127-correctional-matters-amendment-bill-department-correctional-services>- Accessed 29 December 2011).

prior to their cases being finalised and that the existing legal framework does not provide adequate protection of the rights to liberty and to have one's trial commence and conclude without undue delay. Combined with one another, these three thematic issues raise serious concerns about the right to dignity and the right to be free from arbitrary detention.

12.1 Conditions of detention

Conditions of detention are closely linked to overcrowding, as discussed previously in section 3. Table 3 below presents the figures on the unsentenced prisoner population as at the end of February 2011 for the 15 prisons holding the highest numbers of this category of prisoner. Nearly 70% of unsentenced prisoners are held in these prisons; with the exception of Pollsmoor Medium A, all the listed prisons holding unsentenced prisoners were overcrowded, with several of them occupied above 175%.

Table 3

Prison	Capacity	Unsentenced	Sentenced	In custody: total	% Occupation
Johannesburg Med. A	2630	6118	150	6268	238.3%
Pollsmoor Max.	1872	4162	104	4266	227.9%
Pretoria Local	2171	4140	104	4244	195.5%
Durban Med. A	2399	3873	137	4010	167.2%
St. Albans Med. A	1446	2681	45	2726	188.5%
Boksburg	2012	2188	1973	4161	206.8%
Modderbee	2993	2156	2845	5001	167.1%
Krugersdorp	1757	1445	1774	3219	183.2%
Pietermaritzburg	2499	1326	1597	2923	116.9%
Umtata Med.	580	1272	61	1333	229.8%
Grootvlei Max.	890	1260	609	1869	210.0%
Goodwood	2115	1216	1158	2374	112.3%
Nelspruit	816	864	421	1285	157.5%
Pollsmoor Med. A	1111	824	249	1073	96.6%
Vereeniging	786	752	379	1131	143.9%

As articulated in the Correctional Services Act (111 of 1998), the general requirement in respect of unsentenced prisoners creates the impression of a freer and more open regime:

Remand detainees⁴¹¹ may be subjected only to those restrictions necessary for the maintenance of security and good order in the remand detention facility and must, where practicable, be allowed all the amenities to which they could have access outside the remand detention facility.⁴¹²

The reality, however, is substantially different. Unsented prisoners do not have access to rehabilitation and education programmes, and seldom have access to recreational services.⁴¹³ The Judicial Inspectorate reported on instances where prisoners were not issued with eating utensils and had to resort to eating out of plastic containers with their hands or, using expired phone cards, with self-made spoons.⁴¹⁴ Given the severity of overcrowding and the prevalence of staff shortages (see Chapter 4 section 2.2.4 with reference to the Seven Day Establishment), it is doubtful if the minimum of one hour of outside exercise per day⁴¹⁵ is consistently complied with. Indeed, pre-trial detention is primarily a life of idleness, monotony and boredom. Compared to sentenced prisoners, unsented prisoners are frequently worse off, an observation that did not escape the UN Working Group on Arbitrary Detention during its mission to South Africa in 2005:

The Working Group is primarily concerned about the conditions of detention affecting these persons, either when placed in police cells or in regular prison facilities. Not only are the conditions much worse than those affecting sentenced detainees, but the lack of adequate facilities is so blatant that they do not meet minimum standards enshrined in the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.⁴¹⁶

Similar observations were made as far back as 1997 by the South African Human Rights Commission⁴¹⁷ and, in 2004, by the Special Rapporteur on Prisons and Conditions of

⁴¹¹ Act 5 of 2011 introduced the new terms 'remand detainee' and 'remand detention'.

⁴¹² s 46(1).

⁴¹³ Office of the Inspecting Judge (2006) Judicial Inspectorate for Correctional Services Annual Report 2005/6, Cape Town: Office of the Inspecting Judge, p. 14.

⁴¹⁴ Office of the Inspecting Judge (2008) Judicial Inspectorate for Correctional Services Annual Report 2007/8, Cape Town: Office of the Inspecting Judge, p. 9.

⁴¹⁵ s 11 of Act 111 of 1998.

⁴¹⁶ E/CN.4/2006/7/Add.3 para 66.

⁴¹⁷ South African Human Rights Commission (1998) *Report of The National Prisons Project of the South African Human Rights Commission*, Johannesburg: SAHRC, p. 32.

Detention in Africa after her mission to South Africa.⁴¹⁸ The Judicial Inspectorate for Correctional Services has also consistently raised concerns about overcrowding in pre-trial detention facilities and the impact it has on hygiene, infrastructure and the general well-being of these prisoners. In its 2005/6 Annual Report the Inspectorate noted that, because unsentenced prisoners were not issued with uniforms and made to wear their private clothes, it is often the case that they have only one set of clothes: should they want to wash these clothes, they have to strip naked and wait for them to dry.⁴¹⁹ Even though (as described above) the DCS cited the issuing of uniforms from a security perspective,⁴²⁰ it should nevertheless address this undignified practice.

The Department's strategy in respect of unsentenced prisoners is unclear at present. However, the most important development was the confirmation, in the form of a Cabinet decision, that the DCS is indeed the agency responsible for unsentenced prisoners. It means the DCS must ensure that such prisoners are detained under conditions consonant with human dignity. The changes to the legislation, the planned White Paper on Remand Detention and the creation of a distinct unit in the Head Office to manage pre-trial detention are all grounds for optimism that there will be an improvement in the conditions under which unsentenced prisoners are detained. That being said, reducing the number of unsentenced prisoners – and, more specifically, reducing the period in which they are kept in custody – remains the central challenge. This is discussed in the following section.

12.2 Avoidable detention

Some 30% of South Africa's prison population are unsentenced prisoners, and while this may not be high compared to some African states (e.g. Mali = 89%) it is also higher than the figures for several other African states.⁴²¹ It will be argued that the detention in prison of a

⁴¹⁸ Special Rapporteur on Prisons and Conditions of Detention in Africa (2004) *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa Mission to the Republic of South Africa 14 – 30 June 2004*, Banjul: African Commission on Human and People's Rights.

⁴¹⁹ Office of the Inspecting Judge (2006), p. 20.

⁴²⁰ PMG Report on the meeting of the Portfolio Committee on Correctional services of 10 November 2010, <http://www.pmg.org.za/report/20101110-department-correctional-services-matters-related-enhanced-parole-syst> Accessed 29 November 2011.

⁴²¹ Ghana 28.6%; Cote d'Ivoire 28.5%; Sao Tome & Principe 28.5%; Swaziland 27.5%; Seychelles 27.2%; Mozambique 26.9%; Rwanda 26.9%; Tunisia 22.7%; Malawi 18.5%; Lesotho 18.0%; Botswana 17.0%;

substantial proportion of the unsentenced prison population is in fact avoidable. Avoidable detention is primarily the result of unnecessary arrests being made by the police, courts granting unaffordable bail, and persons suspected of mental illness being detained in prisons awaiting trial. These are problems arising mainly from poor coordination between different role players in the criminal justice system and the consequent fragmentation in functions and performance. Three issues, then, are dealt with below: unnecessary arrests, unaffordable bail, and the detention of persons to undergo psychiatric evaluations.

12.2.1 Unnecessary arrests

It is difficult to determine the extent to which the police make unnecessary arrests, but the Judicial Inspectorate made such an attempt in its 2004/5 Annual Report. It estimated that in excess of 18 000 people per month were unnecessarily arrested by the police and consequently ended up in prison awaiting trial.⁴²² Even though the exact quantum may be hard to pin down, it is well known that the police have monthly arrest targets and it is hence likely that these targets contribute to unnecessary arrests.⁴²³ A closer analysis of police arrests statistics shows that 53% of the 1 452 600 arrests made by the police in 2010/11 were not for priority crimes, or crimes less serious than shoplifting;⁴²⁴ it can be assumed that at least some of those suspects will have been detained in prison. These observations are given further credence by findings from three magisterial courts, to the effect that one out of two accused persons remanded to custody are never tried – instead, their cases are either withdrawn or struck from the roll.⁴²⁵ Even if only a relatively small proportion of the unnecessary arrests made by the police end up awaiting trial for a relatively short period of time, it will

Ethiopia 14.0%; Algeria 12.4%; Sudan c.10%; Egypt 9.9%; Namibia 7.9% (World Prison Brief, International Centre for Prison Studies,

http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=africa&category=wb_pretrial Accessed 29 December 2011).

⁴²² Office of the Inspecting Judge (2005) *Judicial Inspectorate for Correctional Services Annual Report 2004/5*, Cape Town: Office of the Inspecting Judge, p. 21.

⁴²³ Women's Legal Centre (Undated) *Submissions on South Africa to the Commission on status of Women*, para 188.

⁴²⁴ SAPS (2011) *Annual Report 2010/11*, Pretoria: SAPS, p. 66.

⁴²⁵ Karth, V (2008) *'Between a rock and a hard place' - Bail decisions in three South African courts*, Cape Town: Open Society Foundation (South Africa), p. 32.

nonetheless make a significant contribution to the unsentenced prisoner population. Whether or not the DCS has attempted to intervene on policy and coordination level in this regard is unknown. Be the case as it may, the sheer number of arrests raises serious concerns that many of them would amount to arbitrary detention, which is a violation of section 12(1)(a) of the Constitution.

12.2.2 Unaffordable bail

The majority of South Africa's prisoners, sentenced and unsentenced, are from poor and disadvantaged backgrounds. What may seem a modest and affordable amount to a magistrate granting bail, may in truth not be the case. The accused may even agree to the affordability of the proposed bail amount, hoping that friends and family will contribute. Unaffordable bail is not an isolated incident, and a 2005 survey by the Judicial Inspectorate found that 27% of the unsentenced prison population were granted bail of less than R1 000 (US\$ 150) but remained in custody because they could not afford to pay it.⁴²⁶ Two years later, in 2007, the situation improved marginally and the proportion dropped to 22.3%.⁴²⁷ The implication, nonetheless, is that one in five unsentenced prisoners is unnecessarily in custody because of his or her socio-economic status.

Part of the problem appears to lie in poor coordination and communication between Heads of Prisons and the courts. If bail is granted, a court may assume that the accused will pay. However, if he does not, there is no formal mechanism by which the court will be notified of this and will only become aware of it at the accused person's next appearance in court. In this regard the Judicial Inspectorate recommended close and active monitoring to ensure that courts are informed with the least delay that the accused is unable to pay the amount set and that reconsideration may be required.⁴²⁸

12.2.3 Detention of persons suspected of mental illness, mental defect or lacking criminal responsibility

⁴²⁶ Office of the Inspecting Judge (2005), pp. 19 and 21.

⁴²⁷ Office of the Inspecting Judge (2007) *Judicial Inspectorate for Correctional Services Annual Report 2006/7*, Cape Town: Office of the Inspecting Judge, p. 31.

⁴²⁸ Office of the Inspecting Judge (2007), p. 35.

The Criminal Procedure Act makes provision for the committal of a person suspected of mental illness, mental defect or lacking criminal responsibility to a psychiatric institution where a panel of designated persons will conduct an assessment and make a recommendation to the court.⁴²⁹ However, bed space in the designated psychiatric hospitals is limited. For example, Valkenburg Psychiatric Hospital in Cape Town has space for 15 patients referred by the courts for observation. The result is that if bail is not granted, these individuals remain in the custody of the DCS until bed space becomes available. In 2010 it was reported that an accused person referred for observation to Valkenburg had still not been admitted to the hospital despite two months having passed; he was, moreover, number 55 on the waiting list.⁴³⁰ Waiting lists of similar length were also reported at Sterkfontein Psychiatric Hospital in Krugersdorp⁴³¹ and Weskoppies Psychiatric Hospital in Pretoria.⁴³² The waiting time for admission to a psychiatric hospital can be months and possibly more than a year. In one case it was reported that an accused person was referred to Sterkfontein Psychiatric Hospital for observation shortly after being arrested.⁴³³ At that stage he was number 114 on the waiting list and seven months later he had moved up to number 35. In the meantime he was detained at a prison where he was frequently assaulted by other prisoners.

Although prisoners in this category constitute a small proportion of the total unsentenced prisoner population, their prolonged detention in prison whilst awaiting bed space in a psychiatric hospital is an attack both upon their right to dignity and right to have their trials commence and be concluded without unreasonable delay.⁴³⁴ Moreover, because there is at least a suspicion of mental illness or defect, their presence in a prison may pose a risk to themselves and to others.

⁴²⁹ s 78-79 of the Criminal Procedure Act 51 of 1977.

⁴³⁰ 'Geen bed by ValkenburgvirEksteen. *Die Burger*, 17 May 2010, <http://www.dieburger.com/Suid-Afrika/Nuus/Geen-bed-in-Valkenberg-vir-Eksteen-20100517> Accessed 29 December 2011 [No bed at Valkenburg for Eksteen – own translation].

⁴³¹ 'Alleged wife and daughter killer could walk free' *Looklocal.co.za* <http://www.looklocal.co.za/looklocal/content/en/kempton-park/kempton-park-news-crime?oid=4497689&sn=Detail&pid=490121&Alleged-wife-and-daughter-killer-could-walk-free> Accessed 29 December 2011.

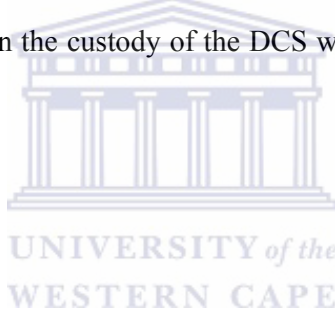
⁴³² 'Ghosts in C-Max?' *IOL*, 10 April 2008, <http://www.iol.co.za/news/south-africa/ghosts-in-c-max-1.395985> Accessed 29 December 2011.

⁴³³ 'The plight of prisoners with mental illnesses' *Wits Justice Project*, Radio production, 21 August 2011, <http://www.journalism.co.za/he-plight-of-prisoners-with-mental-illnesses.html> Accessed 29 December 2011.

⁴³⁴ s 35(3)(d) Act 108 of 1996.

The Correctional Matters Amendment Act (5 of 2011) attempted to provide some relief in this regard in that it mandates the National Commissioner to detain a person suspected of having a mental illness in a single cell and also to provide, as far as possible, the necessary mental health care services.⁴³⁵ Strictly speaking, the Correctional Matters Amendment Act (5 of 2011) did not bestow any more powers on the National Commissioner in respect of prisoners suspected of being mentally ill. Segregation was already possible if “such detention is prescribed by the medical officer on medical grounds”.⁴³⁶ The capacity of the Department to render mental health care services to these prisoners whilst they are awaiting admission to a psychiatric hospital is limited, and at the end of the 2010/11 financial year only 55 psychologists were employed in the Department.⁴³⁷

The solution to the problem lies in the sphere of the Department of Health, which is responsible for psychiatric hospitals. The limited available bed space is far exceeded by the demand, leading to an entirely undesirable situation in which persons awaiting psychiatric observation remain for months in the custody of the DCS with virtually no access to support services.



12.3 Duration of custody

Even though the Constitution guarantees the right for an accused person’s trial to commence and be concluded within a reasonable time, there is no limit on how long a person may remain in custody awaiting trial. While the accused may at any time apply for bail, subject to the submission of additional evidence if already refused, the majority (65%) of detained accused persons stay in custody until their cases are finalised.⁴³⁸ The Criminal Procedure Act also provides for an inquiry into unreasonable delays in a trial, but the initiation of such an inquiry is at the discretion of the court and is not mandatory after a specified period of time has lapsed.⁴³⁹ It has been argued elsewhere that this open-ended approach, lacking custody

⁴³⁵ s 49D Act 5 of 2011.

⁴³⁶ s 30(1)(c) Act 111 of 1998.

⁴³⁷ Department of Correctional Services (2011 a), p. 202.

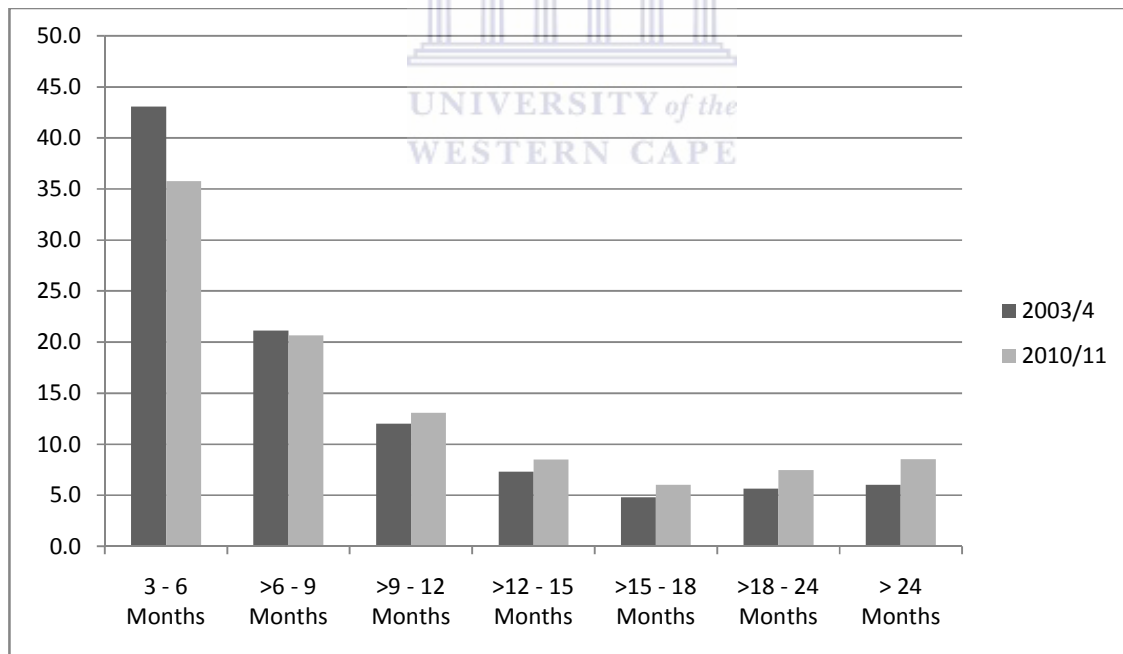
⁴³⁸ Karth, V. (2008) p. 28. Ballard, C. (2011) *Research report on remand detention in South Africa: an overview of the current law and proposals for reform*, Bellville: Community Law Centre, p. 21.

⁴³⁹ s 342A Criminal Procedure Act 51 of 1977.

time-limits and a mandatory review mechanism concerning delays, is out of step with developments in other countries and regional jurisprudence.⁴⁴⁰ It is not necessary to repeat this reasoning here. Fundamentally, the absence of these safeguards results in the Criminal Procedure Act providing inadequate protection of the accused persons' right to liberty.

A substantial proportion of unsentenced prisoners remain in prison for a considerable period of time while they wait for the finalisation of their trials. As at the end of February 2011, 47% of the unsentenced prison population had been in custody for longer than three months. Comparing data from 2003/4 with data from 2010/11, it appears that the situation is deteriorating slightly and that there has been an increase in the number of unsentenced prisoners remaining in custody for longer than 12 months; this is presented in Figure 4 below.⁴⁴¹ In 2003/4 some 42% of unsentenced prisoners had been in custody for three to six months, but by 2010/11 this proportion had dropped to 38%. On the other hand, the proportion of unsentenced prisoners who had been in custody for longer than two years had increased from 6% to 8.5%. This shift is seen across all the categories presented in Figure 4.

Figure 5

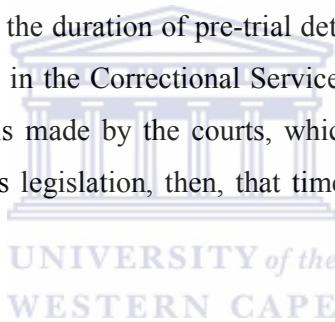


⁴⁴⁰ Ballard, C. (2011).

⁴⁴¹ Statistics supplied by the Judicial Inspectorate for Correctional Services.

The Correctional Matters Amendment Act (5 of 2011) (not in operation at the time of writing), stipulates in section 49G that the period of incarceration of a remand detainee cannot exceed two years “from the initial date of admission without such matter having been brought to the attention of the court”. The Head of Prison will also be required to report to the National Prosecuting Authority at six-monthly intervals on cases involving remand detainees who have been held for successive six-month periods. In the event that detention continues, the Head of Prison must bring such cases before the court on an annual basis. The proposed mechanism, even if it is a step in the right direction, remains weak and will serve only as a monitoring mechanism.⁴⁴² Furthermore, the amendment sets out the procedure to bring an accused before a court, but it does not explain what the court must do. The court may indeed end up postponing a case for a further six months without interrogating the reasons for the delay, as provided for in section 342A of the Criminal Procedure Act (51 of 1977).

In order to be effective, limiting the duration of pre-trial detention should be regulated in the Criminal Procedure Act and not in the Correctional Services Act. The decision to remand a person to prison awaiting trial is made by the courts, which are governed by the Criminal Procedure Act. It is through this legislation, then, that time limits and a mandatory review mechanism should be created.



The current provisions are open to a constitutional challenge and it is unlikely that the two-year limit provided for in the Correctional Matters Amendment Act (5 of 2011) would be sufficient to avert such a challenge. Moreover, the two-year limit seems of itself to be too long to reflect the constitutional requirement that trials should commence and conclude with undue delay. Even though the large awaiting trial prison population, their conditions of detention and the duration of their custody are longstanding and well-known problems, efforts to address them have not succeeded in bringing about a situation reflecting the Constitutional requirement.

13. Conclusion

This chapter presented an overview of the state of prison reform with reference to prisoners' rights in the period after 2004. It dealt with the pervasive and persistent problem of prison

⁴⁴² Muntingh, L. and Ballard, C. (2011 a).

overcrowding, and demonstrated that, especially since the 2005 remission, there has been a notable improvement in the national occupancy levels; nevertheless, many prisons remain critically overcrowded and detain prisoners under conditions that are an affront to human dignity. The combination of overcrowding and reported staff shortages continues to be a substantial obstacle to improved service delivery and satisfactory conditions of detention. It is unsentenced prisoners in particular who bear the brunt of this situation, and they are frequently worse off than sentenced prisoners.

Even though there has been a marked drop in the mortality rate of prisoners, this should not be taken to mean that prison health care is at an acceptable level. Information was presented that those who die of natural causes do so in a shorter period of time after admission than was the case five years earlier. Poor conditions of detention combined with TB, overcrowding and less than optimal health-care services place the lives of prisoners at great risk, potentially violating their right to life and their right to primary health care.

The Department cannot guarantee the personal safety and bodily integrity of prisoners, and it was shown that inter-prisoner violence, sexual violence, assaults on prisoners by officials and torture remain frighteningly common in the prison system. Even if it is accepted that violence will always be part of any prison system, the level at which it has been shown to occur in South African prisons is unacceptable and cannot be regarded as “normal”. This situation is aggravated by the lack of proper investigations for holding perpetrators, especially officials, accountable.

The super-maximum prisons, originally conceived to house only the most problematic of prisoners, have not been shown to reduce escapes or make other prisons any safer. Furthermore, their regimes of isolation and deprivation remain at odds with the right to dignity and the right not to be punished in a cruel, inhuman and degrading manner.

The Department’s level of compliance with statutory prescripts, such as mandatory reports to the Judicial Inspectorate and the legislation governing parole, has been shown to be less than desirable. The situation was especially poorly managed in respect of the first civilian parole boards, resulting in incorrect decisions and prisoners possibly serving longer sentences than were strictly necessary.

It was also shown that even if the number of children in prison decreased dramatically, this did not result in a consistent and general improvement in service delivery and conditions of

detention. It is rather a case of inconsistency prevailing, with some centres rendering excellent services and others denying children the basic right to education and flouting national legislation. Unsentenced children find themselves in a particularly vulnerable situation. As small a group as they may be, it was shown that female prisoners present a distinctive profile that the Department should not ignore in rendering services to them. However, little effort is being made to assist female prisoners to remain in contact with their families, notwithstanding the fact that DCS policy dictates that the family is central to rehabilitation.

Lastly, unsentenced prisoners are a marginalised group and subject to poor conditions of detention characterised by overcrowding. It was also shown that in many instances their detention could have been avoided but that poor coordination and communication between criminal justice system departments created impediments to their release.

In overview, then, it appears that while the Constitution and the Correctional Services Act set out in detail the rights of prisoners and particular groupings such as children, compliance with these standards remained weak. A number of observations in this regard are warranted.

First, it is safe to say that prisoners' rights, as legal and ideological constructs, had not attained the necessary prominence in the Department's strategy development and consequently failed to permeate the execution of policy. At a rhetorical level, references are frequently made to prisoners' rights, but there is little indication that there exists, or that systematic efforts were made to create, a pervasive awareness of prisoners' rights among the staff of the Department. Such an awareness would have prompted dynamic, proactive engagement with risk areas; in actuality, however, the situation was all too frequently one in which the DCS merely reacted as and when problems broke out.

Second, in Chapter 4 it was shown that the Department made significant efforts to address governance issues, such as engaging external stakeholders, developing internal capacity, fixing administration weaknesses and enforcing the disciplinary code. With reference to prisoners' rights, though, similar initiatives were not observed. Governance and human rights are two sides of the same coin, but both require an explicit focus if they are to result in effective and fundamental reform. The implications of this are twofold. It indicated that violations of prisoners' rights were not regarded with the same reverence by the Department's leadership as allegations and findings of corruption and mismanagement. Furthermore, it indicated that when rights violations were reported, they were at best seen as

individual incidents as opposed to systemic problems. Rights violations were consequently not regarded as systemic failures requiring systemic solutions. While the Department acknowledged that in respect of governance it was in a crisis and thus required a focused and strategic response, the same conclusion was not reached about the level of compliance with prisoners' rights standards.

Third, and following from the preceding, the Department at times actively resisted efforts to improve the situation in respect of prisoners' rights. This was well illustrated by its willingness to engage in fruitless litigation on parole decisions, by the *EN and Others* case regarding prisoners' access to ARV, and in its actions in frustrating the class action by a group of prisoners from St Albans prison following the mass assault there in 2005.

Fourth, the 2004 White Paper described the Department's new core business as rehabilitation, and significant efforts were made internally to communicate and promote this message to DCS staff. The focus on rehabilitation was, however, nothing new, and even the apartheid government of the 1970s advocated for a stronger focus on rehabilitation.⁴⁴³ The White Paper assumed great prominence in the reports, communications and policies of the Department after 2004. This cannot be faulted, as the White Paper is the overarching policy framework. However, with the focus on the White Paper and the centrality accorded to it as the point of reference, the Correctional Services Act and meticulous compliance with its prescripts consequently shifted to the background. It appears that little preparation was undertaken to implement the Correctional Services Act when it came into force in mid- 2004,⁴⁴⁴ and training on the Act seems to be of a superficial and job-specific nature.⁴⁴⁵ Moreover, as Sloth-Nielsen pointed out in 2007 – a commentary which, so far as could be established, remains valid at the time of writing – the Department has not summarised the Act, simplified it into a user-friendly format, or used promotional material to communicate it to its 42 000 employees.⁴⁴⁶ The lack of knowledge and understanding of the Correctional Services Act amongst the staff corps is evidenced by increased litigation against the Department, failure to

⁴⁴³ Super, G. (2011) Like some rough beast slouching towards Bethlehem to be born – a historical perspective on the institution of the prison in South Africa 1976-2004, *British Journal of Criminology*, Vol. 51, p. 218.

⁴⁴⁴ Sloth-Nielsen, J. (2007) 'The state of South Africa's prisons'. In S. Buhlungu, J., Daniel, R., Southall & J. Lutchman *State of the Nation – South Africa 2007*, HSRC Press, Cape Town, p. 390.

⁴⁴⁵ Personal observation based on interactions with officials and training provided to DCS officials in the course of a six-year research project to monitor compliance with the Correctional Services Act.

⁴⁴⁶ Sloth-Nielsen, J. (2007), p. 391.

comply with statutory reporting obligations, and denying prisoners rights that are clearly articulated in the Correctional Services Act. The lack of compliance with basic requirements in the Correctional Services Act therefore raises doubts about the ability of the Department to comply with the 2008 and 2011 amendments to the Act, which place even further demands on it. The Correctional Services Act sets the requirements for the operationalisation of the Constitutional rights of prisoners; the lack of focus by DCS in this regard therefore explains to a large extent the very limited impact the Constitution has had on human rights reform in the prison system.

Fifth, the great prominence that was given to the 2004 White Paper led to the emergence of contradiction, one in which the goal – not the reality – of “rehabilitation of offenders” was accorded greater priority than meeting the minimum standards of humane detention. For example, while prisons remained overcrowded and numerous assaults were reported, public pronouncements by the Department, along with its official documentation, addressed these in a limited manner. Notwithstanding the bloated rhetoric about rehabilitation,⁴⁴⁷ realising the aims of rehabilitation in an environment where basic rights, especially the right to dignity, are compromised is, of course, extremely difficult. Meeting the minimum standards of humane detention is, it is contended, a prerequisite for the rendering of effective interventions with offenders.

Sixth, the Department remained less than responsive to concerns raised by domestic and international stakeholders to human rights violations. In essence the Department did not identify strategic areas of concern regarding rights violations. It did not, based on the available information, engage external stakeholders, seek expert advice or train staff on human rights law, and so forth, to address rights concerns and violations clearly identified by the Judicial Inspectorate, the Committee against Torture, the Special Rapporteur on Prisons, the UN Working Group on Arbitrary Detention, UN Human Rights Committee, the SA Human Rights Commission and civil society groupings. This lack of responsiveness is nowhere better illustrated than in the McCullum case, discussed above in section 4.

⁴⁴⁷ The following is an extract from the Department’s official newsletter: ‘In his keynote address, the Minister said that the department is reaching a milestone in its social partnerships towards sustaining an effective correctional system and breaking the cycle of crime. “We are forging ahead with quantifiable service delivery targets of promoting corrections as a societal responsibility, running successful rehabilitation programmes and facilitating offenders’ social reintegration through partnerships with community police forums and civic society,” he said.’ (*SA Corrections Today*, April/May 2008, p. 5.)

Lastly, if it is accepted that the policy and legislative framework in respect of prisoners' rights is sufficient and that, flowing from it, the duties imposed on the Department are adequately described, the implementation consistent with these requirements was in a material way grossly deficient. This raises concerns about the ability of the Department's senior management to communicate new standards of service delivery to staff at operational level. Moreover, it raises concerns about senior management's ability or willingness to address non-compliance issues. The extent to which the Head Office has regained control over the Department remains questionable, since compliance with the mandatory reports to the Judicial Inspectorate and the decision-making of parole boards call into doubt the functionality of the Department's command hierarchy.

In overview, progress in respect of delivering on prisoners' rights has been slow since 2004, notwithstanding more than adequate legislation and a growing body of jurisprudence on prisoners' rights. The guidance provided by statutory and case law on prisoners' rights is indeed detailed and progressive. The notable achievements attained in advancing prisoners' rights were by and large the result of external pressure from civil society and the courts.

It is submitted that the general lack of achievement in giving manifest expression to rights enumerated in the Constitution can by and large be attributed to the Department's lack of emphasis on compliance with the Correctional Services Act. The lack of focus on prisoners' rights seems to indicate that the Department was beguiled by populist notions of punishment in view of the high violent crime rate. The expectation that post-1994 South Africa's prison system would come to embody, as far as is possible, the values of a constitutional democracy has consequently not been met. This chapter has shown that in all the thematic areas assessed, there remain serious deficiencies, often of such a serious nature (e.g. deaths in custody) that one is left with the impression that very little has actually changed. Neither the rights requirements nor the rehabilitation objectives have been met.

In Chapter 4 it was argued that external pressure combined with constitutional obligations resulted in governance improvements in DCS. With reference to human rights standards, it is, however, concluded that Departmental policy and practice were not infused with a similar realisation of constitutional obligations. Even when human rights deficiencies and violations were patently evident, similar external pressure (from government and civil society) did not emerge, or where such pressure existed, the Department was able to evade and deflect it. In a

general sense it can thus be concluded that constitutionalism had not provided the requisite impetus for human rights reforms in the prison system after 1994.



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Chapter 6 The broader political context and the role of external influences on prison reform

1. Introduction

This chapter reviews the influence of events and developments external to the DCS on prison reform after 1994. The prison system does not exist in a vacuum and, despite its insular tendencies, is affected by external forces and role-players. Moreover, the Constitution creates a framework based on cooperative governance¹ and, with reference to Parliament, places a duty on it to facilitate public participation.² An analysis of prison reform and constitutionalism therefore has to assess the influence of stakeholders external to DCS.

The preceding chapters (3-5) showed that the DCS has been less than responsive to external influences, especially with regard to human rights concerns. However, this is not to say it has been entirely immune to such influences, or that there had not been a significant amount of activity to advance prison reform since 1994. Policies, or rather the lack thereof, of the Government of National Unity (GNU) created a particular environment for the DCS, and many of the problems that continue to beset it have their roots in the period 1994 to 1999. As discussed in Chapter 3, the failure to deal effectively and constructively with the legitimacy crisis resulting from the new democratic order led to the second crisis in the prison system, namely the collapse of order and discipline, leading to the appointment of the Jali Commission and the launch of investigations by the Special Investigations Unit (SIU).³ The influence of four important stakeholders on prison reform after 1994 is explored in this chapter, these being civil society (including the media), organised labour, the legislature, and the Judicial Inspectorate for Correctional Services.

¹ Chapter 3 Act 108 of 1996.

² Section 59 Act 108 of 1996.

³ The SIU investigations would focus on medical aid fraud, procurement and vehicle fleet management (Muntingh, L. (2006) *Corruption in the prisons context*, CSPRI Research Paper, Bellville: Community Law Centre).

Historically, three periods are discernible in this review. The first is the period from 1994 to the end of 1996 when there were still real attempts by civil society and the Portfolio Committee on Correctional Services to reform the prison system, albeit attempts that faced resistance from the DCS and the then Minister of Correctional Services. From 1997 to 2003 the DCS became increasingly closed to outsiders, the Portfolio Committee failed to hold the Department accountable, and, by 1999, the state had in fact lost control of the Department. Instead of addressing the legitimacy crisis stemming from the new constitutional order, powerful and corrupt groupings arose in the DCS which operated with impunity and in the absence of external control or interventions. This was described in Chapter 3. The third period is from roughly 2004 onwards, when a new Portfolio Committee was appointed, the Jali Commission and SIU investigations were under way, and civil society had again re-entered the discourse on prison reform. It was also in 2004 that the DCS adopted a new White Paper on Corrections in South Africa and the entire Correctional Services Act (111 of 1998) came into force. Whereas Chapters 3-5 described and discussed developments focusing primarily on the DCS, this chapter assesses the period under review by focusing on the influences and actors external to the DCS. From a constitutional perspective the aim is therefore to assess and analyse the extent to which accountability and transparency have been established in the relationship between the DCS and designated oversight structures as well as in relation to civil society.

The chapter commences with the role of the national government in steering the reform process; thereafter it deals with the influence of civil society, the role of the legislature, the impact of organised labour (POPCRU in particular) and the Judicial Inspectorate for Correctional Services. The aim here is to provide an overview of trends as these relate to the influence of external stakeholders; much of the underpinning factual information was presented in Chapters 3-5. It will be argued that for a brief period after 1994 civil society had a notable presence in the prison-reform discourse but by 1996 this had disappeared. In the subsequent years until 2004, the DCS paid little attention to external stakeholders, including its designated oversight structures. The lack of transparency and accountability correlate with the collapse of discipline and order in the Department immediately after 1996. However, post-2004 the situation changed and both transparency and accountability showed improvements in view of the re-emergence of civil society and a more assertive Portfolio Committee on Correctional Services. After the passage of nearly a decade, the constitutional principles of accountability and transparency found new expression in the prison-reform discourse.

2. The national government

In large-scale societal transformation processes, the national government has a key role to play in containing the change-process in the public service through the identification of overarching objectives. In order to facilitate large-scale public service reform, of the kind that South Africa required in 1994, it is important that there should be first and foremost an overarching programme for state reform which aims in particular at institution-building and the promoting good governance and the rule of law. This programme should set an appropriately time-bound framework for high-level decision-making to bring certainty to senior managers in the public service; in addition, it should articulate particular targets for reform and set the necessary standards. An overt and conscious focus on institution-building to meet international human rights standards is crucial.

An example of such an overarching programme is the so-called Fayyad Plan, the programme of the 13th Government of the Palestinian Authority.⁴ The Fayyad Plan is relevant to this thesis because it has guided decision-making in prison reform and significant results have been achieved to date.⁵ Importantly, a clear vision and plan for reform at a high level should secure political will and consolidate support. The Fayyad Plan makes repeated references to building institutions of state and strengthening capacity where it is lacking:

Success in achieving national goals requires that high priority be given to developing the public institutions in the PNA (Palestinian National Authority). . . The Government has identified its main institution-building priorities in five core areas: the legal framework; organizational structures and processes; the use of technology in government; management of national financial resources; and management of human resources in the civil and security sectors.

With the overall focus of establishing an independent Palestinian state, there is full recognition that this will not be possible in the absence of effective institutions of state (to

⁴ Palestinian National Authority (2009) *Palestine: Ending the Occupation, Establishing the State - Program of the Thirteenth Government*. (The Fayyad Plan.)

⁵ The author was part of a two-person team tasked to evaluate in July to August 2010 a prison reform project in the Palestinian Authority which was funded and facilitated by the UN Office on Drugs and Crime.

maintain security and enable economic growth) and that such institutions must be well governed, able to meet the needs of Palestinians and comply with international human rights norms.

In view of the constitutional demand for democratic and institutional reform in 1994 in South Africa, it was the task of the national government to provide stewardship and clearly identify targets for reform aligned to the Constitution. In the discussion below the emphasis is, firstly, placed on the approach to public service reform in the period 1994 to 2000. Three major areas of policy development are dealt with: crime, poverty and affirmative action. It is argued that the failures of prison reform after 1994 (especially under the Government of National Unity - GNU) were strongly shaped by policy-development difficulties in the period 1994 to 2000. Second, an assessment is made of how the rights enshrined in the Constitution, applicable to suspects and prisoners, shaped or failed to shape government policy. Third, from 1994 to 2004 the Correctional Services Portfolio was under ministers from a minority party (the Inkatha Freedom Party – IFP) in a Parliament and Cabinet dominated by the ANC. This had a profound influence on the performance of the DCS. It was especially under Minister Mzimela that aspirations for widespread prison reform were dealt crippling blows.

2.1. Public service reform

In 1994 the ANC-led GNU faced enormous challenges: the economy was under strain, crime was rampant, socio-economic development needs were enormous, and political consensus was tenuous. Moreover, it had to address these challenges with a bloated and ineffective public service⁶ that was not representative of the population but dominated by an old guard occupying senior positions. How the GNU responded to the demands for reform in the public service, and in particular to demands for affirmative action, shaped in material ways the events that unfolded in the DCS under the new constitutional order. Importantly, the GNU did not have a “clean slate” – it inherited the institutions of state and their processes from its predecessor and was bound, to some extent, by its policies and what the reality dictated.⁷ Nonetheless, it needed to create the framework for public sector reform that would guide government departments, such as the DCS, to de-institutionalise and re-institutionalise with a

⁶ Gumede, W. M. (2009) Delivering the democratic developmental state in South Africa. In McLennan, A. and Munslow, B. (eds) *The politics of service delivery*, Johannesburg: Wits P&DM Governance Series, p.55.

⁷ Picard, L.A. (2005) *The state of the state – institutional transformation, capacity and political change in South Africa*. Johannesburg: P&DM Wits University Press, p. 121.

sense of urgency (see Chapter 2 section 2.2.2). This, however, did not happen as institution-building was not a priority for policy-makers in the ANC-led GNU and the public sector soon faced a capacity-crisis that made it increasingly unable to deliver the services it needed to.⁸

National government was not oblivious to the situation in the public service, and in 1996 President Mandela established the Commission of Inquiry Regarding the Transformation and Reform of the Public Service which became known as the Presidential Review Commission into the Public Services (PRC). Its final report, published in 1998, described the DCS (together with Education, Justice and Safety and Security) as being in a crisis situation:

The crisis in these departments has been widely covered and stems from a variety of sources. The departments are inadequately coordinated, erratically restructured and apparently dysfunctional at some levels. Greater management capacity in all of them is required at senior level. Escapes from prisons have been chronically regular and there has been a notable failure to provide credible assurances that mechanisms are in place to avoid these in the future. Provincial heads were instructed to achieve a 50% drop in escapes by the end of 1997. However, no strategy is in place to achieve this.⁹

The PRC recommended that in the case of these departments serious and urgent consideration must be given to a major re-engineering and rationalisation at senior level and that the President and relevant ministers reassess the suitability or otherwise of some of the top echelons of their public managers.¹⁰ As part of the re-engineering, the PRC recommended the de-establishment of the Ministries of Correctional Services and Justice (and their associated departments) and the creation of a new ministry and department, namely the Ministry of Justice and Rehabilitation.¹¹ This would have taken the situation back to something similar to what prevailed before October 1990 when the De Klerk government created the Ministry of Correctional Services. The proposal, however, was not accepted and the two departments remained as they were. The restructuring of the two departments may indeed have provided the necessary impetus to see wide-ranging reforms in the criminal justice system and prison

⁸ McLennan, A. (2009) Introduction. In McLennan, A. and Munslow, B. (eds) *The politics of service delivery*, Johannesburg: Wits P&DM Governance Series, p. 11. Picard, L.A. (2005), p. 118.

⁹ Presidential Review Commission of the Public Service (1998) *Developing a culture of good governance report of the presidential review commission on the reform and transformation of the public service in South Africa*. Pretoria: Government of the Republic of South Africa, para 2.5.2.

¹⁰ Presidential Review Commission of the Public Service (1998) para 2.5.2.

¹¹ Presidential Review Commission of the Public Service (1998) para 2.5.8.2.

system in particular. Instead the opposite happened and the crisis deepened, as described in Chapter 3. The situation in the DCS became more disorganised and distant from state control, and by 2000 it was conceded that the state had lost control over the DCS. The separation from the Ministry of Justice appears in hindsight not to have been an innocuous event. Without the oversight exercised by the Minister of Justice, generally regarded as a senior and influential portfolio in Cabinet, the DCS, headed by a minority party minister, drifted away from state control.

2.1.1. Policy development

Three national policy areas dominated the period after 1994 and emanated from South Africa's three major societal problems, poverty, crime and racial inequality. In respect of crime, the National Crime Prevention Strategy (NCPS) would initiate a process of policy development, while the Reconstruction and Development Programme (RDP) and the RDP White Paper (1994) were aimed at addressing poverty. Transformation of the public service to render services to all South Africans and be representative of the South African population was ultimately done in a rushed and unsupported manner through affirmative action.

2.1.1.1. Crime

The NCPS was a response to President Mandela's 1995 State of the Nation Address in which he announced that instructions had been issued to the relevant ministers to take all necessary measures to bring crime under control.¹² Published in 1996, there were great expectations from the NCPS, and government departments and civil society would rally around it. However, the NCPS made little mention of the prison system save for references to community-based sentencing, crime intelligence, general education, support for other departments, and diversion of young offenders.¹³ The NCPS did not assign to the prison system a fundamentally different task and left it in its "comfort zone". The NCPS articulated a dual approach where more effective law enforcement would be balanced with addressing the social causes of crime. It would unavoidably require a long-term approach, but long-term view would result in diminished political support for the NCPS.

¹² Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*, Johannesburg: CSV, p. 1.

¹³ Government of South Africa (1996) *National Crime Prevention Strategy – a summary*.

<http://www.info.gov.za/otherdocs/1996/crime1.htm>

The high violent crime rate and public demands for action prompted government to opt for more visible short-term strategies focusing on priority crimes as described in the National Crime Combating Strategy (NCCS) released in 2000, a policy document produced in-house by the South African Police Service (SAPS).¹⁴ By the late 1990s the initial political support for the balanced approach of the NCPS (combining law enforcement and social crime prevention) had fizzled out despite the PRC having regarded its integrated approach in a favourable light.¹⁵ The NCCS did not deal with Correctional Services, but large police operations flowing from the NCCS impacted negatively on the prison system and high numbers of arrests aggravated prison overcrowding.¹⁶ From 1998 to 2004 government's response to crime would largely be shaped by the White Paper on Safety and Security,¹⁷ a policy document for the police which thus made only occasional reference to the DCS.¹⁸ Apart from requiring additional space to accommodate the rising numbers of prisoners,¹⁹ the NCPS and the other national policy documents aimed at addressing crime (i.e. NCCS) did not in any material way place different demands on the prison system. In the crime policy discourse after 1994, it appears that the prison system was increasingly marginalised and the discourse dominated by the SAPS.

2.1.1.2 Poverty

The RDP, released by the tripartite alliance²⁰ before the 1994 elections, set extremely ambitious targets for socio-economic reform.²¹ It was indeed too ambitious, and by 1996 the

¹⁴ Du Plessis, A. and Louw, A. (2005) Crime and crime prevention in South Africa: 10 years after, *Canadian Journal of Criminology and Criminal Justice*, April 2005, pp. 430-431.

¹⁵ Presidential Review Commission of the Public Service (1998) para 2.5.8.10.

¹⁶ Burger, J. (2006) Crime combating in perspective: a strategic approach to policing and the prevention of crime in South Africa, *Acta Criminologica* 19 (2) 2006, pp. 105-118.

¹⁷ Newham, G. (2005) *A decade of crime prevention in South Africa: from a national strategy to a local challenge*, Johannesburg: Centre for the Study of Violence and Reconciliation, p.4.

¹⁸ Department of Safety and Security (1998) *White Paper on Safety and Security: 'In Service of Safety' 1999 – 2004*. Pretoria: Department of Safety and Security

¹⁹ Rauch, J. (2001), p. 13.

²⁰ The alliance consists of the African National Congress (ANC), the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU).

²¹ Terreblanche, S. J. (1999) *The Ideological Journey of South Africa: From The RDP to the GEAR Macroeconomic Plan*. Paper presented at workshop on 'Globalisation, Poverty, Women and the Church in South

ministry of the RDP was abolished and the office of the RDP was transferred to the Office of the Deputy President.²² The RDP did, however, include a section on the prison system articulating a number of specific outcomes relating to: the establishment of a representative staff corps; de-militarisation; recognising prisoners' rights; rendering rehabilitation services; law reform in respect of child offenders; improved conditions of detention for mothers with infants; the abolition of solitary confinement and spare diet and dietary punishments; substantial prison law reform; and improved transparency and oversight over the prison system.²³ Flowing from the RDP, the RDP White Paper (released in 1994) did indeed describe more clearly what was expected of the prison system and the following eight policy objectives were formulated, each accompanied by a programme, targets, requirements for institutional reform, legislative reform requirements and financial arrangements:

- to protect the community by ensuring the safe custody and risk management of those persons entrusted to its care;
- to incarcerate and treat prisoners in a humane manner and to create a climate which is conducive to rehabilitation;
- to provide the necessary infrastructure for the rehabilitation of offenders;
- to provide separate facilities and specifically designed programmes for juveniles sentenced to imprisonment;
- to provide an adequate infrastructure for alternative or community-based sentences;
- to ensure a professional personnel corps broadly representative of the community;
- to be open and accessible to the public, responsive to public criticism and continuously seeking improvement; and,
- to establish and maintain positive and constructive partnerships locally, nationally and internationally.²⁴

Africa'. 16 February 1999, Cape Town, hosted by Religion in Public Life and the Ecumenical Foundation for South Africa. http://web.uct.ac.za/depts/ricsa/confer/me99/procs/pro_terr.htm p. 81, accessed 20 October 2011.

²² Terreblanche, S. J. (1999), p. 81.

²³ African National Congress (1993) *The Reconstruction and Development Programme (RDP) - A Policy Framework*,

<http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm>

Accessed 20 October 2011, Para 8.5.

²⁴ Ministry in the Office of the President (1994) *White Paper on Reconstruction and Development*, Government Gazette No. 16085, Notice No. 1954 of 1994, pp. 57-60.

The policy objectives set out in the RDP White Paper would have been a solid framework for prison reform in South Africa if these were followed through. However, the status of the RDP White Paper waned and its oversight structure demoted in rank. Consequently, by 1996 it would have been relatively easy for the DCS to ignore it. Moreover, the rapidly increasing prison population and rampant corruption in the Department placed it well beyond the influence of a national policy document.²⁵ Overcrowding and corruption overshadowed the strategic renewal of the Department, if not directly undermining the capacity and willingness to reform. While the RDP White Paper could have steered the prison system onto a new trajectory, the GNU was not able to drive and sustain its objectives. The RDP White Paper should thus be regarded as a missed opportunity in providing the springboard to operationalise the requirements set in the Constitution.

2.1.1.3 Affirmative action

Under the GNU, improving the delivery of public services seemed to have focused on affirmative action while maintaining existing services,²⁶ and this frequently resulted in under-qualified and inexperienced officials being appointed to senior positions.²⁷ During the years of the GNU, the debate on affirmative action also pulled in different directions and there was indeed no single strategy to implement affirmative action.²⁸ Importantly, affirmative action increasingly meant Africanisation as opposed to non-racialism.²⁹ After a year under the GNU there was already widespread dissatisfaction with the implementation of affirmative action amongst both black elites and the predominantly white senior civil service.³⁰ Different interpretations of and proposals to implement affirmative action had a paralysing effect on the GNU and its efforts to reform the public sector. What was lacking was a “legal framework to regulate and control the bureaucracy and to mete out punishment for

²⁵ Both the 1994 and 1995 Annual Reports of the Department of Correctional Services give prominence to the RDP in the National Commissioner’s introduction to the reports, but in the 1996 Annual Report no such mention is made.

²⁶ Picard, L.A. (2005), p. 131.

²⁷ Presidential Review Commission of the Public Service (1998) para 2.1.3; Ngoma, W. (2009) The potholes of service delivery – reflections on the Eastern Cape Department of Education. In McLennan, A. and Munslow, B. (eds) *The politics of service delivery*, Johannesburg: Wits P&DM Governance Series, p.210.

²⁸ Presidential Review Commission of the Public Service (1998) para 2.5.1. Picard, L.A. (2005), p. 155.

²⁹ Picard, L.A. (2005), p. 128.

³⁰ Picard, L.A. (2005), p. 139.

corruption”.³¹ A clear roadmap was needed to guide institution-building in order to meet the needs and demands of the public.

The controversial nature of affirmative action resulted in many senior civil servants leaving and finding employment in the private sector, frequently to return as consultants to the departments they had served in.³² Capacity problems also resulted in mismanagement and corruption, and increasingly private sector involvement became an acceptable solution in order to minimise losses.³³ Whilst capacity problems were increasingly evident, government’s White Paper on Affirmative Action (1998) contained no specific component on training and human resource development but cross-refers to the White Paper on Public Service Training and Education (1997) and the White Paper: Human Resource Management in the Public Service (1997).³⁴ Human resource development in the context of affirmative action would become, and continue to be, a serious problem in the public service, as borne out by a 2010 Public Service Commission report:

There are no specific leadership and management development interventions for employees from designated groups in national and provincial departments. Similarly, there is no support mechanism specifically designed for employees from designated groups in middle and senior management.³⁵

By 1999 corruption in the public service had become an extremely worrying problem to the political leadership, and in his State of the Nation address of that year President Mbeki undertook to deal with corruption in the criminal justice system, the protection of whistleblowers, and improvements to the integrity of public servants.³⁶ Problems of capacity, internal conflicts, lack of control and inability to enforce discipline resulted in what Picard summarised as “a lethal combination of patronage and corruption, and a narrow focus on

³¹ Picard, L.A. (2005), p. 148.

³² McLennan, A. (2009) Introduction. In McLennan, A. and Munslow, B. (eds) *The politics of service delivery*, Johannesburg: Wits P&DM Governance Series, p.10; Picard, L.A. (2005), p. 148.

³³ Presidential Review Commission of the Public Service (1998) para 2.1.3. Picard, L.A. (2005), pp. 245-291.

³⁴ Department of Public Service and Administration (1998) *White Paper on Affirmative Action in the Public Service*. Government Gazette, 23 April 1998 No. 18800, p. 21.

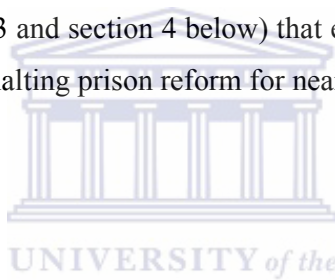
³⁵ Public Service Commission (2010) *An audit of affirmative action in the public service*. Pretoria: Public Service Commission, p. xi.

³⁶ Address of the President of the Republic of South Africa, Thabo Mbeki, at the Opening of Parliament: National Assembly, Cape Town, 25 June 1999.

salaries, privileges and what the South African press called the gravy train, which would threaten long-term institutional effectiveness of the South African government and society”.³⁷ It would, however, take several years for government to start implementing a coherent approach to deal with corruption in the public service. Only in 2002 did Cabinet make a decision requiring all government departments to establish a Minimum Anti-Corruption Capacity (MACC), as noted in Chapter 4.³⁸ Similarly, the inadequate Corrupt Activities Act (94 of 1992) was replaced by the Prevention and Combating of Corrupt Activities Act (12 of 2004) only in 2004, five years after President Mbeki’s undertaking to deal with corruption in the public service.

The lack of direction from the national government in implementing affirmative action in the public service and the sluggish response to corruption and maladministration created the space for corrupt forces to establish themselves in the DCS. It was in particular organised labour (as discussed in Chapter 3 and section 4 below) that exploited this space, destabilising the Department and effectively halting prison reform for nearly a decade.

2.1.1.4 Summary of issues



Post-1994 the role of the national government in containing and guiding reform in the public service is important for the assessment of prison reform, as three issues would have a material impact on the DCS. The first was the particular interpretation of affirmative action to address racial and gender imbalances in the public service. As early as 1995 there was support for a rapid process to be implemented, and affirmative action was interpreted to mean Africanisation. Second, and as a consequence of this, little attention was paid to institution-building (or re-institutionalisation) and capacity development in the public service with specific reference to the human resource development of new and emerging incumbents. The lack of containment and guidance from the national government created the space for corrupt groupings within the DCS staff corps to hijack the recruitment process and placement of

³⁷ Picard, L.A. (2005), p. 230.

³⁸ Department of Correctional Services (2011 d) *Annual trend analysis on corruption, fraud, theft and maladministration. Briefing to the portfolio Committee on Correctional Services*, 18 October 2011, p. 4.

<http://www.pmg.org.za/report/20111018-discussion-department-correctional-services-activities-its-legal-serv>

Accessed 25 October 2011.

staff, as was found by the Jali Commission and described in Chapter 3. As a result, competency in job function became secondary to ensuring that the “right people” were appointed. Third, corruption had become a pervasive problem by 1999 and the corruption later uncovered in the DCS should be seen against this background – corruption was indeed not a DCS-only problem, but the failures of the GNU made it easier for corruption to flourish in the prison system. Efforts across the public service to address corruption in a comprehensive manner would only materialise from 2002, shortly after the Jali Commission was established.

The broader issues affecting public service reform after 1994 were also felt in DCS, and the national government’s slow response in addressing governance concerns, despite clear constitutional obligations, would consequently impede prison reform. As an external influence, the role of the national government was especially weak for the first six years of democratic rule and the results were seen in both a deterioration of governance and human rights standards.

2.2 Human rights

The Constitution places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁹ This implies that the state should place a high priority on human rights in all its actions and not only in its rhetoric. The state’s human rights obligations should thus be a driving force in policy development, legislative reform and service delivery. After 1994 the legislature and executive were extremely busy and hundreds of pieces of legislation were passed and policies developed to dismantle the legacy inherited from apartheid⁴⁰ and establish a legal framework reflecting the Constitution. Moreover, the Bill of Rights “exposed all existing legal provisions, whether statutory or derived from the common law, to reappraisal in the light of the new constitutional norms heralded by that transition”.⁴¹ This process has not been completed and legislative advances continue to be made in pursuit of this objective, such as the Child Justice Act (75 of 2008) and Children’s Act (38 of 2005). While service delivery may be constrained by available financial resources (for example,

³⁹ s 7(2).

⁴⁰ SA Human Rights Commission (2004) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)*, Johannesburg: SA Human Rights Commission, p. 192.

⁴¹ *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999), para 2.

when addressing widespread socio-economic inequalities), there should at least be visible political will to give effect to the rights in the Bill of Rights. As is the case with institutional reform, the requirement is that national government should provide the framework and broad direction for reform.

It is not within the scope of this thesis to provide an assessment of how the Bill of Rights informed and influenced national government policies in general after 1994, and attention will be placed rather on how the rights pertaining to suspects and offenders were framed by government as this had a direct impact on developments in the prison system. It is argued below that government, due to the high violent crime rate, became increasingly intolerant of prisoners' rights and attempted (and was partly successful) to reframe or dilute these rights, or distance itself from prisoners' rights enshrined in the Constitution. In effect, the rights afforded to suspects and sentenced prisoners became a contested terrain.

2.2.1 Policy and rhetoric

By 1994 violent crime had spoiled the fruits of the new democratic order and continued to do so⁴² – the public was fearful and demanded action from government. It was in fact President Mandela who framed the problem in a particular manner, portraying a war-like situation of criminals versus law-abiding citizens.⁴³ The ensuing government response was focused on improved law enforcement embodied in the NCPS of 1996, although the NCPS still balanced this with social crime prevention as noted in section 2.1.1.1 above. However, the focus on law enforcement became overt after a review of the NCPS in 1998.⁴⁴ Political rhetoric, espousing a tough-on-crime approach, found popular support and in his 1999 State of the

⁴² Sarkin, J. (2000) Fighting crime while promoting human rights in the police, the courts and the prisons in South Africa, *Law Democracy and Development*, Vol. 4 No. 2, pp.151-153.

⁴³ 'The situation cannot be tolerated in which our country continues to be engulfed by the crime wave which includes murder, crimes against women and children, drug trafficking, armed robbery, fraud and theft. We must take the war to the criminals and no longer allow the situation in which we are mere sitting ducks of those in our society who, for whatever reason, are bent to engage in criminal and anti-social activities. Instructions have therefore already gone out to the Minister of Safety and Security, the National Commissioner of the Police Service and the security organs as a whole to take all necessary measures to bring down the levels of crime.' (Opening of Parliament address by President N. R. Mandela, 17 Feb 1995, Cape Town). Also Cavadino, M. and Dignan, J. (eds) (2006) *Penal Systems – a comparative approach*, London: Sage Publications, p. 95.

⁴⁴ Rauch, J. (2001) *The 1996 National Crime Prevention Strategy*. Johannesburg: CSVr, p. 10.
<http://www.csvr.org.za/docs/urbansafety/1996nationalcrime.pdf> Accessed 11 October 2011.

Nation Address President Mbeki was convinced that more effective law enforcement would reap dividends.⁴⁵ At an earlier opportunity Mbeki (then Deputy President) likened criminals to "barbarians in our midst".⁴⁶ The new Ministers of Justice and Safety and Security in the first Mbeki Cabinet were explicit in how they saw the required response:

As our country embarks on the second democratic term, we have to reflect on the shortcomings of the previous term and resolve to improve significantly on performance. While over the last five years the Department [of Justice] was able to lay a solid legislative and indeed infra-structural foundation for a strong and responsive justice system, many problems continue to plague our justice system and at times evoking public sentiments that the new democratic order is more sympathetic to human rights concerns of criminals and less sensitive to the plight of victims of crime and the general sense of insecurity that continues to besiege our country. (Minister of Justice, Penuel Maduna, June 1999)⁴⁷

The criminals have obviously declared war against the South African public. ... We are ready, more than ever before, not just to send a message to the criminals out there about our intentions, but more importantly to make them feel that 'die tyd vir speletjies is nou verby'.⁴⁸ We are now poised to rise with power and vigour proportional to the enormity and vastness of the aim to be achieved. (Minister of Safety and Security, Steve Tshwete June 1999)⁴⁹

Minister Maduna was evidently frustrated with the rights to which offenders and suspects were entitled. In 1999 Steve Tshwete, Minister of Safety and Security, reportedly suggested that police officers deal with criminals "in the same way a bulldog deals with a bull".⁵⁰ Calls for the return of the death penalty were also frequent despite it having been declared unconstitutional in 1994. Throughout the 1990s and later, political rhetoric framed crime and

⁴⁵ Address of the President of the Republic of South Africa, Thabo Mbeki At the Opening of Parliament: National Assembly, Cape Town, 25 June 1999.

⁴⁶ Speech by ANC President, Thabo Mbeki, at the Fourth National Congress of the South African Democratic Teachers Union, Durban, 6 September 1998.

⁴⁷ Cited in Rauch, J. (2001), p. 10.

⁴⁸ 'The time for fun and games is over' (own translation).

⁴⁹ Cited in Rauch, J. (2001), p. 10.

⁵⁰ ANC Daily News Briefing 8 January 2006 citing article by W. Roelf. <http://www.e-tools.co.za/newsbrief/2006/news0108.txt> Accessed 11 October 2011.

human rights in a particular manner, attempting to drive a wedge between the Constitution (applicable to the just and innocent) and offenders (who should have limited protection under the Constitution).

2.2.2 Harsher punishment and tighter bail laws

Shortly after the April 1994 elections the Constitutional Court dealt with the constitutionality of the death penalty and of corporal punishment.⁵¹ Both types of punishment were declared unconstitutional and this may have given some cause for optimism around a more liberal sentencing framework. This was not to be the case. The political rhetoric and “tough on crime” approach espoused by government found public support and were soon expressed in harsher sentences and tighter bail laws. Indeed, a sense of “moral panic” had set in as a result of the high crime rate and perceptions that offenders were walking away scot-free.⁵² Even the courts expressed disgust at the high levels of crime and supported longer sentences:

Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.⁵³

Initially, and as a temporary and annually renewable measure, Parliament passed the minimum sentences legislation in 1997.⁵⁴ This legislation set down certain mandatory minimum terms of imprisonment to be imposed for certain, primarily violent, crimes.⁵⁵

⁵¹ *S v Makwanyane* 1995 (3) SA 391 (CC) and *S v Williams* 1995 (3) SA 632.

⁵² Cavadino, M. and Dignan, J. (eds) (2006), p. 94.

⁵³ *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O).

⁵⁴ Act 105 of 1997.

⁵⁵ For example, the imposition of life imprisonment was mandatory for the crime of rape when: the victim is raped more than once by the accused or others; by more than one person as part of common purpose or

However, courts could deviate from the prescribed minimum sentence if there were “substantial and compelling reasons” to do so. To add further sting to the minimum sentences legislation, it had two provisions to ensure that the time served in prison is as long as possible, although both these stipulations have subsequently been amended. First, offenders sentenced under the minimum sentences legislation had to serve four-fifths of the sentence before they could be considered for release on parole compared to the one-third or one-half rule of thumb depending on the applicable parole regime.⁵⁶ Second, the sentence starts on the day of sentencing, thus deliberately excluding discount for any time spent awaiting trial in prison.⁵⁷ Shortly after passing the minimum sentences legislation, the sentence jurisdiction of the Magistrates’ Courts was increased.⁵⁸ In the case of district courts the jurisdiction was raised from one year to three years’ imprisonment and in the case of regional courts, from ten to 15 years. A further development, by means of the Correctional Services Act (111 of 1998), was that prisoners sentenced to life imprisonment had to serve 25 years and not 20 years, as the case was previously, before they could be considered for parole.⁵⁹ Due to the delay in bringing the full Correctional Services Act (111 of 1998) into operation, the increase in the term of life imprisonment only became operational in October 2004, but it nonetheless reflected the sentiments of the legislature and the executive as they were in 1998.

Amendments to the bail legislation in 1995 and 1997 saw a tightening of the bail laws which undoubtedly also contributed to prison overcrowding.⁶⁰ As was discussed in Chapter 5

conspiracy; the accused has been convicted of more than one rape offence and not yet sentenced; the accused knows he is HIV-positive; or when the victim is under 16 years of age, a vulnerable disabled woman, is a mentally ill woman, or involved the infliction of grievous bodily harm.

⁵⁶ This requirement has subsequently been removed by section 12 of the Correctional Matters Amendment Act 5 of 2011, but was not yet in operation at the time of writing (December 2011).

⁵⁷ This requirement has subsequently been removed by section 1 of the Criminal Law (Sentencing) Amendment Act, 38 of 2007.

⁵⁸ Magistrates Amendment Act No. 66 of 1998.

⁵⁹ s 73(6)(iv) of the Correctional Services Act. As at the end of February 2011 there were 10 349 prisoners serving life imprisonment, compared to the 443 in 1995 (Giffard, C. and Muntingh, L. (2006) *The impact of sentencing on the size of the prison population*, Cape Town: Open Society Foundation (SA). DCS website <http://www.dcs.gov.za/WebStatistics/> Accessed 3 November 2011).

⁶⁰ Steyn, E. (2000) Pre-trial detention – its impact on crime and human rights, *Law Democracy and Development*, Vol. 4 No. 2, p. 213; Van Zyl Smit, D. (2004) Swimming against the tide. In Dixon, B. and Van der Spuy, E. *Justice gained – crime and crime control in South Africa’s transition*, Devon: Willan Publishing, p. 242-243.

(section 12) awaiting-trial prisoners would spend, and continue to do so, long periods in detention due to unaffordable bail, unnecessary arrests and inefficiencies in the criminal justice process. In the absence of a mandatory review mechanism and enforceable time-limits on pre-trial detention the situation will persist.⁶¹

The 1998 parole guidelines discussed in Chapter 5 (section 9.1.1) were furthermore reflective of the punitive attitude demonstrated by government.⁶² Even though they were later declared unconstitutional,⁶³ they were nonetheless an attempt to regulate the release of (violent) offenders through a policy instrument instead of regulating it through legislation. This consequently created much confusion, resulting in a flood of High Court applications from prisoners believing they were being treated unfairly, as discussed in Chapter 5 (section 9.1.1).⁶⁴

Punishment and deterrence remained the central themes in government's response, and between 1995 and 1998 a number of legislative and policy measures were adopted reflecting this. It was borne out of a perception that offenders were getting away with light sentences and that government should be seen to be "tough on crime". There was and is, however, no scientific evidence that such an approach would indeed be effective in bringing crime under control. These changes were purposefully directed at imposing harsher punishments by limiting access to bail, increasing sentence jurisdiction, lengthening prison terms, limiting courts' discretion at sentencing and increasing non-parole periods. The impact of these measures, individually or combined, on the already overcrowded prisons was of little concern to the legislature and the executive.⁶⁵ The combined effect of these measures contributed to worsening the overcrowding in the prisons, having a material impact on conditions of detention and thus the right to dignity but it simply did not matter: prisoners were not a group worthy of sympathy and public concern.

⁶¹ Ballard, C. (2011) *Research report on remand detention in South Africa – an overview of the current law and proposals for reform*. CSPRI Research Report, Bellville: Community Law Centre. Steyn, E. (2000), p. 215.

⁶² Muntingh, L. (2007 d) *Punishment in South Africa*, Paper delivered at seminar hosted by the Wits Institute for Social and Economic Research (WISER), 29-30 August 2007, Johannesburg.

⁶³ Mujuzi, J.D. (2011) Unpacking the law and practice relating to parole in South Africa, *Potchefstroom Electronic Law Journal*, Vol. 14 No. 5, p. 220.

⁶⁴ Jali Commission, pp. 505-507.

⁶⁵ Van Zyl Smit, D. (2004), p. 239.

2.2.3 The right to vote

A further indication of how the executive's attitude towards prisoners became more vengeful was the intended exclusion of prisoners from the 1999 general elections, given that the Electoral Commission had not put in place measures to register prisoners for the upcoming elections.⁶⁶ The matter was ultimately settled in the Constitutional Court in favour of prisoners and they were permitted to participate in the 1999 general elections.⁶⁷ Late in 2003 Parliament passed the Electoral Law Amendment Act (34 of 2003), and this time the intention was clear: certain prisoners (those serving a prison sentence without the option of a fine) should be excluded by law from voting. Again the matter went to the Constitutional Court and again the Court ruled in favour of prisoners and declared unconstitutional the impugned provisions of the legislation.⁶⁸ Importantly, part of the state's defence was that the government would be seen to be "soft on crime" if prisoners were allowed to vote but the Constitutional Court rejected this argument. Government's intention was nonetheless clear: the symbolic and thus political value of harsher punishments outweighed constitutional concerns.

2.2.4 Prison law delayed

In 1996 the DCS commenced with drafting new legislation to replace the already extensively amended Correctional Services Act of 1959 (see Chapter 3 section 3.1.5). Parliament adopted the new Correctional Services Act in 1998, but it would take six years before the chapters detailing the minimum conditions of detention and other relevant rights applicable to prisoners would come into operation.⁶⁹ While some parts of the Act were brought into force earlier (e.g. the chapters dealing with the Judicial Inspectorate), the effect was that there was legal uncertainty, with both the 1996 Constitution and the 1959 prison laws being applicable.

⁶⁶ Muntingh, L. and Sloth-Nielsen, J. (2009) The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa. In Ewald, A.C. and Rottinghaus, B. (eds) *Criminal disenfranchisement in an international perspective*, Cambridge: Cambridge University Press, p. 232.

⁶⁷ *August and Another v Electoral Commission and Others*, [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363.

⁶⁸ *Minister of Home Affairs v NICRO and Others*, [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

⁶⁹ Reference is made specifically to Chapter 3 (Custody of all prisoners under conditions of human dignity), Chapter 4 (Sentenced prisoners) and Chapter 5 (Unsentenced prisoners) which came into effect on 31 July 2004.

The reasons for the delay are less than firm and not entirely convincing, as noted by Sloth-Nielsen. First, that regulations for the 1998 Act had to be drafted; second that a “work study” was required to redefine staff levels and shifts so as to be able to serve three meals at reasonable intervals each day; and third that the legislation had to accommodate changes in the composition of Correctional Supervision and Parole Boards (CSPB) since some government departments had decided that they could no longer be represented on these structures due to cost and time implications.⁷⁰ The delay in bringing the Correctional Services Act into force did, however, not make a material difference as substantial areas of non-compliance with it remain to date, as described in Chapters 4 and 5.⁷¹ The apparent reluctance to bring the full Correctional Services Act (111 of 1998) into operation is nonetheless regarded as indicative of government’s unwillingness to bring legal certainty to prisoners’ rights under the new democratic and constitutional order.

2.2.5 Summary of issues

Seeking a balance between being tough on crime and strong on human rights⁷² proved to be a difficult task for the post-1994 governments. However, emphasising the former at the cost of the latter was not only easier but came at a cost to an already marginalised group with little political influence and low moral standing in the eyes of the public. In response to the high violent crime rate and under pressure from public opinion and the media, government’s attitude towards criminal suspects and prisoners became increasingly conservative and

⁷⁰ Sloth-Nielsen, J. (2003) *Overview of Policy Developments in South African Correctional Services*. CSPRI Research report No. 1, Bellville: Community Law Centre, p. 32. Prior to an amendment in 2001 (s 28 Correctional Services Amendment Act 32 of 2001), the Correctional Services Act required that a CSPB would consist of a chairperson and vice-chairperson, two DCS officials, an official from the South African Police (SAPS) nominated by the Commissioner of Police, an official and an alternate from the Department of Justice and Constitutional Development (DoJCD) nominated by the Director General of the DoJCD (both with a legal background), and two members from the community. In total a CSPB would have had nine members. The 2001 amendment reduced the number to five by requiring only one DCS official and doing away with required representation from the DoJCD and SAPS, although allowing for co-optation of one official from each department.

⁷¹ Report of the Auditor-General to Parliament on the financial statements of vote no. 18: Department of Correctional Services for the year ended 31 March 2010. In Department of Correctional Services (2010) *Annual Report 2009/10*, Pretoria: Department of Correctional Services, p. 132.

⁷² Calland, R. and Masuku, T. (2000) Tough on crime and strong on human rights – the challenge for us all, *Law Democracy and Development*, Vol. 4 No. 2, pp. 121-135.

punitive, if not vindictive. By emphasising punishment, “tough on crime” rhetoric, and delaying the coming into operation of the Correctional Services Act, the national government appealed to populist notions of crime and justice, but twice this position landed it in the Constitutional Court. The effect was that it had not only failed to establish a firm policy and legal framework for prisoners’ rights, but actively sought to dilute and limit them. As a result it was easier for the DCS senior management and other stakeholders (such as Parliament) to tolerate rights violations in the prison system, even when these were well known and frequently reported in the media. The acceptance of prison overcrowding by government is a good example in this regard and it is doubtful if government would of its own accord have taken any measures were it not for pressure from the Office of the Inspecting Judge (see discussion below at section 6.1 on the Judicial Inspectorate) and civil society groupings after 2003 (see section 3 below).

2.3 An IFP portfolio 1994 – 2004

The inclusion of the Inkatha Freedom Party (IFP) in the Cabinet of the GNU was the result of a negotiated settlement reflected in the Interim Constitution that would give each political party with more than 5% of the votes in the 1994 election representation in Cabinet.⁷³ From 1994 to the end of the first Mbeki Cabinet in 2004, the Correctional Services portfolio had an IFP minister at the helm, first Sipo Mzimela (May 1994 to July 1998) and then Ben Skosana (1998 to 2004). Correctional Services was one of three portfolios held by IFP ministers, the others being Mangosotho Buthelezi (Home Affairs) and Ben Ngubane (Arts and Culture).⁷⁴ During both terms, the Parliamentary Portfolio Committee on Correctional Services had ANC Chairpersons, which would have added to tensions but also created a sense of vulnerability on the part of the IFP Minister of Correctional Services in the ANC-dominated Cabinet and Parliament. Moreover, during the first years of democratic rule the senior bureaucrats in the DCS were still from the “old guard” and resistant to change, as described above in Chapter 3 (section 3.1). For the first two years of Mzimela’s reign the DCS National Commissioner was General H. Bruyn, a career prison officer who had been in that position since 1 January

⁷³ s 88(2) Interim Constitution Act 200 of 1993.

⁷⁴ ‘President Mandela chooses an all-party cabinet’ *African Business*, June 1994,

http://findarticles.com/p/articles/mi_qa5327/is_n189/ai_n28645345/ Accessed 13 October 2011.

1994.⁷⁵ In 1996 he was replaced by Commissioner Khulekani Sithole, the first black National Commissioner, who left under a cloud of financial mismanagement at the end of 1998,⁷⁶ as discussed in Chapter 3 (section 4.2).

The IFP was also a political party with waning support, and after securing 43 seats in the 400 seat Parliament in the 1994 elections this dropped to 34 seats in the 1999 elections.⁷⁷ With dwindling political support for the IFP and with its traditional Zulu support-base, the new Minister of Correctional Services was probably not the most popular choice amongst DCS officials. Mzimela had, at the time, returned from the USA where he had been in exile for more than 30 years and worked as a prison chaplain. Mzimela was reportedly impressed with American super-maximum security prisons⁷⁸ and favoured private sector involvement in the prison system,⁷⁹ as noted in Chapter 3 (section 4.1.2 and 4.1.3)

It is difficult to assess how the IFP Ministers of Correctional Services fared in the ANC dominated Cabinet, but three issues have emerged in respect of Mzimela.⁸⁰ The first centred on a large-scale prison construction programme, the second on the security threat that former death row prisoners posed after the death penalty was declared unconstitutional in 1994, and the third was his political activities outside of the correctional service portfolio. On the first two issues Mzimela was at odds with the ANC ministers Jeff Radebe (then Minister of Public Works) and the late Dullah Omar (Minister of Justice). In respect of the prison construction

⁷⁵ Department of Correctional Services (1994 a) *Annual Report 1993*, Pretoria: Department of Correctional Services, p. 1.

⁷⁶ Taco Kuiper Award 2006, Forum for Investigative Reporters, http://www.fairreporters.org/?showcontent_home&global%5B_id%5D=914 Accessed 20 October 2011.

⁷⁷ Election Resources on the Internet: General Elections in the Republic of South Africa by Manuel Álvarez-Rivera <http://electionresources.org/za/> Accessed 13 October 2011. In the 2004 election the IFP secured 28 seats and in 2009, 18 seats.

⁷⁸ Buntman, F. and Muntingh, L. (2012 forthcoming) Super-maximum prisons in South Africa. In Ross J (ed) *Globalization of Supermax Prison*, Chapel Hill: Rutgers University Press.

⁷⁹ Goyer, K.C. (2001) *Prison privatisation in South Africa - issues, challenges and opportunities*. Monograph 64, Pretoria: Institute for Security Studies, pp. 38-39. Giffard, C. (1997) *Out of Step? The transformation process in the South African Department of Correctional Services*, Dissertation submitted in partial fulfilment of the degree of Master of Science in Criminal Justice Studies, Scarman Centre for the Study of Public Order, University of Leicester, p. 32.

⁸⁰ Buntman, F. and Muntingh, L. (2012 forthcoming).

programme,⁸¹ Mzimela was of the belief that the DCS was capable of managing its own prison construction projects and that it was not necessary for the Department of Public Works to manage this, but twice his proposals were scuppered by Radebe.⁸² In respect of the former death row prisoners, Mzimela reportedly believed that Dullah Omar did not appreciate the urgent security problems these prisoners posed for DCS and that it needed to build a super-maximum security prison where they would be held. In the end, Cabinet supported this decision as a departmental rather than a senior governmental decision, without attaching much political weight to it. This ultimately led to the construction of the over-priced and under-utilised Ebongweni Super-Maximum Security prison in Kokstad (KwaZulu-Natal),⁸³ as discussed in Chapter 5 (section 7). The third issue that ultimately led to his removal from office in July 1998 was his political activities outside of the Correctional Services portfolio. Over a period of time he reportedly persisted with provocative statements about a merger between the IFP and the ANC. This attracted the ire of his own party, and in June 1998 the IFP National Council passed a motion of no confidence in Mzimela as minister. IFP President Mangosuthu Buthelezi informed President Mandela that the IFP no longer wanted Mzimela as a minister and he was relieved of his duties in July 1998, although with some delay.⁸⁴ Mzimela appears to have made numerous enemies along the way and was a controversial political character. The insults he directed at then President Mandela in a book he published did not help his cause either.⁸⁵ At a time when South Africa needed mediators and reconciliatory leaders, Mzimela's role was divisive. He would also alienate civil society groupings, as described below in section 3.1 below.

It was also during Mzimela's tenure that a number of important events took place, but the overall impression gained is that he was conspicuously absent. With violence and unrest wracking the prison system in the aftermath of the 1994 election (as discussed in Chapter 3

⁸¹ According to the then advisor to Mzimela plans were afoot to replace the entire prison infrastructure with 160 prisons and this would have been funded with RDP funds as well as the sale of the grounds that Pollsmoor prison is situated on. (Interview with Mr. Golz Wessman, 16 July 2010.)

⁸² In the media Mzimela described the prisons built by the Department of Public Works as 'totally useless warehouses fit only for cattle' and went on to describe its officials as 'stupid'. (*Weekend Argus* 10-11 June 1995, cited in Giffard, C. (1997), p. 49)

⁸³ Buntman, F. and Muntingh, L. (2012 forthcoming).

⁸⁴ 'Mzimela uit Kabinet geskop' *Die Burger*, 31 July 1998. [Mzimela kicked out of cabinet – own translation.]

⁸⁵ Gevisser, M. (1996) *Portraits of power: profiles in a changing South Africa*. Johannesburg: Mail and Guardian, p. 55.

section 3.3.2), Mzimela appears absent from all efforts to bring the situation under control, save for announcing the six-month amnesty to be granted to sentenced prisoners on 10 June 1994.⁸⁶ The six-month amnesty itself was regarded as an insult by many prisoners and resulted in further unrest and violence in the prisons. It also must have alienated the Minister from the prison population, since a more substantive amnesty would have curried favour with them. Whether Mzimela supported the 1994 White Paper is uncertain, but when it was criticised by civil society organisations he refused to engage with these groupings on the Transformation Forum on Correctional Services (discussed below in section 3.1).⁸⁷ The inability of Mzimela to exercise control became abundantly clear when the National Commissioner, Khulekani Sithole, was implicated in corruption and effectively forced to resign in 1999 after the Standing Committee on Public Accounts (SCOPA) recommended that he was not fit to hold office.⁸⁸ At the end of Mzimela's term in 1998 there were serious problems within the DCS.⁸⁹ Corruption and maladministration were rife, and this was confirmed by the Department of Public Service and Administration (DPSA) in 1999 when its Director General (Phumi Sikhosana) told Parliament: "The state had completely lost control over the Department of Correctional Services; the Department is not under the state's control."⁹⁰

In many ways the problems that continue to beleague the DCS emerged under the GNU with Mzimela at the helm. Shortly after Ben Skosana took over as Minister of Correctional Services, matters in the DCS took a turn for the worse with the assassination of a whistleblower.⁹¹ This was a watershed event, and Skosana requested then President Mbeki to

⁸⁶ Final Report of the Commission of Inquiry into unrest in prisons (1995) Unrest in Prisons (Kriegler Commission), p. 75.

⁸⁷ Giffard, C. (1997).

⁸⁸ Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services, 10 November 1999, <http://www.pmg.org.za/minutes/19991109-closure-sitole-matter-overseas-trip> Accessed 13 January 2012. Interview with Gavin Woods, *Focus*, Issue 21, <http://www.hsf.org.za/resource-centre/focus/issues-21-30/issue-21-first-quarter-2001/interview-with-gavin-woods> Accessed 13 January 2012.

⁸⁹ Presidential Review Commission of the Public Service (1998) para 2.5.2

⁹⁰ 'Staat het alle beheer oor DKD verloor, sê DG' *Die Burger*, 15 April 2000. [State lost all control over Department - Own translation.] PMG Report on the meeting of the Portfolio Committee on Correctional Services, 14 April 2000 <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services> Accessed 13 January 2012.

⁹¹ 'Ms Thuthukile Bhengu was in charge of Human Resource Management in the KwaZulu-Natal Provincial Office of the Department of Correctional Services. She was murdered when she was shot through a window in

appoint a Judicial Commission of Inquiry, with the result that the Jali Commission was established.⁹² Skosana did the sensible thing and acknowledged there was a problem in the DCS beyond his and his senior management's control. More precisely, they had lost control of the Department⁹³ and needed to regain it. The fact that Correctional Services was given to the IFP is evidently not the reason why the state had lost control over the Department, but Mzimela's position in the political landscape, his own views and style, and tensions between the ANC and IFP did not help the prison system. Moreover, he failed to provide the necessary leadership at a time when it was desperately needed.

3. The role of civil society and the media

Civil society organisations are an integral part of the South African human rights landscape.⁹⁴ Their role in prison reform after 1994 has involved varying levels of activity, but in general it has been less than warmly welcomed by the Department and Ministry of Correctional Services. This lack of enthusiasm for external stakeholder involvement did not escape the attention of the Jali Commission, which found the overall attitude of Departmental officials to be self-defeating inasmuch as they believed outsiders were not in a position to tell them how to run their prisons.⁹⁵

This is a sad state of affairs because it is this very attitude that discourages any input from people who might be experts in other areas, which would be of assistance to the Department. The Department cannot operate in isolation. It is not an island but an integral part of the South African society. The manner in which it conducts its affairs has a bearing on the lives of all South Africans, who expect the Department to consult

her residence on the prison grounds on 26 June 2001. In June 2002, two senior correctional officers, Mr. Mlungisi Dlamini and Mr. Lucky Mpungose, were convicted and sentenced to life imprisonment for Ms Bhengu's murder. The court heard that the assassination was planned after Ms Bhengu refused to consider the employment of Mr. Mpungose's fiancée allegedly as a result of a fraudulent job application.' (Jali Commission p. 27.)

⁹² Jali Commission, p. 5.

⁹³ Jali Commission, p. 116.

⁹⁴ Mubangizi, J.C. (2004) The role of non-governmental organisations in the protection of human rights in South Africa, *Journal of South African Law*, Vol. 2, pp. 324-342.

⁹⁵ The Jali Commission Report, pp. 944 -945.

and interact with experts and relevant stakeholders to ensure that correctional facilities in our country are competently run so that they compare with the best in the world.⁹⁶

It will be argued that the relationship between civil society and the DCS reached its lowest point during the first ten years of democratic rule. From 2003 onwards there was an improvement in civil society engagement, although it was not always welcomed by the DCS. In this regard, the Constitutional requirement for public involvement in the work of Parliament proved to be a critical ingredient for more purposeful prison reform.

3.1 The Transformation Forum on Correctional Services

Community involvement and inclusivity became, after 1994, key requirements for government on all tiers. The DCS realised this and even the Annual Reports at the time make reference to “community involvement”.⁹⁷ In the early 1990s an alliance of civil society organisations,⁹⁸ the Penal Reform Lobby Group (PRLG), was formed with the aim to promote prison reform, placing particular emphasis on human rights concerns. The PRLG would rally against the 1994 White Paper and regarded it as so inadequate that it drafted an Alternative White Paper.⁹⁹ This, unfortunately, had little impact and there is no real indication that the DCS or the Ministry took the Alternative White Paper seriously, given that the 1994 White Paper remained intact until it was finally discredited ten years later in the 2004 White Paper.¹⁰⁰

The PRLG did present the DCS with the opportunity to engage with a group of high-calibre civil society organisations (lawyers, academics and service delivery agencies) but it did not do so. It was thanks only to external pressure that then Deputy President Mbeki convened a meeting of stakeholders, including the DCS, Portfolio Committee on Correctional Services,

⁹⁶ The Jali Commission Report, p. 945.

⁹⁷ Giffard, C. (1997), p. 33.

⁹⁸ The following organisations were part of the PRLG: Lawyers for Human Rights, NICRO, SAPOHR, POPCRU as well as research groups (Giffard, C. (1997), p. 33).

⁹⁹ Penal Reform Lobby Group (1995) *An Alternative White Paper on Correctional Services*, Pretoria: Penal Reform Lobby Group.

¹⁰⁰ Department of Correctional Services (2004) *White Paper on Corrections in South Africa*, Pretoria: Department of Correctional Services, p. 33-36

Minister and PRLG, that some progress was made. As proposed by Mbeki, an inter-sectoral conference on prison reform was held¹⁰¹ and there it was agreed that a transformation task group will be established “to develop a plan for transformation”.¹⁰² Mbeki’s proposal was not entirely new, having been proposed a year earlier by the Kriegler Commission (see Chapter 3 section 3.3.2).¹⁰³ Shortly thereafter the task group was established and by mid-1995 became known as the Transformation Forum on Correctional Services (TFCS), with broad representation from the Ministry, Department, Portfolio Committee on Correctional Services, trade unions, the National Advisory Council on Correctional Services, and non-governmental organisations. The TFCS was chaired by Carl Niehaus (ANC), who was also chairperson of the Portfolio Committee on Correctional Services at the time.¹⁰⁴ The TFCS was, however, short-lived and by September 1996 its funding ended and it dissolved. Throughout the Forum’s short existence it was clear that Minister Mzimela was not interested in participating in the Forum, and in March 1996 he withdrew, only to be ordered back by President Mandela.¹⁰⁵ However, this did not resolve the intense conflict between Niehaus and Mzimela.¹⁰⁶ The Department’s cooperation was not much better than the Minister’s and it played its cards close to its chest, as Giffard observed:

¹⁰¹ Conference on Civil Society Involvement in Correctional Services, Johannesburg, 16 -18 March 1995.

¹⁰² Giffard, C. (1997), p. 33.

¹⁰³ Kriegler Commission, pp. 102-103.

¹⁰⁴ Giffard, C. (1997), p. 33.

¹⁰⁵ Giffard, C. (1997), p. 34.

¹⁰⁶ The following report from the *Mail and Guardian* of 22 March 1996 gives some insight into the relationship between these two individuals: Minister’s ‘one-upmanship’: ‘African National Congress MP Carl Niehaus has charged Correctional Services Minister Dr Sipo Mzimela with displaying “one-upmanship” rather than the leadership necessary to effect change in South Africa’s prisons. In a letter to Mzimela this week, Niehaus said the “deepening crisis” in the Department of Correctional Services needed ‘strong, transparent and consultative leadership’. Yet recent events had left him with “the distinct impression [of] one-upmanship”. Niehaus cited Mzimela’s announcement earlier this year that the department would be demilitarised, which came four days before the Transformation Forum on Correctional Services presented him with a document on the selfsame issue. After Mzimela terminated the department’s participation in the forum, claiming it cost too much and was unproductive, the forum, which is funded by the Danish government, released a sheaf of documents on work it had done. These included proposals for an independent prisons inspectorate - prompting “a hasty press statement by your office that a “prisons inspector” will soon be appointed. One is left with the distinct impression that instead of leadership one is confronted by one-upmanship.” While it was encouraging that proposals developed by the forum were being implemented, the way it is done raised “serious concerns”, Niehaus wrote. He appealed to Mzimela to “find time” to meet a delegation from the forum. “Consultation is not

While on the one hand the Department wanted the legitimacy that the representative Forum gave it, particularly with reference to its dubious past, on the other its centralised leadership was not accustomed to referring ideas to, or negotiating with, ‘outsiders’. As a result, the Department to a large extent kept the key decisions to itself, while it attempted to control the issues that were presented to the Forum.¹⁰⁷

Nonetheless, the Forum did make some lasting impact on the prison reform process, most notably proposals on an independent prisons inspectorate and a lay visitor’s scheme.¹⁰⁸ Both of these became part of the Correctional Services Act (111 of 1998) as the Office of the Inspecting Judge and the Independent Visitors. With Carl Niehaus as chairperson of both the Portfolio Committee on Correctional Services and the TFCS, there was indeed closer interaction between civil society groupings and Parliament,¹⁰⁹ and although this would wane after Niehaus’s departure in 1997, there would be a revival from 2003 onwards (see section 3.2 below).

Another factor that undermined the TFCS was the inclusion of organised labour, more particularly the union POPCRU, which equated transformation of the prison system with affirmative action in staff appointments, as discussed in Chapter 3.¹¹⁰ When established in 1989 POPCRU’s roots lay in a civil rights agenda, reflecting resistance by police and prison officers to implement unjust policies such as the ill-treatment of black prisoners and strip-searching of prisoners.¹¹¹ It was on this basis that it sought allegiances with, and was accepted into, the network of organisations focusing on prisoners’ rights. However, over time its focus shifted away from prisoners as a stakeholder group. For example, the Preamble to POPCRU’s Constitution (as at October 2011) makes no mention of prisoners and refers only to

a luxury in the new South Africa, it is a prerequisite for any effective ministry. The ministers who perform best are those who developed good relationships with parliamentary committees and civil society. We are not interested in challenging you – we want to work with you,” he said. Copies of the letter were sent to Mandela, the Commissioner of Correctional Services, members of Niehaus’s portfolio committee and the forum.’ *Mail and Guardian* 22 March 1996, <http://mg.co.za/article/1996-03-22-ministers-one-upmanship> Accessed 3 November 2011.

¹⁰⁷ Giffard, C. (1997), p. 34.

¹⁰⁸ Giffard, C. (1997), p. 34.

¹⁰⁹ Dissel, A. (2003) *A review of civilian oversight over Correctional Services in the last decade*, CSPRI Research report No. 4, Bellville: Community Law Centre, p. 21.

¹¹⁰ Giffard, C. (1997), p. 35.

¹¹¹ Mtshelwane, Z. (1993) Recognize POPCRU, *SA Labour Bulletin*, Vol. 17 No. 6, p. 70.

employees of SAPS, DCS and traffic departments. Importantly, prisoners could not join POPCRU as they were not employees. By the mid-1990s POPCRU was a recognised trade union looking after its members' interests, and in due course it also developed significant private sector interests through the POPCRU Group of Companies.¹¹² Ultimately POPCRU would be a highly destructive force in the Department, as found by the Jali Commission and discussed in Chapter 3.

The demise of the TFCS and the departure in 1997 of Carl Niehaus, a proponent of civil society involvement in prison reform, ushered in a period that saw very limited civil society engagement on prison-related matters and lasted until 2003. Although there were a number of court cases that focused on prisoners' rights during that period,¹¹³ the DCS and the Portfolio Committee on Correctional Services became increasingly inaccessible to civil society.¹¹⁴

3.2 Civil society after 2003

In 2003, supported by the Open Society Foundation (South Africa) (OSF-SA), the Community Law Centre (University of the Western Cape) and NICRO¹¹⁵ established a joint project aimed at prison reform, the Civil Society Prison Reform Initiative (CSPRI).¹¹⁶ The project would focus its activities on research and advocacy to promote transparency, accountability and civil society involvement in the prison system. CSPRI was a direct response to the marginalisation of civil society from the policy debates in the preceding years and the dearth of reliable research on prisons and prison reform. Its first research output was

¹¹² By 2007 the POPCRU Group of Companies had assets worth more than R200 million (US\$ 29.4 million).

(‘Union Investment- a pile of assets’ *Financial Mail*, 28 September 2007,

<http://secure.financialmail.co.za/07/0928/cover/coverstoryf.htm> Accessed 2 November 2011.

¹¹³ *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC); *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455; *Nortje en ‘n ander v Minister van Korrektiewe Dienste en Andere Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 455; *Winckler v Minister of Correctional Services*. 2001 (2) SA 747 (CPD); *Roman v Williams NO* 1998 (1) SA 270 (CPD); *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (CPD); *C v Minister of Correctional Services* 1996 (4) SA 292 (T); and *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W).

¹¹⁴ Dissel, A. (2003), p. 2; Sloth-Nielsen, J. (2003), p. 6.

¹¹⁵ At the time the author was Deputy Executive Director of NICRO and the Community Law Centre was represented by Prof. J. Sloth-Nielsen, and were the founding members of CSPRI.

¹¹⁶ In mid-2005 NICRO withdrew from the agreement.

a critical review of policy development in the DCS for the period 1994 to 2001. It criticised the Department severely for its lack of focus and flip-flopping between different foci without making much progress on any stated objectives,¹¹⁷ as discussed in Chapter 3 (section 4.1). The CSPRI policy review of the DCS was presented to the Portfolio Committee on Correctional Services on 9 September 2003 and received a lukewarm response.¹¹⁸ However, after the 2004 elections Mr. Dennis Bloem (ANC) was elected as chairperson of the Portfolio Committee on Correctional Services.¹¹⁹ Under Bloem the Portfolio Committee would welcome civil society organisations to air their views of the prison system and he thus created an important space for policy debates. The Portfolio Committee had in effect stepped in to fill the gap left by the demise of the TFCS in 1996. For example, in the remainder of 2004 the Portfolio Committee received 18 submissions from civil society organisations, the majority of them on the 2004 White Paper. Even though the impact of the submissions was negligible (as noted in Chapter 4 (section 3)), civil society organisations had nonetheless found a platform to air their views, namely Parliament. This was a radical break from the past. The available records indicate that between 1998 and 2001 there were indeed no submissions or other formal interactions between civil society organisations and the Portfolio Committee.¹²⁰ There is little doubt that after 2004 the oversight capacity of the Portfolio Committee was significantly strengthened by civil society in-puts and research undertaken by civil society organisations. For example, between 2007 and 2009 the Portfolio Committee would receive 31 formal written submissions from a range of civil society organisations.¹²¹ These included expert briefings and submissions on draft legislation, the budget vote and Annual Reports of the DCS.¹²²

Over the next eight years CSPRI and other civil society organisations (e.g. Institute for Security Studies and the Centre for the Study of Violence and Reconciliation) would produce several research papers focusing on prison reform. It was an express aim of CSPRI to fill the

¹¹⁷ Sloth-Nielsen, J. (2003), pp. 39-41.

¹¹⁸ PMG Report on the meeting of the Portfolio Committee on Correctional Services on 9 September 2003, <http://www.pmg.org.za/minutes/20030908-civil-society-prison-reform-initiative-briefing> Accessed 20 October 2011.

¹¹⁹ PMG Report on the meeting of the Portfolio Committee on Correctional Services on 25 June 2004, www.pmg.org.za/minutes/20040624-chairperson-election-1

¹²⁰ See PMG reports on Committee meetings for 1998 to 2001.

¹²¹ Muntingh, L. (2011 d).

¹²² Muntingh, L. (2011 d).

knowledge-gap that had developed after the PRLG¹²³ and TFCS came to an end. Research undertaken and inserted into the discourse on prison reform dealt with sentencing,¹²⁴ oversight,¹²⁵ prisoners' rights litigation,¹²⁶ governance and corruption,¹²⁷ children in prison,¹²⁸ offender reintegration,¹²⁹ torture and ill treatment,¹³⁰ prison law,¹³¹ remand

¹²³ By 2000 the PRLG had lost its momentum (telephonic interview with Ms Amanda Dissel, former manager of the Criminal Justice Programme at the Centre for the Study of Violence and Reconciliation, 20 October 2011).

¹²⁴ Ann Skelton (2004) *Alternative Sentencing Review*. CSPRI Research Paper No. 6, Bellville: Community Law Centre; Giffard, C. and Muntingh, L. (2006); Mujuzi, J.D. (2008) *The Changing Face of Life Imprisonment in South Africa*. CSPRI Research Paper, Bellville: Community Law Centre.

¹²⁵ Jagwanth, S. (2004) *A Review of the Judicial Inspectorate of Prisons of South Africa*. CSPRI Research Paper No. 7, Bellville: Community Law Centre; Dissel, A. (2003); Gallinetti, J. (2004) *Report of the Evaluation of the Independent Prison Visitors (IPV) System*. CSPRI Research Paper No. 5, Bellville: Community Law Centre; Hettinga, B., Mandlate, A. and Muntingh, L. (2011) *Survey of Detention Oversight Mechanisms Provided for in the Laws of SADC Countries*. CSPRI Research Paper, Bellville: Community Law Centre.

¹²⁶ De Vos, P. (2003) *Prisoners' Rights Litigation in South Africa Since 1994, a Critical Evaluation*, CSPRI Research Paper No. 3, Bellville: Community Law Centre; De Vos, P. (2004) *South African Prisoner's Right to Vote: Addendum to 'Prisoners' Rights Litigation in South Africa since 1994: a Critical Evaluation*. CSPRI Research Paper No. 3A, Bellville: Community Law Centre.

¹²⁷ Van der Berg, A. (2007) *Jali Commission Report - Summary and Comment*. CSPRI Research Paper, Bellville: Community Law Centre; Muntingh, L. (2006) *Investigating prison corruption*. CSPRI Research Paper, Bellville: Community Law Centre; Muntingh, L. (2006); Tapscott, C. (2005) *A study of best practice in prison governance*. CSPRI Research Paper No. 9, Bellville: Community Law Centre.

¹²⁸ Odongo, G. and Gallinetti, J. (2005) *The Treatment of Children in South African Prisons - A Report on the Applicable Domestic and International Minimum Standards*. CSPRI Research Paper No. 11, Bellville: Community Law Centre.

¹²⁹ Muntingh, L. (2005) *Offender rehabilitation and reintegration: taking the White Paper on Corrections forward*. CSPRI Research Paper No. 10, Bellville: Community Law Centre; Muntingh, L. (2009) *A Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration*. Pretoria: CSPRI and Institute for Security Studies; Muntingh, L. (2009) *Prisoner Re-Entry in Cape Town – An Exploratory Study*. CSPRI Research Paper, Bellville: Community Law Centre; Muntingh, L. (2011) *The law and the business of criminal record expungement in South Africa*. CSPRI Research Paper, Bellville: Community Law Centre; Muntingh, L. (2010) *Ex-prisoners' Views on Imprisonment and Re-Entry*. CSPRI Research Paper, Bellville: Community Law Centre.

¹³⁰ Muntingh, L. (2008) *Preventing and Combating Torture in South Africa: A framework for action under CAT and OPCAT*. CSPRI Research Paper, Bellville: Community Law Centre; Fernandez, L. (2003) *Optional Protocol to the Convention against Torture and Other Cruel and Inhumane Treatment*. CSPRI Research Paper No. 2, Bellville: Community Law Centre; Muntingh, L. (2009) *Reducing Prison Violence: Implications from the literature for South Africa*. CSPRI Research Paper, Bellville: Community Law Centre; Muntingh, L. (2009)

detention¹³² and HIV and AIDS.¹³³ After 2004 there would be an increasing convergence of issues raised by civil society organisations with the Portfolio Committee on Correctional Service and the issues that the Committee in turn raised with the DCS during departmental briefings.¹³⁴ Private sector involvement in the prison system, deaths in custody, the Jali Commission's recommendations, the quality of Annual Reports, and the alignment of the budget to the strategic plan are examples of the issues that were raised with the Portfolio Committee on Correctional Service by civil society organisations. The submissions and inputs received from civil society would provide the Portfolio Committee with different perspectives on issues in the prison system and thus reduce its reliance on the DCS to provide it with information. In its handover report in 2009 the outgoing Committee acknowledged the role of civil society organisations in assisting it.¹³⁵

After 2004 it can be concluded that, compared to preceding years, there had developed a special relationship between a number of civil society organisations and the Portfolio Committee. The latter would continue to invite submissions on a consistent basis relating to law reform, DCS Annual Reports, budget votes and particular focal areas (e.g. medical

Guide to UN Convention Against Torture in South Africa. CSPRI Research Paper, Bellville: Community Law Centre.

¹³¹ Muntingh, L. (2007 b) *Prisons in South Africa's Constitutional Democracy.* CSPRI and CSVR Research Paper, Johannesburg: CSVR; Muntingh, L. (2011) *Prisons in a Democratic South Africa - a Guide to the Rights of Prisoners as Described in the Correctional Services Act and Regulations.* CSPRI Research Paper, Bellville: Community Law Centre.

¹³² Ballard, C. (2011).

¹³³ Tapscott, C. (2008) *An Assessment of the Impact of HIV/AIDS on Correctional System governance with Special Emphasis on Correctional Services Staff.* CSPRI Research Paper, Bellville: Community Law Centre.

¹³⁴ Muntingh, L. (2007) Has prison oversight come of age in South Africa? Reflections on the Judicial Inspectorate of Prisons and the Portfolio Committee on Correctional Services. *CSPRI Newsletter*, No. 24, December 2007. <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/newsletter%2024.pdf/>. Accessed 21 October 2011.

¹³⁵ 'The Committee was fortunate to during its tenure build working relationships with a number of non-governmental organisations with interest in matters related to correctional services, including the Civil Society Prison Reform Initiative (CSPRI), the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and the Centre for the Study of Violence and Reconciliation (CSVR).' [Parliament of the RSA (2009) *Overview report of the oversight activities of the Portfolio Committee on Correctional Services (2004 - 2009)*, p. 2. PMG report of the meeting of the Portfolio Committee on Correctional Service, 17 February 2009, <http://www.pmg.org.za/report/20090217-correctional-services-committee-reports-and-minutes-adoption> Accessed 20 October 2011.

parole). It was in particular the engagements on the DCS Annual Reports and the budget votes that afforded civil society organisations with a platform to raise a broad range of issues with the Committee and not be restricted to, for example, a particular legislative amendment.¹³⁶ Moreover, the range of in-puts received enabled the Portfolio Committee to be more effective in holding the DCS accountable. This is discussed further in section 5 below.

3.3 Civil society and litigation on prisoners' rights

Civil society's actions were also not limited to engagements with Parliament and two notable court decisions were the result of litigation initiated by civil society organisations on behalf of prisoners. The first involved prisoners' right to vote and, using the name of NICRO to litigate, CSPRI launched an application in 2003 in the Cape High Court to challenge the exclusion of sentenced prisoners without the option of a fine from the voters' roll.¹³⁷ When the case reached the Constitutional Court, the state argued that the exclusion of this category of prisoners was justifiable because it had to limit the number of people for whom special votes needed to be arranged due to financial and logistical reasons. In essence, "the justification was that the resources available for special votes should rather be used for law abiding citizens (par 45)".¹³⁸ A further point raised was that allowing this category of prisoner to vote would send out the message that the government is soft on crime (par 45),¹³⁹ evidently a concern of government, as noted in section 2.2.3 above. The Constitutional Court dismissed the cost argument, stating that a factual basis for such a claim had not been established and that steps had to be taken in any event to register prisoners not affected by the exclusion (unsentenced prisoners and prisoners serving a sentence with the option of a fine). In response to the "soft on crime" claim, the Court found:

A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration. It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of

¹³⁶ Muntingh, L. (2011 d).

¹³⁷ *Minister of Home Affairs v NICRO and Others*, (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004). Muntingh, L. and Sloth-Nielsen, J. (2009), pp. 221-243.

¹³⁸ Muntingh, L. and Sloth-Nielsen, J. (2009), p. 236.

¹³⁹ Muntingh, L. and Sloth-Nielsen, J. (2009), p. 236.

valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals.¹⁴⁰

In March 2004, shortly before the 2004 general elections the Constitutional Court declared the relevant sections of the Electoral Law Amendment Act unconstitutional.¹⁴¹

In 2006 a group of 15 prisoners, at Durban Westville prison, supported by the Treatment Action Campaign (TAC) and the Aids Law Project (ALP), took the Government of South Africa to court to gain free and unrestricted access to anti-retroviral therapy (ART) for prisoners suffering from AIDS.¹⁴² The prisoner-applicants (15 in total) were HIV-positive and had developed AIDS symptoms. In the preceding months several attempts were made by ALP and TAC to avoid litigation but failure by the DCS to comply with the implementation plan it proposed left no alternative. Ultimately the Court ordered that any restrictions that are preventing the applicants and other similarly situated persons from accessing ART at an accredited public health facility, as guided by the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa, be removed. Furthermore, it was ordered that the DCS provides the applicants and similarly situated persons with access to ART at an accredited public health facility as set out in the Department of Health's Operational Plan.¹⁴³ The Court was also critical of how the DCS had dealt with the problem and described it as inflexible, causing unexplained delays especially when time was of the essence. The DCS appealed, but the appeal was dismissed and the Court of Appeal confirmed the order made earlier. The Appeal Court was equally scathing of the DCS and found it in contempt of court as it had failed to implement the interim order made by Judge Pillay in the High Court.¹⁴⁴

¹⁴⁰ *Minister of Home Affairs v NICRO and Others*, (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004), Para 56

¹⁴¹ *Minister of Home Affairs v NICRO and Others*, (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004).

¹⁴² *EN and Others v Government of RSA and Others* 2007 ((1) BCLR 84 (SAHC Durban 2006)

¹⁴³ *EN and Others v Government of RSA and Others* 2007 ((1) BCLR 84 (SAHC Durban 2006) para 35.1-35.2

¹⁴⁴ *EN and Others v Government of the Republic of South Africa and Others* (Westville), Section 27 website, Posted on 12 April 2006, <http://www.section27.org.za/2006/04/12/en-and-others-v-government-of-the-republic-of-south-africa-and-others-westville-2/> Accessed 21 October 2011.

Subsequent to the *EN and Others* decision, the DCS has established 21 accredited ART sites,¹⁴⁵ as discussed in Chapter 5 (section 4.1.1), and the impact of civil society's intervention should not be underestimated. Historically, the Department's response to the HIV pandemic after 1994 should be contextualised in government's general response to HIV and the internal challenges faced by the DCS. Under President Mbeki, government's response to HIV and AIDS was one of denialism, inaction and confusion at national government level, making a proactive, goal-directed and evidence-based approach to HIV and AIDS impossible.¹⁴⁶ Government's lack of an appropriate response to HIV and AIDS created a particular environment in which the DCS was operating, one in which HIV and AIDS were not priorities. This was a lethal combination: "Seen in tandem, the national government's confused response to HIV and Aids and the DCS's own internal woes, placed prisoners at tremendous risk of rights violations in general and, more specifically, of HIV and Aids."¹⁴⁷

The right to vote and the right to adequate health care were issues fundamental to the right to dignity and consequently personhood. In both instances civil society organisations were left with no alternative but litigation. In the *NICRO* case Parliament had already passed the impugned legislation and in the *EN and Others* case, the DCS was failing to deliver on its own undertakings. Civil society organisations have indeed used litigation sparingly after 1994 to advance prisoners' rights and have preferred to affect reform through research-based advocacy. It should be added that the DCS has in general not responded well to litigation and where this was pursued, the Department frequently ignored court orders.¹⁴⁸ By using Parliament and the courts, civil society organisations relied on Constitutional provisions to affect very specific advances in prison reform and the recognition of prisoners' rights.

3.4 The media

Since 1994 the influence of the media on the prison system has been significant. Apart from general reporting on events relating to prisons and prisoners, a few areas stand out:

¹⁴⁵ Department of Correctional Services (2010), p. 75.

¹⁴⁶ Nattrass, N. (2007) *Mortal Combat – AIDS denialism and the struggle for antiretrovirals in South Africa*. Scottsville: University of KwaZulu-Natal Press.

¹⁴⁷ Muntingh, L. and Tapscott, C. (2009) HIV/Aids and the prison system. In Rohleder, P. et al (eds) *HIV/Aids in South Africa 25 years on*, New York: Springer, p. 314.

¹⁴⁸ De Vos, P. (2003).

overcrowding, the Jali Commission, the so-called Grootvlei-video, and tender manipulation. These are important because they advanced transparency in the prison system, without which there can be no accountability.

3.4.1 Overcrowding

Even though prison overcrowding has been a long-standing problem, it would receive renewed media attention from 2000 onward during the tenure of Judge Hannes Fagan as Inspecting Judge for Correctional Services.¹⁴⁹ Fagan would also find support from another judge, Judge Bertelsman of the North Gauteng High Court, who initiated the “National Initiative to Address Overcrowding in Correctional Facilities”.¹⁵⁰ In September 2005 the Department of Justice and Constitutional Development, funded by the Dutch government, together with a working committee consisting of other National Ministries, NICRO, Justice College, and several government and civil society role-players, hosted a national conference on prison overcrowding in Pretoria. The aim of the conference was to define and stimulate a national initiative to reduce both criminal behaviour and the overcrowding of prisons by pooling resources, avoiding duplication of services, networking and creating a national register of available services, resources and initiatives.¹⁵¹ In November 2006 a follow-up conference was held in East London to review progress.¹⁵² The two conferences involved numerous stakeholders from within and outside government. Improved access to prisons would also enable the reproduction of photographs¹⁵³ and video material about overcrowded

¹⁴⁹ See Fagan, H. (2005) *Our Bursting Prisons*. Paper delivered at the Criminal Justice Conference 7-8 February 2005, Pretoria; ‘Dramatic Drop in Prison Numbers, Less Overcrowding: Fagan’ *AllAfrica.com*, 16 September 2003, <http://allafrica.com/stories/200309170018.html> Accessed 21 October 2011; PMG Report on the Meeting of the Portfolio Committee on Correctional Services, 16 September 2002, <http://www.pmg.org.za/minutes/20030915-progress-report-regard-overcrowding-and-current-situation-prisons> Accessed 21 October 2011; Fagan, H. (2002) Prison Overcrowding - One of our biggest challenges to transformation, *Track Two*, Vol.11 No.2; Fagan, H. (2004) Curb the vengeance - Laws on minimum sentencing and parole spell worsening prison conditions. *SA Crime Quarterly*, No. 10.

¹⁵⁰ Correspondence with Judge Bertelsman, February 2012, on file with author.

¹⁵¹ *Conference on strategies to address prison overcrowding in South Africa*, 14-16 September 2005, Pretoria Country Club, Pretoria <http://www.issafrica.org/pgcontent.php?UID=3875> Accessed 27 October 2011.

¹⁵² Correspondence with Judge Bertelsman, February 2012, on file with author.

¹⁵³ A series of photographs about life at Pollsmoor prison by Cape Town photographer Mikhael Sobotsky attracted wide media attention, giving the public a rare glimpse to life inside. The photographs are accessible at <http://www.subotzkystudio.com/die-vier-hoeke/> Accessed 15 October 2011.

prisons in South Africa.¹⁵⁴ Over a period of ten years a substantial amount of information was placed in the public domain by the media about prison overcrowding, to the extent that it can safely be assumed that most South Africans are now aware of the problem.

3.4.2 Jali Commission

The Jali Commission, as a judicial commission of inquiry, had the necessary independence, resources and powers to conduct thorough investigations. The Jali Commission and its findings remain a watershed event in the history of the Department, for it officially exposed the corrupt and criminal practices prevalent in DCS. The Commission held public hearings at intervals from February 2002 to March 2005 in the course of its investigations. These were well covered by the media for the simple reason that it was a banquet of shock and scandal, as described in Chapter 3. The public was treated to tales that astounded belief, and even the Commission remarked in respect of one particular case: “If not for the consistency of his evidence, one would have been forgiven to think that one was reading a novel because the facts he revealed were facts of which bestsellers are made.”¹⁵⁵ The testimonies given at the Jali Commission’s hearings fuelled public perceptions about wide-scale corruption in the DCS and added further to the legitimacy crisis of the prison system. Through the media, the Jali Commission served an important public-education function, affirming the importance of the constitutional requirements of accountability and transparency as well as highlighting the grievous consequences that arise when there is a failure to comply with them.

3.4.3 Grootvlei video

Shortly after the Jali Commission commenced with its work, the SABC3 investigative journalism programme *Special Assignment* aired, on 18 June 2002, a video secretly recorded by a group of prisoners at Grootvlei prison near Bloemfontein.¹⁵⁶ The video showed how warders engaged in a range of corrupt and dishonest practices, such as selling alcohol to

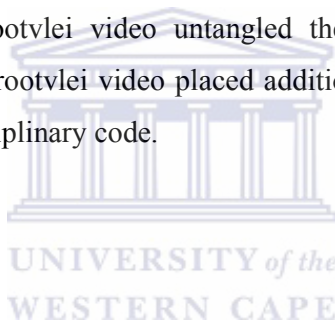
¹⁵⁴ ‘Welcome in South Africa Mthatha Jail’ Dispatch On-line Multimedia Productions
http://www.youtube.com/watch?v=Z8t1yAGd_wQ Accessed 21 October 2011.

¹⁵⁵ Jali Commission, p. 292.

¹⁵⁶ Government Communication Service (2002) Allegations of Corruption, 19 June 2002,
<http://www.info.gov.za/speeches/2002/02061916241001.htm> Accessed 21 October 2011.

prisoners, selling a firearm, drinking alcohol with them, trafficking in juvenile prisoners and taking bribes. The Grootvlei management area was not originally a target of the Jali Commission's investigation but after Minister Skosana had seen the video, the Commission's scope was extended to include the Grootvlei management area. The screening of the video on national (and later international) television during prime time elicited disbelief followed by fierce responses from various stakeholders about the state of the prison system. It showed with clarity the state of ethics in the prison system: officials were freely and unashamedly engaging in criminal behaviour.¹⁵⁷

Even if certain groupings in DCS were attempting to dispute and discredit the findings of the Jali Commission (as noted in Chapter 3 section 4.8), the release of the Grootvlei video to the media and its broadcast on national and international television placed beyond doubt that the legitimacy of the prison system was in an abysmal state. If the public image of the DCS was not already in tatters, the Grootvlei video untangled the last few threads. The hyper-transparency provided by the Grootvlei video placed additional pressure on DCS to address governance and enforce the disciplinary code.



3.4.4 Tender manipulation

Good investigative journalism also added to the woes of the DCS, and in this case it prompted a high-level official investigation, as discussed in Chapter 4 (section 4.2) with reference to high-value contracts. In February 2005 the DCS issued an invitation for tenders to supply hi-tech security equipment to 66 maximum security prisons. What followed baffled security industry insiders, because the R237 million (US\$ 30.8 million) contract was not awarded to one of the established security technology providers but to a small company, Sondolo IT (part of the Bosasa Group of Companies), which was entirely unknown and not even a registered company when the tender was advertised. Two journalists investigated the tender and Sondolo-IT, finding evidence of tender manipulation as well as uncovering links between the National Commissioner (Linda Mti) and Sondolo-IT.¹⁵⁸ The investigation

¹⁵⁷ Coetzee, W. (2003) Ethics in corrections – a South African perspective, *Acta Criminologica*, Vol. 16 No. 1 p. 63.

¹⁵⁸ Taco Kuiper Award 2006, Forum for Investigative Reporters, http://www.fairreporters.org/?showcontent_home&global%5B_id%5D=914 Accessed 20 October 2011.

attracted the attention of the Auditor General, and the Special Investigations Unit (SIU) was tasked to investigate high value contracts,¹⁵⁹ as described in Chapter 4 (section 4.2).

Even though the SIU submitted its report to the Minister of Correctional Services in 2009,¹⁶⁰ no response was forthcoming from the Minister. In March 2011 the newspaper *City Press* published a summary of the key findings after it obtained a leaked copy of the SIU's report.¹⁶¹ Unlike the SIU when it briefed Parliament (see Chapter 4 section 4.2), the *City Press* article disclosed the names of individuals and companies allegedly involved. At the time of writing (December 2011) the implicated officials have not yet been prosecuted, but seeing as their identities are known, closer monitoring would be possible.

The combined effect of the media coverage of the Jali Commission's public hearings, the Grootvlei video, the investigation into tender manipulation, and other scandals and incidents of a lesser nature, has had a devastating impact on the public image of the DCS as well as the morale of the average DCS official. It is therefore with good reason that the DCS has, as part of its strategic plan, an "Image Turn Around Campaign".¹⁶² However, efforts to improve the Department's public image are undermined by a fairly consistent stream of negative media reports on the DCS and its officials.¹⁶³ Notwithstanding these concerns, the media have played an important role in promoting transparency in the prison system and also served a critically important public education function. Moreover, the influence of the media on prison

¹⁵⁹ 'Bosasa's tender touch' *Mail and Guardian*, 13 February 2009, <http://mg.co.za/printformat/single/2009-02-13-bosasas-tender-touch/> Accessed 21 October 2011; PMG Report 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 21 October 2011.

¹⁶⁰ PMG Report on the meeting of the Portfolio Committee on Correctional services of 17 November 2009, <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> Accessed 21 October 2011.

¹⁶¹ 'Prison boss bribed' *City Press*, 20 March 2011, <http://www.citypress.co.za/SouthAfrica/Prison-boss-bribed-20110320>, Accessed 21 October 2011.

¹⁶² Department of Correctional Services (2011) *Annual Report 2010/11*, Pretoria: Department of Correctional Services, p. 40.

¹⁶³ For example, an August 2011 report related an incident in which a male DCS official and female SAPS official had sex while they were supposed to guard a prisoner at a hospital. The DCS official recorded the incident on video and circulated it. He was subsequently dismissed from the Department. ('Officer in sex video dismissed' *Times Live*, 31 August 2011, <http://www.timeslive.co.za/local/2011/08/31/officer-in-sex-video-dismissed> Accessed 3 November 2011)

reform underscores the importance of media freedom, which is amply demonstrated by the Auditor General and SIU investigations that were initiated after journalists reported on the manipulated tenders.

3.5 Civil society and international human rights law

With the DCS being generally unresponsive to civil society advocacy efforts aimed at improving the human rights situation in prisons, a small number of organisations turned their focus to international human rights law after 2004. South Africa ratified the UN Convention against Torture (UNCAT) in 1998 and submitted its initial report to the Committee against Torture (CAT) in 2005 – some five years late. The report was considered at the 37th session of CAT in November 2006. Three submissions from South African organisations were made to CAT, in addition to three submissions from international organisations.¹⁶⁴ The submission by CSPRI focused exclusively on prisons, whereas the submission by Centre for the Study of Violence and Reconciliation (CSVr) covered some aspects of prisoners' rights. The submissions were well received by CAT, and an assessment of the submissions and the Committee's concluding remarks¹⁶⁵ found that there was a

high level of congruence between the concerns raised by the civil society organs and those highlighted by the Committee. This cannot conclusively be regarded as a cause-and-effect relationship and should rather be seen as the consolidation of shared concerns and the development of an inclusive South African agenda aimed at the prevention and combating of torture.¹⁶⁶

¹⁶⁴ Muntingh, L. (2008) 'The betrayal of Steve Biko – South Africa's Initial Report to the UN Committee against Torture and responses from civil society' *Law, Democracy and Development*, Vol. 1, p. 46.

¹⁶⁵ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture – South Africa* CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.

¹⁶⁶ Muntingh, L. (2008), p. 46.

One of the issues raised in the CSPRI submission to CAT was a mass assault on prisoners at St Albans prison in June 2005,¹⁶⁷ as discussed in Chapter 5 (section 5). Ultimately it would lead to the *McCullum* decision by the UN Human Rights Committee.

In 2010 CSPRI launched a campaign to see the domestication of the UNCAT, with specific reference to the criminalisation of torture as required by Article 4 of the Convention.¹⁶⁸ Subsequently the campaign has mobilised a number of civil society organisations in support of domesticating UNCAT. Even though a draft bill was prepared by the Department of Justice and Constitutional Development as early as 2005, the Bill had not been tabled in Parliament.¹⁶⁹

In a further development, in early 2007 the South African Human Rights Commission (SAHRC) established a thematic committee on torture¹⁷⁰ known as a Section 5 Committee, with reference to section 5 of the Human Rights Commission Act (Act 54 of 1994).¹⁷¹ The Committee has representation from a number of civil society organisations and has proven to be valuable in coordinating activities in the sector, although the focus is not strictly on prison reform.¹⁷²

On a more general level it is surmised that there is little evidence that the DCS invited and entertained international involvement from organisations with an overt human rights focus. The DCS did, however, engage increasingly with professional corrections associations,

¹⁶⁷ Muntingh, L. And Fernandez, L. (2006) *Civil Society Prison Reform Initiative (CSPRI) Submission To The UN Committee Against Torture in response to 'Republic Of South Africa – First Country Report On The Implementation of the Convention Against Torture, And Other Cruel, Inhuman And Degrading Treatment Of Punishment'*, para 57.

¹⁶⁸ Domestication of the Convention Against Torture (CAT) Campaign <http://www.peopletoparliament.org.za/focus-areas/prisoners-and-detained-persons/campaigns/icescr-ratification-campaign> Accessed 13 January 2012.

¹⁶⁹ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 30 November 2011, <http://www.pmg.org.za/report/20111130-stakeholder-hearings-prevalence-torture-correctional-centres> Accessed 13 January 2012.

¹⁷⁰ Telephonic interview with Ms F. Adams, SA Human Rights Commission, Cape Town, 16 January 2012.

¹⁷¹ s 5 (1) The Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it.

¹⁷² The author is a member of the Committee.

ministers, senior officials from other prison services, and academics,¹⁷³ and was indeed instrumental in establishing the African Correctional Services Association (ACSA), a body consisting of African Commissioners of Prisons.¹⁷⁴ International interactions were aimed rather at gathering information on specific issues such as public-private partnerships, electronic tagging of parolees, and unit management.

International expertise and a greater sense of transparency would have been of significant benefit, as has been found in other young democracies and emerging states. Sustained international involvement and support for prison reform efforts are valuable to ensure that external influence stimulates the debate and a human rights focus is maintained. The value of continued international involvement has been demonstrated in the Palestinian Authority,¹⁷⁵ Russia,¹⁷⁶ South Sudan,¹⁷⁷ and Kazakhstan.¹⁷⁸ International involvement appears to be more successful where this is done through and supported by regional (e.g. European Commission in the case of the Palestinian Authority) and/or international structures (e.g. UNODC and UNMIS¹⁷⁹ in the case of South Sudan). International involvement should ideally support both

¹⁷³ See Department of Correctional Services Annual Reports 1997-2010/11.

¹⁷⁴ South Africa's leadership role in African corrections re-affirmed *SA Corrections Today*, August/September 2008, pp. 102.

¹⁷⁵ 'PM Fayyad and EU Representative lay first stone at €14.3 million Nablus Security Compound' and 'European Neighbourhood Policy in action: EU and PA hold first joint meeting on human rights, good governance and the rule of law'. ReliefWeb Briefing Kit for European Union and Palestinian National Authority and Protection and Human Rights, Compiled on 18 October 2011, http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/briefingkit-a441c21365f98a26566e43d622113f51.pdf

Accessed 20 October 2011. There are several detention systems under the Palestinian Authority, for example under the military, police and intelligence service. In this case reference is made to the civil prisons known as Reform and Rehabilitation Centres (RRCs) and administered by the General Administration of Reform and Rehabilitation Centres (GARCC) and is managed as a unit within the Palestinian Civil Police (PCP).

¹⁷⁶ Coyle, A. (2002) *Managing prisons in a time of change*. London: International Centre for Prison Studies. p. 22-23.

¹⁷⁷ Kuuire, R. (2010) 'Corrections/prisons in United Nations peacekeeping operations'. In Aromaa, K. and Viljanen, T. *Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system*. Proceedings of the workshop held at the 12th United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 12-19 April 2010. Helsinki: European Institute for crime Prevention and Control.

¹⁷⁸ Coyle, A. (2002), p. 25-26.

¹⁷⁹ UN Office on Drugs and Crime; UN Mission in Sudan under the UN Department of Peacekeeping Operations (DPKO).

technical assistance and infrastructure development, if the latter is indeed needed. Prison construction has been supported by UNMIS in Southern Sudan¹⁸⁰ and the European Commission in Palestine,¹⁸¹ but both have been supported heavily with technical assistance and not only infrastructure development support.¹⁸² Multi-stakeholder partnerships over a broad front of development and reform areas have also been shown to be effective in promoting prison reform when there is a strong focus on compliance with international human rights norms.¹⁸³

3.6 Summary of issues

After the TFCS was dissolved, civil society organisations adopted different tactics to advocate for prison reform. First, it found a useful platform in Parliament and developed a mutually beneficial relationship with the Portfolio Committee on Correctional Services from 2004 onwards. Second, where it concerned fundamental rights, litigation was used in respect of the right to vote and the rights to equality and primary health care. Third, civil society has been drawing increasingly on international human rights law to advance prisoners' rights, focusing on the absolute prohibition of torture. However, the DCS has remained true to character – a preserving and inward-looking organisation, resisting outside influences and changing tack only very slowly and begrudgingly.

4. The emergence of organised labour

In Chapters 3 and 4, overview descriptions of the influence of organised labour were provided, specifically of POPCRU, and this requires closer analysis. Compared to the other

¹⁸⁰ 'Bor commences construction of prison and police buildings' *The Sudan Tribune*, 3 November 2008, http://www.sudantribune.com/spip.php?page=imprimable&id_article=29143 Accessed 20 October 2011.

¹⁸¹ 'PM Fayyad and EU Representative lay first stone at €14.3 million Nablus Security Compound'. ReliefWeb Briefing Kit for European Union and Palestinian National Authority and Protection and Human Rights, Compiled on 18 Oct 2011, http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/briefingkit-a441c21365f98a26566e43d622113f51.pdf

¹⁸² 'South Sudanese Prisons Set for Reforms - The United Nations Mission in Sudan (UNMIS) has launched training sessions for prison officers in South Sudan'. *Gurtong.net*, 13 June 2010. <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/3697/South-Sudanese-Prisons-Set-for-Reforms.aspx> Accessed 20 October 2011.

¹⁸³ Kuuire, R. (2010), p. 33.

unions active in the DCS, POPCRU has had significantly more members and because of its actions, a more visible impact on the DCS and the prison system. The Interim and 1996 Constitutions granted employees the right to organise¹⁸⁴ and the Labour Relations Act created the framework for this.¹⁸⁵ In its early days, POPCRU's activities were aimed at the recognition of civil rights of all prisoners¹⁸⁶ and the organisation was part of the PRLG (as noted in section 3.1 above), an alliance focusing on prisoners' rights. In October 1994 the DCS signed a recognition agreement with POPCRU.¹⁸⁷ In a joint media statement following the signing of the recognition agreement, DCS and POPCRU said: “. . . the process of labour relations is a novelty to the employees and management of this Department . . . but we are committed to promoting good labour relations”.¹⁸⁸ Regrettably, the events that followed did not bear this out, as described in Chapter 3 (section 4.3). In the two years following the agreement there was general unrest in the public service, and events in DCS should be seen against this background. There are, however, a number of features of POPCRU's activities in DCS worthy taking of note.

First, the recognition agreement did not change POPCRU's militant *modus operandi* evident since 1989, which included mass protests,¹⁸⁹ disruptions,¹⁹⁰ strikes,¹⁹¹ sit-ins,¹⁹² use of firearms,¹⁹³ hostage-taking,¹⁹⁴ and even mobilising prisoners for its cause.¹⁹⁵ POPCRU's

¹⁸⁴ s 27 of Act 200 of 1993 and s 23 of Act 108 of 1996.

¹⁸⁵ s 4 Act 66 of 1995

¹⁸⁶ Van Zyl Smit, D. (1992) *South African Prison Law and Practice*. Durban: Butterworth Publishers, p. 41.

¹⁸⁷ Department of Correctional Services, Annual Report 1994, p. 2.

¹⁸⁸ 'Departement erken Popcru amptelik' *Die Burger*, 7 October 1994. [Department officially recognises POPCRU - own translation.]

¹⁸⁹ 'Popcru lede met griewe na Parlement' *Die Burger*, 24 January 1995. [Popcru members take grievances to Parliament – own translation.]

¹⁹⁰ 'Bewaarders ontwrig medaljeparade oor lys van griewe' *Die Burger*, 9 June 1994 [Warders disrupt medal parade due to grievances – own translation]; 'Popcru lede jou Jessie Duarte uit' *Die Burger*, 3 February 1995 [Popcru members jeer Jessie Duarte – own translation].

¹⁹¹ 'Chaos neem af by tronke; Popcru staak by Pollsmoor' *Die Burger* 15 June 1994. [Chaos at prisons subsiding – own translation.]

¹⁹² 'Bewaarders beset kantore in Paarlse gevangnisse' *Die Burger*, 21 May 1994. [Warders occupy offices and Paarl prisons – own translation.]

¹⁹³ 'Balju vlug toe stakende bewaarders begin skiet' *Die Burger*, 16 December 1994. [Sherriff flees when warders start shooting – own translation.]

¹⁹⁴ 'Langa se oud-polisiehoof stel eis teen Popcru in' *Die Burger*, 2 February 1995. [Langa police chief sues POPCRU.]

militancy was also not restricted to DCS but also occurred in relation to SAPS, where this union enjoyed support, too.¹⁹⁶ By 1994 it had a tradition of aggressive and militant action for achieving its objectives, a willingness to depart wholly from established labour law procedures and a flagrant disregard for authority. The Jali Commission found ample evidence of how POPCRU used these tactics to achieve its ends.

Second, during the pre- and post-1994 election prison unrest (described in Chapter 3 section 3.3.2) there were a number of instances that POPCRU members acted in sympathy with prisoners regarding the anticipated amnesty to be granted, even siding with SAPOHR's¹⁹⁷ call for mass action at some prisons affected by the unrest.¹⁹⁸ Sympathy for prisoners was, to some extent, a vestige of its civil rights roots, but it was also a way of challenging the then predominantly white management: it was black prisoners and black warders together against white management. By the mid-1990s, it is safe to say, POPCRU had abandoned its civil rights motivations and narrowed its focus on serving a particular interpretation of its members' interests.

Third, POPCRU was started in the Western Cape in 1989 by a police officer (Lt. Gregory Rockman)¹⁹⁹ but soon found support from colleagues in the DCS. POPCRU evidently appealed to DCS officials, and membership grew rapidly. In 2001 POPCRU had 45% of DCS officials as members and by January 2005 this had grown to 63.5% of DCS officials; by comparison, the traditionally white Public Servants Association (PSA) had 27.9% of the DCS staff as members.²⁰⁰ Even more remarkable was the extent to which senior DCS officials joined the union. By 2001 the majority of Area Managers, Provincial Control Officers and

¹⁹⁵ '386 op Mosselbaai wou nie na selle 'omdat Popcru hul aanhits'' *Die Burger*, 1 April 1995. [386 in Mosselbay refuse to return to cells 'because Popcru incited them' – own translation.]

¹⁹⁶ 'Polisie-krisis: Fivas gryp in - vakhond belowe selfbeheersing na samesprekings' *Die Burger*, 2 February 1995 [Police crisis: Fivas intervenes – unions promise self-discipline – own translation]; 'Militante optrede by Polisie wek kommer' *Die Burger*, 1 February 1995 [Militant actions at police give concern – own translation].

¹⁹⁷ South African Prisoners Human Rights Organisation. SAPOHR had a high profile prior to 1994 and in the immediate aftermath of the 1994 elections, but its controversial CEO, Mr. Golden Miles Bhudu (a former prisoner himself), had been implicated in the mismanagement of donor funds and also prosecuted for assisting a prisoner to escape ('Golden Miles Bhudu granted bail' *Mail and Guardian*, 5 February 2009, <http://mg.co.za/article/2009-02-05-golden-miles-bhudu-granted-bail> Accessed 2 November 2011).

¹⁹⁸ Krieglerr Commission, pp. 40, 49, 59, 60, and 65.

¹⁹⁹ Van Zyl Smit, D. (1992), p. 41.

²⁰⁰ Jali Commission pp. 105-106.

Heads of Prisons were POPCRU members.²⁰¹ In addition, 20% of Deputy Commissioners and 31% of Chief Deputy Commissioners were POPCRU members.²⁰² The Jali Commission reported that by 2005 the situation remained by and large the same and that 63% of senior managers (salary bands 11 to 15) were POPCRU members.²⁰³ Equally remarkable was that in 2005, 99.9% of DCS staff belonged to a union, the same unions to which senior managers belonged.²⁰⁴ It was therefore not only a question of the level of unionisation (close to 100%) but how trade union alliances and allegiances affected the hierarchy and management structure of the DCS. The potential for internal conflict and conflicts of interest are obvious in respect of disciplinary enquiries, promotions, appointments, salary increases and merit awards when managers and junior staff belong to the same union. The perverse consequences of this situation were outlined in Chapter 3.

Fourth, the point was made above in section 3.1 that POPCRU saw transformation of the prison system as the (rapid) implementation of affirmative action. In 1995 POPCRU members in the Eastern Cape demanded not only the resignation of then Minister Mzimela, this because they saw him as a stumbling block to reform, but the scrapping of the Constitutional guarantee that white civil servants will not lose their jobs.²⁰⁵ Race had become an overriding concern for POPCRU, and from 1994 onwards the union would use its power in the Department to ensure that appointments were made accordingly.²⁰⁶

Fifth, as a result of union influence, the Department was not able to pursue its chosen strategic direction, assuming such a direction existed.²⁰⁷ POPCRU's influence had become destructive, and by the late 1990s violence and intimidation were the norm. The Jali Commission did not mince its words:

A culture of lawlessness had been introduced into the Department in that it had become the norm for members to be forcibly removed from their positions and for unlawful actions to happen with impunity. This culture was reinforced by the benefits, which

²⁰¹ Jali Commission p.110.

²⁰² Jali Commission p.110.

²⁰³ Jali Commission p.120.

²⁰⁴ Jali Commission p.120.

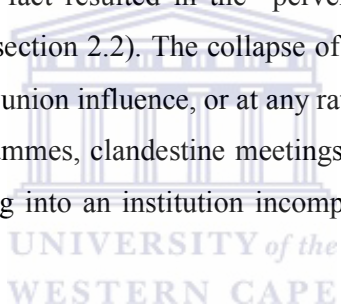
²⁰⁵ 'Popcru eis Sipo se bedanking en bevorderings' *Die Burger*, 23 January 1995. [POPCRU demands Sipo's resignation and promotions – own translation]

²⁰⁶ Jali Commission, Chapter 5.

²⁰⁷ Jali Commission, p. 116.

were derived from the unlawful activities. The members were getting appointed on the strength of their influence within the union, and management, which did not have union protection, was intimidated. They ended up resigning and those who remained had to “toe the line” or be forcibly removed. The union’s intentions were not in doubt as this was happening in various Management Areas. It was clear that the union was no longer playing its lawful role in the Department, and appointments, even that of the Commissioner, had to get union approval.²⁰⁸

Under POPCRU’s influence “state capture” took place: powerful groups with vested interests had exerted undue influence in shaping the rules of the game for their own benefit, taking advantage of the various deteriorating governance mechanisms and resisting demands for change.²⁰⁹ The impact of unionisation as it happened between 1994 and 2000 can only be described as devastating. Management’s failure to understand the crisis in 1994 and develop an appropriate response had in fact resulted in the “perverse consequences” described by Boin and t’Hart (see Chapter 2 section 2.2). The collapse of order and discipline in the DCS can by and large be attributed to union influence, or at any rate to factions operating under the POPCRU banner. Covert programmes, clandestine meetings, coercion and the threat thereof saw the prison system regressing into an institution incompatible with the Constitution and the rule of law.



5. The legislature

The extent to which Parliament, and more specifically the Portfolio Committee on Correctional Services, has influenced prison reform after 1994 is explored in this section. Parliament holds legislative, oversight and accountability mandates.²¹⁰ The legislative mandate refers to the making, introducing and amending of laws. The Constitution requires that the executive must account to Parliament²¹¹ for its actions, policies, expenditure, etc. Corder, Jagwanth, and Soltau explain it as follows:

²⁰⁸ Jali Commission, p. 114.

²⁰⁹ Kaufmann, D. (2004) Corruption Matters: Evidence-Based Challenge to Orthodoxy, *Journal of Development Policy and Practice*, Vol. 1 No. 1, p. 7.

²¹⁰ s 55 Act 108 of 1996.

²¹¹ Section 55(2).

Accountability can be said to require a person to 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.²¹²

Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at monitoring the executive.²¹³ While accountability and oversight may differ in respect of their scope and focus, it is also clear that the two are closely linked and mutually reinforcing.²¹⁴

In respect of its legislative mandate, the Portfolio Committee on Correctional Services has had a relatively light load since 1994 compared, for example, to the Portfolio Committee on Justice and Constitutional Development. After passing the Correctional Services Act (111 of 1998), there have been only three amendments to the Correctional Services Act.²¹⁵

The history of the Portfolio Committee on Correctional Services can be divided into three periods: 1994 to 2003, during which the Committee played a lesser role; 2004 to 2009, when the Committee re-asserted itself; and 2009 to present, where the work methods of the Committee can be characterised as a stern and methodical approach to oversight, one building on the foundation laid in the preceding period.

²¹² Corder, H., Jagwanth, S. and Soltau, F (1999) *Report On Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town <http://www.pmg.org.za/bills/oversight&account.htm> Accessed 14 August 2010.

²¹³ Corder, H., Jagwanth, S. and Soltau, F (1999).

²¹⁴ Muntingh, L. (2011 d).

²¹⁵ The first was the Correctional Services Amendment Act (32 of 2001), and the most significant amendments dealt with the further regulation of the treatment of prisoners; clarifications of sentence calculations; further regulating the functions of the Inspecting Judge; and further regulation of the functions and composition of the Correctional Supervision and Parole Boards (CSPB). The second amendment was the Correctional Services Amendment Act (25 of 2008), dealing with, amongst others: changing the nomenclature of the Department; conditions of detention; the creation of an incarceration framework regulating non-parole periods; further regulating the CSPB and the Judicial Inspectorate for Correctional Services; regulating the Departmental Investigation Unit (DIU); and disciplinary procedures. The third was the Correctional Matters Amendment Act (5 of 2011) which, amongst others, repealed the provisions establishing an incarceration framework introduced by the previous Amendment Act (25 of 2008); provided for a new medical parole system; and provided for the management and detention of remand detainees.

5.1 The period 1994 to 2003

However, the relatively light legislative load did not translate automatically into more effective fulfilment of the oversight and accountability mandates. Under the chairmanship of Carl Niehaus (ANC), there were, it appears, sincere efforts at building trust between the Committee and the DCS.²¹⁶ The Committee was also assisted informally by the TFCS for a short period in 1995 to 1996, as noted in section 3.1. After Carl Niehaus left the Committee in 1997, it seems that the Committee's willingness and ability to hold the DCS accountable diminished. From 1997 to 2003 the Committee had five chairpersons, making consistency in strategy and actions difficult.²¹⁷ In respect of this period (1997 to 2003) Dissel concludes:

The Committee has received regular briefings from the Department on its various policies and practices and questioned DCS representatives following oral presentations. But its response is mainly reactive and mostly concerned with current issues that arise through the media or that are brought before the Committee. While this may be an indication that the Committee has been satisfied with the performance of the Department, it may also indicate that the Committee has seldom taken a pro-active role that allows it to influence the direction of policy. It has also not effectively made use of its authority to make recommendations to shape policy.²¹⁸

The Committee was also constrained by a number of internal and external factors during this period, limiting its ability to exercise oversight and accountability. Most obvious, however, was the number of meetings the Committee held, which dropped from 17 in 1998 to a mere eight in 2000.²¹⁹ Between 1998 and 2001 there were also no submissions made by civil society organisations, and it must be assumed there was a deliberate choice by the successive chairpersons to exclude civil society organisations from making submissions and engaging the Committee on policy and performance issues. In addition to this, the Committee had limited research support.²²⁰ The result was that the Committee depended by and large on media reports and information presented to it by DCS functionaries. The exclusion of civil society organisations, as representatives of the broader public, was indeed contrary to the

²¹⁶ Dissel, A. (2003), p. 11.

²¹⁷ Dissel, A. (2003), p. 11.

²¹⁸ Dissel, A. (2003), p. 11.

²¹⁹ In 2006 the Committee held 37 meetings, the highest number since 1998.

²²⁰ Corder, H., Jagwanth, S. and Soltau, F. (1999), pp. 21-22.

constitutional requirement for public involvement in the work of Parliament.²²¹ Further limitations to the work of the Committee included members' interest in, and knowledge of, imprisonment in general and of the DCS in particular, as well as the workload of committee members.²²² Effective oversight is dependent on adequate information being available, but it also requires that committee members should ask pertinent and penetrating questions of the DCS when it is not satisfied with information presented to the Committee.²²³

Bearing in mind that the years 1996 to 2003 were deeply troubling times for the DCS, the overall impression gained is that the Committee lacked strategic direction and generally reacted to issues presented by the DCS or reported in the media instead of following a proactive and inclusive approach. There was equally little follow-up on issues raised with the DCS on which feed-back or additional information was being sought.²²⁴ Whilst corruption was rife in the DCS and numerous allegations were being made, as well as investigations being instituted by other state agencies,²²⁵ the Portfolio Committee had very little to say about corruption during this period. In mitigation it may be argued that this was indeed the first democratically elected Parliament and that members had not yet developed the confidence, maturity and expertise to hold the executive accountable. Notwithstanding this and other reasons that may be forwarded in mitigation, the result was that the Portfolio Committee failed to hold the Department accountable.

5.2 The Bloem Committee, 2004 to 2009

Following the 2004 general elections, a new chairperson was elected, Mr. L. Modisenyane (ANC),²²⁶ but he remained in the position for a few months and in July 2004 was replaced by Mr. D. Bloem (ANC), who would remain the chairperson for the full term until April 2009. He was a member of the previous Committee and had some familiarity with the issues at

²²¹ ss 59 and 118 of Act 108 of 1996.

²²² Corder, H., Jagwanth, S. and Soltau, F. (1999), pp. 21-22.

²²³ Dissel, A. (2003), pp. 21-22.

²²⁴ Dissel, A. (2003), pp. 21-22.

²²⁵ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 14 April 2000, <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services> Accessed 22 October 2011.

²²⁶ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 11 May 2004, <http://www.pmg.org.za/minutes/20040510-chairperson-election-1> Accessed 22 October 2011.

hand. The Committee quickly demonstrated a higher work rate, and in the remainder of 2004 it held 25 meetings – substantially more than in the previous year. In October and November 2004 the Committee held several meetings reviewing the 2003/4 DCS Annual Report and itself adopted a report in which its views were reflected.²²⁷ The report acknowledged the work of the Department, but also raised a number of problem areas under each of the seven DCS programmes,²²⁸ supporting these with “decisions and recommendations” from the Committee and frequently asking for additional information. This approach departed from past practice in which Annual Reports were not even discussed by the Committee. Indeed, many of the problem areas raised in the Committee’s report would remain on the agenda for its full term, such as prison construction, electronic tagging, corruption, ill discipline of staff, overcrowding, poor conditions of detention, and qualified audits by the Auditor General.

At the end of its term the Bloem Committee adopted a hand-over report to be given to its successor after the April 2009 general elections.²²⁹ This report provides a useful gauge to assess the work of the Portfolio Committee under Bloem and its contribution to prison reform. In contrast to its predecessors, the Bloem Committee proved itself to be extremely active and vocal, and was frequently cited in the media. The Committee was furthermore characterised by a somewhat unusual sense of unity of purpose amongst MPs from different political parties, which was ascribed to the leadership of the Chairperson.²³⁰ The unanimous adoption of the hand-over report by the Committee gives further support to this view. The

²²⁷ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 2 November 2004, <http://www.pmg.org.za/minutes/20041101-department-annual-report-adoption> Accessed 22 October 2011.

²²⁸ The seven programmes are: Administration, Security, Corrections, Development, Care, Social Reintegration and Facilities.

²²⁹ Portfolio Committee on Correctional Services (2009) *Overview Report of the Oversight Activities of the Portfolio Committee on Correctional Services (2004-2009)*, Parliament of the Republic of South Africa, Cape Town.

²³⁰ ‘Committee Members unanimously agreed that the Committee’s success and good working relationship with each other can, to a large extent, be ascribed to the leadership provided by its Chairperson, Mr. Dennis Bloem. He led the Committee by example, always with fairness and respect, good humour and good judgement, giving all Members opportunity to voice their opinions and to be heard – true collective leadership. The Committee was chaired with a passionate and fearless dedication to the oversight of the Department of Correctional Services,, and to holding the Department and its Executive Authority to account. This dedication inspired the Committee to greater heights, and it is its hope that the incoming Committee will benefit from similar leadership that will take it to even greater heights.’ (Portfolio Committee on Correctional Services (2009), p. 2)

report was critical of both the DCS and, in particular, its Minister at the time, Ngconde Balfour (ANC). This gave the Committee an air of independence, impartiality and fairness.²³¹

5.2.1 The relationship with the Minister

The hand-over report dealt briefly with some of the Portfolio Committee's achievements. It noted: the amendments to the Correctional Services Act; improvements to the prison health care system; improved cooperation with other Parliamentary Committees; improved public awareness about prison reform issues; and the Portfolio Committee's participation in a review of the criminal justice system. Nonetheless, the hand-over report also mentions two important challenges to its oversight role: the relationship with the executive authority of the DCS, and the quality and accuracy of the Department's presentations and reports to the Committee. In respect of the latter, the Portfolio Committee notes that "it has at times been very difficult to obtain accurate information from its officials. Documentation for meetings is often received late, sometimes with insufficient and inaccurate information."²³² This remark should, however, be seen within the context of the relationship between the Portfolio Committee and the then Minister of Correctional Services, Ngconde Balfour, which the Portfolio Committee described as follows:

The Committee's relationship with the entity and the department it oversees was generally very good. Unfortunately the relationship with the DCS' Executive Authority was less so. The extent of the breakdown in the relationship between the Committee and that authority is starkly illustrated by the latter's neglect to inform the Committee of the re-deployment of the former National Commissioner in November 2008.²³³

The breakdown in the relationship is somewhat perplexing, since the Portfolio Committee was chaired by an ANC MP, the Minister was from the ANC, and the majority of Committee members were also ANC. It is consequently difficult to pinpoint the circumstances that led to the breakdown. The Portfolio Committee noted its dissatisfaction with reports received from the DCS as well as the accuracy of the information received,²³⁴ yet it appears that Minister

²³¹ The description that follows is based on Muntingh, L. (2009) The Correctional Services Portfolio Committee: 2004 – 2009, *CSPRI Newsletter*, No. 29, March 2009.

²³² Portfolio Committee on Correctional Services (2009), p.4.

²³³ Portfolio Committee on Correctional Services (2009), p.3.

²³⁴ Portfolio Committee on Correctional Services (2009), p. 4.

Balfour had frequently deflected criticism by the Portfolio Committee aimed at the DCS. Heated debates on a number of issues (e.g. the prison construction programme, privatisation of food provisioning, corruption and poor health services) indicated that the Portfolio Committee was resolute about not “rubber-stamping” the decisions of the executive. What provoked the ire of the Portfolio Committee more was perhaps the Minister’s responses to some of the questions it raised. When the Portfolio Committee rejected, in March 2007, the DCS report on the escape of Annanias Mathe from C-Max Prison (see Chapter 5 section 7), the Minister’s office issued a statement labelling the members of the Portfolio Committee as weak political leaders lacking sound judgment.²³⁵ He apologised later, explaining that the statement was issued without his authorisation, but the damage had been done.

In October 2008, in its review of human resource matters, the Portfolio Committee received a briefing from the then National Commissioner on resignations and suspensions of senior officials. Initially the Minister was reported to be absent from the meeting due to ill health. However, he later sent a letter that stated: “Regarding the instability within the Department, I must submit that it is not an oversight matter for the Portfolio Committee.”²³⁶ It was not for a Minister to tell Parliament what it can and cannot do, and this was not well-received. The relationship between the Committee and the Minister was now firmly in trouble. It was therefore not surprising that in February 2009 the Committee Chairperson accused the Minister of directly interfering in the awarding of the controversial prison catering contract to Bosasa.²³⁷ The tensions between the minister and the Portfolio Committee did demonstrate the Committee’s independence, but whether it was good for prison reform is a different issue. Ultimately the bureaucrats in the Department would take instructions from their political heads and not Parliament.

5.2.3 Private sector involvement

²³⁵ ‘Balfour apologises over attack on prisons committee’ *Mail and Guardian*, 19 March 2007, <http://www.mg.co.za/article/2007-03-19-balfour-apologises-over-attack-on-prisons-committee> Accessed 1 March 2009.

²³⁶ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 21 May 2008, <http://www.pmg.org.za/report/20081021-briefing-national-commissioner-department-correctional-services> Accessed 1 March 2009.

²³⁷ ‘MP hits out at Balfour’ *The Times*, 8 February 2009, <http://www.thetimes.co.za/PrintEdition/Article.aspx?id=934538> Accessed 1 March 2009.

The Portfolio Committee took a particular interest in private sector involvement in the prison system primarily because of the budget implications, but also because of persistent suspicions that there may be corruption related to private sector involvement in the prison system. In addition to the two existing privately operated prisons (see Chapter 3 section 4.1.3),²³⁸ the DCS was by 2008 planning for seven prisons to be constructed and operated as public-private partnerships (PPP),²³⁹ as discussed in Chapter 3 (section 4.1.5). Since October 2004 the DCS had also sub-contracted food provisioning to the private sector at a number of prisons.²⁴⁰ The Portfolio Committee consistently expressed deep concerns about private sector involvement in the prison system and found the changing policies of the DCS perplexing:

Taking into consideration the inordinate cost escalation, the government took the decision to halt any further plans to build prisons using the PPP financing model. That notwithstanding, the Minister of Correctional Services stated that the DCS would continue with the construction of five such additional prisons in Nigel, Klerksdorp, East London, Port Shepstone and Paarl.²⁴¹

The debate around privatisation and private sector involvement in the prison system has been continuing since the mid-1990s without clear answers emerging and with the DCS changing its position frequently on the desirability of private sector involvement.²⁴² It is therefore not surprising that the Portfolio Committee “has not been convinced” about private sector involvement.²⁴³ The manner in which the contracts for food provisioning were renewed

²³⁸ Chapter 14 of the Correctional Services Act (111 of 1998) provides for the establishment of Public Private Partnership (PPP) prisons and two such prisons, each housing 3 000 long-term sentenced prisoners, are operational. The first (in Bloemfontein) opened in 2001, and the second (in Makhado) in 2002. (Goyer, K.C. (2001) *Prison privatisation in South Africa - issues, challenges and opportunities*. Monograph 64, Pretoria: Institute for Security Studies, pp. 38-39; Berg, J. (2001) Private Prisons – the international debate and its relation to South Africa, *Acta Criminologica*, Vol. 14 No. 3, pp. 2-12.)

²³⁹ PMG Report on the meeting of the Portfolio Committee on Correctional Services of 19 February 2008, <http://www.pmg.org.za/report/20080219-building-nnw-correctional-centres-department%E2%80%99s-progress-report> Accessed 2 November 2011.

²⁴⁰ Sloth-Nielsen, J. (2007) ‘The state of South Africa’s prisons’. In S. Buhlungu, J. Daniel, R. Southall & Lutchman, J. *State of the Nation – South Africa 2007*, HSRC Press, Cape Town.

²⁴¹ Portfolio Committee on Correctional Services (2009), p. 6.

²⁴² Muntingh, L. (2010) ‘Love me, Love me not’ – *Public Private Partnerships in the Department of Correctional Services*. Paper Presented at seminar on Public Private Partnerships, 28 July 2010, hosted by the Institute for Security Studies, Cape Town.

²⁴³ Portfolio Committee on Correctional Services (2009), p. 6.

without being placed out on tender also raised strong suspicions with the Portfolio Committee, and the former National Commissioner's (Vernon Petersen) transfer to another department during this period served only to add to already existing doubts (see Chapter 4 section 4.3.1). As noted in Chapter 3, in 2011 the PPP prison tender would be withdrawn and the SIU conclude its investigations into the high-value contracts. The Portfolio Committee's scepticism about private sector involvement was ultimately vindicated.

5.2.4 Human resource management

Human resource management in DCS was also a continuous concern for the Bloem Committee. The DCS has a large staff corps: more than 40 000 employees in 45 000 posts at the time of the Bloem Committee.²⁴⁴ This amounts to roughly one official for every four prisoners. The situation at ground-level is, however, often far different from what this ratio may indicate. In the programmes' key to the implementation of the Department's 2004 White Paper, the DCS records, to the great concern of the Portfolio Committee, vacancy rates ranging from 19% to 27%. It was further noted by the Portfolio Committee that the overall vacancy rate increased from 8% to 11% whereas the target was to reduce it to 5%. The debate around vacancies frequently centred on the attraction and retention of scarce skills. To address this, the Occupational Specific Dispensation (OSD) was developed in the Public Service Coordinating Bargaining Council in an effort to adjust remuneration for these skills categories.²⁴⁵ The OSD was to be implemented from 1 July 2008, but in May 2008 the DCS informed the Portfolio Committee that it would not be able to implement the OSD by the due date.²⁴⁶ The Portfolio Committee requested a revised time-frame from the DCS but this was not submitted by the end of the Bloem Committee's term.²⁴⁷ The OSD was heralded as the solution for the Department's long-standing problem with the remuneration of professionals and other scarce skills, yet it appears that despite having nearly one year's forewarning of the

²⁴⁴ Department of Correctional Services (2008) *Annual Report 2007/8*, Department of Correctional Services, Pretoria, p. 151.

²⁴⁵ Public Service Collective Bargaining Council Resolution 1 of 2007, Gazetted 29 August 2007.

²⁴⁶ PMG report on the meeting of the Portfolio Committee on Correctional Services of 27 May 2008

<http://www.pmg.org.za/report/20080527-briefing-department-correctional-services-occupational-specific-dispe>
Accessed 13 January 2012.

²⁴⁷ Portfolio Committee on Correctional Services (2009), p. 9.

implementation date, it was unable to make the necessary arrangements. The Committee was equally concerned about the Seven Day Establishment (see Chapter 4 section 2.2.4) and became increasingly frustrated with the Department's lack of progress.²⁴⁸

5.2.5 Qualified audits

For the full term of the Bloem Committee the DCS received qualified audits, as described in Chapter 4 (section 2.4.2). Of particular concern to the Portfolio Committee was the fact that the DCS did not implement previous recommendations from the Auditor General and also failed to implement resolutions from SCOPA. Key to the problems around financial management seems to be a lack of skill and expertise at the level of Chief Financial Officer. Nonetheless, the Portfolio Committee was well supported by SCOPA, and the DCS appeared before that committee annually as a result of its successive qualified audits.

5.2.6 Summary of issues

Even though the Bloem Committee did not achieve all it set out to do, it has nevertheless established a new standard in Parliamentary oversight over the DCS. It pursued a number of issues in the Department's performance with doggedness and, at times, made it quite uncomfortable for the Department's officials when they were unable to provide convincing responses to questions. It was in these instances that the media picked up on the growing tension between the Portfolio Committee, the DCS and the Minister. A further result that can be ascribed by and large to the pressure from this Committee was a more systematic and methodical approach by the DCS in addressing problems. Annual reports since 2004 show a more accurate description of problems and proposed solutions, development of targets and a range of managerial tools and processes more likely to be found at business schools. While implementation remained a problem, the Bloem Committee left its mark on the DCS and its senior management. The Committee took full advantage of the mandate provided to it by the Constitution.²⁴⁹

5.3 The Smith Committee, 2009 to present

²⁴⁸ PMG report on the meeting of the Portfolio Committee on Correctional Services of 24 June 2008 <http://www.pmg.org.za/report/20080624-recruitment-and-retention-strategy-report-back-department-implementation> Accessed 13 January 2012.

²⁴⁹ s 55(2) Act 108 of 1996.

On 28 May 2009 the Portfolio Committee on Correctional Services elected Mr. Vincent Smith (ANC) as chairperson. Smith was previously a member of SCOPA and thus came with skill and experience in financial oversight. The Smith committee would consequently pay focused attention to financial matters and for this purpose scheduled quarterly meetings with the DCS to review financial management and related matters.²⁵⁰ Given the DCS's history of qualified audits, the Committee expressed its desire that there should be at least be one unqualified audit during its term.²⁵¹ Cooperation between SCOPA and the Portfolio Committee on Correctional Services would carry on, and the DCS would continue to appear before SCOPA as a result of successive qualified audits and unauthorised expenditure.

5.3.1 A focused approach

Compared to the Bloem Committee, the Smith Committee adopted an even more strategic and proactive approach²⁵² towards the Department and ensured that issues not dealt with satisfactorily were indeed followed up.²⁵³ Repeatedly the DCS was reminded of issues that

²⁵⁰ PMG Reports on the meetings of the Portfolio Committee on Correctional Services of held on 26 August 2009 <http://www.pmg.org.za/report/20090826-department-correctional-services-quarterly-report-and-outsourcing-bri>; 18 November 2009 <http://www.pmg.org.za/report/20091118-meeting-department-correctional-service-dcs-office-auditor-general-dc>; 17 February 2010 <http://www.pmg.org.za/report/20101117-judicial-inspectorate-correctional-services-200910-annual-report-brie>; 1 September 2010 <http://www.pmg.org.za/report/20100901-interaction-judicial-inspectorate-correctional-services-jics-matters->; 1 March 2011 <http://www.pmg.org.za/report/20110301-department-correctional-services-sept-dec-2011-quarterly-report-brief>; 15 June 2011 <http://www.pmg.org.za/report/20110615-department-january-march-2011-administrative-quarterly-report-hearing> and 13 October 2011 <http://www.pmg.org.za/report/20111013-department-correctional-services-budgetary-reviewdepartment-correctio> . Accessed 16 January 2012.

²⁵¹ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 20 October 2010 <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 16 January 2012.

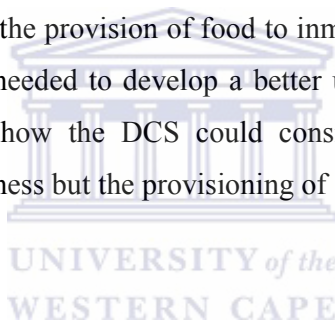
²⁵² PMG Report on meetings of the Portfolio Committee on Correctional Services held on 9 June 2009 <http://www.pmg.org.za/report/20090609-five-year-review-briefing-committee%E2%80%99s-programme-action-and-adoption-m> and 1 September 2010 <http://www.pmg.org.za/report/20100901-interaction-judicial-inspectorate-correctional-services-jics-matters-> Accessed 16 January 2012.

²⁵³ PMG Report on meetings of the Portfolio Committee on Correctional Services held on PMG Report on meetings of the Portfolio Committee on Correctional Services held on 15 September 2010 <http://www.pmg.org.za/report/20100915-department-correctional-services-feedback-outstanding-matters>; 13 October 2010 <http://www.pmg.org.za/report/20101013-department-correctional-services-claims-parole-staffing->

had not been clarified or to which unsatisfactory replies were received. The Committee remains critical of the Department's budget and strategic plan, stating clearly that the two are not aligned and, more specifically, that the budget is not aligned to the 2004 White Paper.²⁵⁴

The Committee had also made it clear to the Department that it would not tolerate poor performance, and at times adopted a strict and stern stance towards Department's failings. After a briefing on the outsourcing of services by the DCS to the Portfolio Committee on 14 October 2009, the chairperson's concluding remarks were noted as follows:

In conclusion, the Chairperson warned the DCS that there was a rocky road ahead of them. He reminded the Department of its mission statement, which stated that the DCS strived to provide humane conditions and re-integrate inmates into society. He perceived a contradiction between the mission statement and what was said by the officials, for example that the provision of food to inmates was not a core business. He said that the Department needed to develop a better understanding of what their core business was. He asked how the DCS could consider that the provision of anti-retrovirals was a core business but the provisioning of food was not.²⁵⁵



[levels-and-ot](http://www.pmg.org.za/report/20110824-stakeholder-submissions-implementation-jali-commission-recommendation) and 24 August 2011 <http://www.pmg.org.za/report/20110824-stakeholder-submissions-implementation-jali-commission-recommendation> Accessed 16 January 2012.

²⁵⁴ PMG Reports on meetings of the Portfolio Committee on Correctional Services held on PMG Reports on meetings of the Portfolio Committee on Correctional Services held on 23 June 2009 <http://www.pmg.org.za/report/20090623-department-correctional-services-strategic-plan-budget>; 4 August 2009 <http://www.pmg.org.za/report/20090804-department-correctional-services-workshop-five-year-strategic-plan-bu>; 17 February 2010 <http://www.pmg.org.za/report/20100217-problems-within-department-correctional-services>; 10 March 2010 <http://www.pmg.org.za/report/20100310-money-act-stakeholder-hearings-department-correctional-services-strat>; 17 March 2010 <http://www.pmg.org.za/report/20100317-researcher-portfolio-committee-budget-department-correctional-service>; 12 May 2010 <http://www.pmg.org.za/report/20100512-update-ms-wilson-matter-preliminary-inputs-portfolio-committee-member> , 13 October 2010 <http://www.pmg.org.za/report/20101013-department-correctional-services-claims-parole-staffing-levels-and-ot> , and 19 October 2010 <http://www.pmg.org.za/report/20101019-researchers-briefing-stakeholder-input-department-correctional-servic> Accessed 16 January 2012.

²⁵⁵ PMG Report on the meeting of the Portfolio Committee of Correctional Services on 14 October 2009, <http://www.pmg.org.za/report/20091014-outsourcing-services-department-correctional-services> Accessed 2 November 2011.

The Committee has also been firm in that it holds the senior management and in particular the National Commissioner responsible and accountable. It has been very clear about the seriousness of the situation. The new National Commissioner (Tom Moyane, from May 2010) was not spared, despite being in the position for only five months at the time, when the Chairperson told him that if matters do not improve and the Committee not supplied with accurate information, it will ask for his removal.²⁵⁶ The Committee has been extremely frank in expressing its frustrations with the Department. It called Department's management "chaotic",²⁵⁷ saying it was being run like a "spaza shop" (a small informal convenience shop, usually operated from the owner's house),²⁵⁸ and told the National Commissioner he must get his management team in order.²⁵⁹ Committee members have also accused the Department's management of trying to undermine it.²⁶⁰ Importantly, the Committee has threatened to not approve the Department's Budget Vote, a situation that would have serious repercussions.²⁶¹

5.3.2 An inclusive approach

The Smith Committee, building on the work method established under Bloem, sought information from sources other than the DCS. This included several briefings by non-governmental organisations, receiving submissions from other government departments (e.g.

²⁵⁶ PMG Report on meetings of the Portfolio Committee on Correctional Services held on 20 October 2010, <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 22 October 2011.

²⁵⁷ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 16 February 2010, <http://www.pmg.org.za/report/20100217-problems-within-department-correctional-services> Accessed 22 October 2011.

²⁵⁸ PMG Report on meetings of the Portfolio Committee on Correctional Services held on 20 October 2010, <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 22 October 2011.

²⁵⁹ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 12 October 2011 <http://www.pmg.org.za/report/20111012-department-correctional-services-dcs-2011-budgetary-review-briefing-d> Accessed 16 January 2012.

²⁶⁰ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 15 September 2010 <http://www.pmg.org.za/report/20100915-department-correctional-services-feedback-outstanding-matters> Accessed 16 January 2012.

²⁶¹ PMG Report on meetings of the Portfolio Committee on Correctional Services held on 20 October 2010, <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 22 October 2011.

Auditor General,²⁶² National Treasury,²⁶³ Judicial Inspectorate for Correctional Services,²⁶⁴ Department of Public Works,²⁶⁵ Department of Health²⁶⁶), Correctional Supervision and Parole Board chairpersons;²⁶⁷ and inviting MPs from other relevant Portfolio Committees to the meetings (SCOPA,²⁶⁸ Police,²⁶⁹ Public Works²⁷⁰). It was in particular in relation to inter-departmental cooperation that the Committee has played a problem-solving role. An example is the relationship between DCS and the Department of Public Works. After a four-year delay, a service level agreement between the two departments was eventually finalised after

²⁶² PMG Report on meeting of the Portfolio Committee on Correctional Services held on 20 October 2010 <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 22 October 2011.

²⁶³ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 1 June 2011 <http://www.pmg.org.za/report/20110601-national-treasury-matters-related-public-private-partnership-correcti> Accessed 16 January 2012.

²⁶⁴ PMG Report on meetings of the Portfolio Committee on Correctional Services held on 12 May 2010 <http://www.pmg.org.za/report/20100512-update-ms-wilson-matter-preliminary-inputs-portfolio-committee-member> and 17 November 2010 <http://www.pmg.org.za/report/20101117-judicial-inspectorate-correctional-services-200910-annual-report-brie> Accessed 16 January 2012.

²⁶⁵ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 25 May 2011 <http://www.pmg.org.za/report/20110525-department-public-works-progress-made-construction-four-new-generatio> Accessed 16 January 2012.

²⁶⁶ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 21 April 2010 <http://www.pmg.org.za/report/20100421-department-correctional-services-report-amaravathe-wilson-matter-pro> Accessed 16 January 2012.

²⁶⁷ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 8 September 2009 <http://www.pmg.org.za/report/20090908-briefing-selected-parole-board-chairpersons-challenges-functioning-pa> Accessed 16 January 2012.

²⁶⁸ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 1 June 2011 <http://www.pmg.org.za/report/20110601-national-treasury-matters-related-public-private-partnership-correcti> Accessed 16 January 2012.

²⁶⁹ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 3 November 2010 <http://www.pmg.org.za/report/20101103-departments-correctional-services-justice-police-impact-delays-invest> Accessed 16 January 2012.

²⁷⁰ PMG Report on meetings of the Portfolio Committee on Correctional Services held on 2 June 2010 <http://www.pmg.org.za/report/20100602-department-correctional-services-public-works-their-service-level-agr> and 25 May 2011 <http://www.pmg.org.za/report/20110525-department-public-works-progress-made-construction-four-new-generatio> Accessed 16 January 2012.

intervention by the Portfolio Committee.²⁷¹ Similarly, the Committee has continued with announced and unannounced oversight visits to prisons, providing it with first-hand evidence of what is happening on a daily basis in South Africa's prisons.²⁷² Frequently this information has contradicted what the Department's senior management had been telling the Committee during its meetings; this has often placed the Department's officials on the back-foot at Committee meetings.

5.3.3 Showing results

The increasingly methodical and sustained pressure on the Department has, since the Bloem Committee, started bearing fruits. The Department has become less elusive when responding to Committee questions, and in this regard the meeting of 20 October 2010 is instructive. The chairperson explained that, following a meeting with the Auditor General the previous day, it seemed as if the DCS Head Office was unable to enforce instructions as regions ignored directives, there was no follow-up, and departure from compliance was pervasive. Instead of defending the criticism, the National Commissioner (Moyane) gave a frank assessment of the situation, explaining that when he assumed the position of National Commissioner he noted the lack of accountability.²⁷³ He described the leadership of the Department as "lethargic and office-bound", lazy and lackadaisical, and that this led to mediocrity. More specifically, the regional leaders did not visit prisons in their area of control and there were regional fiefdoms. His frankness earned the National Commissioner a good measure of respect with the Committee, and in the months to come there would be improvements, albeit small, in the Department's performance. The quarterly report-back meetings of 15 June 2011 and 13 October 2011 noted a number of achievements and reflected a more cooperative working

²⁷¹ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 25 May 2011 <http://www.pmg.org.za/report/20110525-department-public-works-progress-made-construction-four-new-generatio> Accessed 16 January 2012.

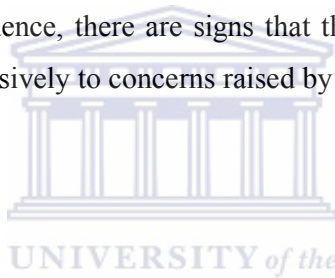
²⁷² PMG Report on meeting of the Portfolio Committee on Correctional Services held on 1 July 2009 <http://www.pmg.org.za/report/20090701-prisoner-complaints-committee-strategy-2009-and-2010-committee-progra> and 26 May 2010 <http://www.pmg.org.za/report/20100526-interaction-department-correctional-services-matters-emanating-commit> Accessed 16 January 2012.

²⁷³ PMG Report on meeting of the Portfolio Committee on Correctional Services held on 20 October 2010 <http://www.pmg.org.za/report/20101020-department-feedback-matters-emanating-14-october-interaction-its-2009> Accessed 16 January 2012.

relationship between the DCS and the Committee. Importantly, the number and scope of qualifications in the Auditor General's report for 2010/11 has shown a significant reduction,²⁷⁴ as discussed in Chapter 4.

Since 2004 the successive Portfolio Committees on Correctional Services have remained critical of the Department's performance, affirming the institutional crisis. Under Smith the Committee's focus has, however, become more methodical and their interventions more aimed at addressing the institutional crisis, with particular reference to accurate reporting, managing governance and accounting problems, and enabling more effective delivery on the mandate. The Committee has also not allowed itself to be distracted as much by scandals and embarrassing incidents even though they still occur.²⁷⁵ The quarterly meetings gave structure to this focus and have been well-supported by following up on issues and, where necessary, involving other stakeholders in government to resolve long-standing issues. Although it is difficult to furnish detailed evidence, there are signs that the DCS leadership is responding more constructively and less evasively to concerns raised by the Committee.

5.3.4 Summary of issues



The history of the Portfolio Committee on Correctional Services since 2004 reflects an increased willingness and maturity in Parliament to fulfil its oversight and accountability mandate. This accords with the views of the manager of Parliament's Legislation and Oversight Division:

There is a shift in emphasis from initiating, amending and passing legislation to increasing the effectiveness of Parliament's oversight capacity. Parliament has developed an Oversight and Accountability Model, which provides for the

²⁷⁴ Department of Correctional Services (2011 a), pp. 124-125.

²⁷⁵ The suspension of the National Commissioner, for example, was discussed only in one meeting. (PMG Report on meeting of the Portfolio Committee on Correctional Services held on 11 November 2009, <http://www.pmg.org.za/report/20091111-minister-progress-case-against-national-commissioner-developments-ye>) Accessed 22 October 2011.

strengthening of existing parliamentary oversight practices, as well as the establishment of new processes and structures to enhance this capacity.²⁷⁶

The task of oversight centres, in its crudest form, is on monitoring the strategic priorities of the executive and the utilisation of resources allocated thereto with the aim to ensure that resources are being used effectively and efficiently to achieve the stated aims.²⁷⁷ In this regard, two instruments stand out as tools that have been used with particular effectiveness by the Portfolio Committee on Correctional Services: the budget vote (which is read together with the department's strategic plan) and the departmental Annual Report. The budget vote and strategic plan, read together, set out a multi-year plan for the department concerned. Based on this, Parliament will approve, amend or reject the proposed budget for the year. In fulfilling this duty, the committees of Parliament are obligated, by virtue of the Money Bills Amendment Procedure and Related Matters Act (Act 9 of 2009), to assess the performance of each national department with reference to the following: the medium-term estimates of expenditure; its strategic priorities; measurable objectives; prevailing strategic plans; the expenditure report published by National Treasury; financial statements; annual report; the report from SCOPA; and any other information presented to or requested by any house of Parliament.²⁷⁸ While Parliament may undertake other activities to exercise its oversight mandate, such as inspection visits to government facilities (e.g. prisons), the duties imposed by the Money Bills Amendment Procedure and Related Matters Act are a very clear and tangible operationalisation of the oversight mandate. The Portfolio Committee of Correctional Services has not yet utilised the mechanisms provided by the Money Bills Amendment Procedure and Related Matters Act to its fullest extent, for example, by changing or even rejecting the budget vote. Nonetheless, it provides the Committee with a powerful tool.

While the DCS remains confronted with internal problems, the Portfolio Committee on Correctional Services has grown in stature and influenced the performance of the Department in significant ways. There has developed a greater sense of transparency, reflected in the

²⁷⁶ *Parliament's 2007 Reflections* (2007) December 16, Cape Town: Parliament of South Africa 9
http://www.parliament.gov.za/content/Reflections_Final_12pg%209.pdf Accessed 14 August 2010.

²⁷⁷ Muntingh, L. (2011 d).

²⁷⁸ Section 5 Money Bills Amendment Procedure and Related Matters Act (9 of 2009).

detailed reports, regular meetings, and thorough questioning on the budget and strategic plan; information from multiple sources is now also available to the Committee. The oversight function has seen equal improvement, as is evident in the Committee's less tolerant approach to poor performance on a broad front of issues. To address performance issues, the Committee has placed particular emphasis on encouraging the Department to develop the necessary institutional capacity to deliver on its mandate and rid itself of long-standing problems such as corruption. While results may at times seem modest, the Department has made significant gains since 2001 when the Jali Commission started its investigations, even though it is frequently a case of three steps forward and two steps back. Notwithstanding these concerns, it is evident that the Portfolio Committee took its Constitutional mandate to heart, demonstrating that it will and can use the powers entrenched by the Constitution to effect prison reform.

6. The Judicial Inspectorate for Correctional Services

The mandate of the Judicial Inspectorate for Correctional Services was already described in Chapter 4 (section 2.4.3) and need not be repeated here. Other authors have also done more detailed analyses of the Inspectorate.²⁷⁹ In the course of its existence the Judicial Inspectorate initially focused on overcrowding but has broadened its scope over time. However, the Inspectorate has not been without its limitations, and three issues are discussed below.

6.1 Overcrowding

The second Inspecting Judge (Judge Fagan),²⁸⁰ in the first annual report that he authored (in 2000), made the point that prison overcrowding was the root cause of the “most awful conditions” of detention²⁸¹ and elsewhere called conditions “horrendous”.²⁸² Under Judge

²⁷⁹ Jagwanth, S. (2004); Dissel, A. (2003); Gallinetti, J. (2004); Hettinga, B., Mandlate, A. and Muntingh, L. (2011).

²⁸⁰ The first was Judge Trengove, from 1 June 1998 to 30 March 2000, who oversaw the establishment of the Judicial Inspectorate.

²⁸¹ Office of the Inspecting Judge (2000) *Judicial Inspectorate for Correctional Services Annual Report 2000*, Cape Town: Office of the Inspecting Judge, p. 3.

Fagan (from 2000 to 2006) the Judicial Inspectorate would, through a variety of means, draw attention to overcrowding in prisons.²⁸³ It targeted Parliament, members of the judiciary, SAPS, DCS, the media, civil society and the general public. Placing overcrowding, and with it poor conditions of detention, on the national agenda has been an important achievement of the Inspectorate and influential in the prison reform discourse.²⁸⁴ For example, it resulted in a number of research publications aimed at gaining a better understanding of the causes of prison overcrowding and possible solutions.²⁸⁵ The Annual Reports of the Judicial Inspectorate have provided detailed information on trends, problems encountered and also advances made in addressing prison overcrowding. In short, the Inspectorate fulfilled a valuable public education function about prisons and conditions of detention.

The Inspectorate took the initiative and encouraged government to take or create measures to alleviate prison overcrowding. In 2000 the Judicial Inspectorate encouraged government to use its powers under section 66 of the 1959 Correctional Services Act and release certain categories of awaiting trial prisoners. The result was that 8 451 awaiting trial prisoners with bail of less than R1 000 (US\$ 150) were released in September 2000.²⁸⁶ An amendment, under pressure from the Inspectorate, to the Criminal Procedure Act (51 of 1977) broadened the scope of police bail with the aim to reduce the use of pre-trial detention in prison.²⁸⁷ In 2001, again under pressure of the Inspectorate, an amendment to the Criminal Procedure Act

²⁸² Fagan, H. (2002), p. 17.

²⁸³ Mubangizi, J.C. (2002) Some reflections on the promotion of the rights of prisoners in South Africa'. *Acta Criminologica*, Vol. 15 No. 2, pp. 26-34.

²⁸⁴ Fagan, H. (2005) 'Dramatic Drop in Prison Numbers, Less Overcrowding: Fagan' *AllAfrica.com*, 16 September 2003, <http://allafrica.com/stories/200309170018.html> Accessed 21 October 2011; PMG Report on the Meeting of the Portfolio Committee on Correctional Services of 16 September 2002, <http://www.pmg.org.za/minutes/20030915-progress-report-regard-overcrowding-and-current-situation-prisons> Accessed 21 October 2011; Fagan, H. (2002); Fagan, H. (2004) Curb the vengeance - Laws on minimum sentencing and parole spell worsening prison conditions. *SA Crime Quarterly*, No. 10.

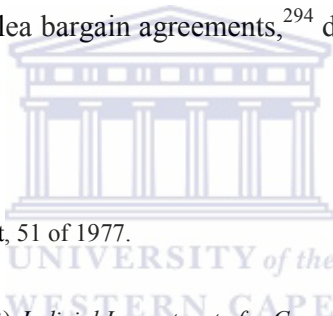
²⁸⁵ See Karth, V. (2008) *Between a rock and hard place*. Cape Town: Open Society Foundation (SA); Giffard, C. and Muntingh, L. (2006); Redpath, J. and O'Donovan, M. (2006) *The Impact of minimum sentencing in South Africa - Research into the impact of minimum sentencing in South Africa*. Cape Town: Open Society Foundation (SA); *Sentencing in South Africa - Report on a conference on sentencing in South Africa held from 25 -26 October 2006*, Cape Town. Cape Town: Open Society Foundation; Steinberg, J. (2005) *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*. Johannesburg: Centre for the Study of Violence and Reconciliation.

²⁸⁶ Jagwanth, S. (2004).

²⁸⁷ Jagwanth, S. (2004), p.52.

was made to allow a Head of Prison, who is satisfied that the population of the prison “is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused”²⁸⁸ to apply to court for their release under specific conditions.²⁸⁹ This amendment would, for a variety of reasons, prove to be ineffective in reducing overcrowding (see Chapter 5 section 3.2).²⁹⁰

Nonetheless, the focus on overcrowding has been a strategic one, not only because it is a key driver of other problems but because it is one issue which the DCS can associate itself with and openly acknowledge. If more sensitive matters, such as gross human rights violations, corruption and dishonest practices, were to have been the focus of the Judicial Inspectorate, especially in the early years, it is likely they would have summoned far more resistance from the DCS. In focusing on overcrowding, the Inspectorate has consistently called for the use of non-custodial sentences,²⁹¹ the scrapping of the minimum sentences legislation,²⁹² earlier release on parole,²⁹³ the use of plea bargain agreements,²⁹⁴ diversion,²⁹⁵ police bail,²⁹⁶ greater



²⁸⁸ s 63A of the Criminal Procedure Act, 51 of 1977.

²⁸⁹ Jagwanth, S. (2004), p.52.

²⁹⁰ Office of the Inspecting Judge (2003) *Judicial Inspectorate for Correctional Services Annual Report 2002/3*, Cape Town: Office of the Inspecting Judge, p. 23.

²⁹¹ Office of the Inspecting Judge (2001) *Judicial Inspectorate for Correctional Services Annual Report 2000*, Cape Town: Office of the Inspecting Judge, p. 17; Office of the Inspecting Judge (2004) *Judicial Inspectorate for Correctional Services Annual Report 2003/4*, Cape Town: Office of the Inspecting Judge, pp. 24-26; Office of the Inspecting Judge (2005) *Judicial Inspectorate for Correctional Services Annual Report 2004/5*, Cape Town: Office of the Inspecting Judge, pp.19-26.

²⁹² Office of the Inspecting Judge (2003), p.27; Office of the Inspecting Judge (2004), pp. 24-26; Office of the Inspecting Judge (2005), pp.19-26.

²⁹³ Office of the Inspecting Judge (2001), p. 15; Office of the Inspecting Judge (2004), pp. 24-26; Office of the Inspecting Judge (2005), pp.19-26.

²⁹⁴ Office of the Inspecting Judge (2007) *Judicial Inspectorate for Correctional Services Annual Report 2006/7*, Cape Town: Office of the Inspecting Judge, p. 35.

²⁹⁵ Office of the Inspecting Judge (2001), p. 16; Office of the Inspecting Judge (2004), pp. 24-26; Office of the Inspecting Judge (2005) *Judicial Inspectorate for Correctional Services Annual Report 2004/5*, Cape Town: Office of the Inspecting Judge, pp.19-26.

²⁹⁶ Office of the Inspecting Judge (2001), p. 16; Office of the Inspecting Judge (2003), p.27; Office of the Inspecting Judge (2004); Office of the Inspecting Judge (2004), pp.19-26.

use of admission of guilt fines,²⁹⁷ and granting of affordable bail.²⁹⁸ This approach placed less pressure on the DCS and instead targeted other role-players in the criminal justice system.

6.2 A widening focus

From 2006/7 the Judicial Inspectorate has, in its Annual Reports, broadened its focus somewhat to emphasise general conditions of detention. To this end it conducted a national inspection in that year and an infrastructure audit in the following.²⁹⁹ Although still recognising prison overcrowding as a major driving force, it started identifying other systemic problems such as poor management and low performance levels of staff.³⁰⁰ The prevention of human rights violations³⁰¹ also received increasing attention from the Judicial Inspectorate, and in recent years it has paid particular attention to deaths in custody,³⁰² with the result that deaths in custody have been discussed more frequently at Portfolio Committee meetings.³⁰³ The data reported by the Inspectorate on unnatural deaths in custody (see Chapter 5 section 4.2) have been an extremely valuable contribution to bringing about greater transparency on this issue.

Since its establishment, the Judicial Inspectorate has made significant contributions to transparency chiefly in two ways. The first is the deployment of the Independent Visitors, whereby community members have access to prisoners, documents and facilities. Visits to places of detention remain the most effective mechanism for preventing rights violations, and

²⁹⁷ Office of the Inspecting Judge (2001), p. 16; Office of the Inspecting Judge (2004), pp.24-26; Office of the Inspecting Judge (2005), pp.19-26.

²⁹⁸ Office of the Inspecting Judge (2001), p. 16; Office of the Inspecting Judge (2003), p.27; Office of the Inspecting Judge (2004), pp.24-26; Office of the Inspecting Judge (2005), pp.19-26.

²⁹⁹ Office of the Inspecting Judge (2007) and Office of the Inspecting Judge (2008) *Judicial Inspectorate for Correctional Services Annual Report 2007/8*, Cape Town: Office of the Inspecting Judge.

³⁰⁰ Office of the Inspecting Judge (2007), p. 6-8.

³⁰¹ Office of the Inspecting Judge (2009) *Judicial Inspectorate for Correctional Services Annual Report 2008/9*, Cape Town: Office of the Inspecting Judge, Chapter 2. Office of the Inspecting Judge (2010) *Judicial Inspectorate for Correctional Services Annual Report 2009/10*, Cape Town: Office of the Inspecting Judge, Judicial Inspectorate for Correctional Services, Chapter 3.

³⁰² Office of the Inspecting Judge (2010), pp. 59.

³⁰³ See PMG Report on meeting of the Portfolio Committee on 24 November 2010, <http://www.pmg.org.za/report/20101124-meeting-finalisation-department-public-works-department-correctional-> Accessed 22 October 2011.

in particular torture and other ill-treatment.³⁰⁴ While some concerns have been raised about the independence and effectiveness of the Independent Visitors,³⁰⁵ the mere fact that an external person has unrestricted access to a prison and its prisoners necessitates a different response from the officials in charge. The second is that through its annual reports as well as other activities (e.g. media responses, meetings, workshops, conference presentations and assistance to researchers), the Judicial Inspectorate has placed a significant amount of hitherto unavailable information in the public domain. Importantly, the Judicial Inspectorate has access to the Management Information System (MIS) of the DCS, and it is particularly in respect of quantitative information that more thorough analyses of prison population trends became possible. Other stakeholders, such as Parliament and civil society organisations, now have access to information that the DCS had been rather reluctant to share with outsiders.

6.3 Limitations of the Judicial Inspectorate

The Inspectorate has not been without limitations and two are noted, namely the impact of complaints lodged by prisoners with Independent Visitors, and the Inspectorate's relationship with the Minister and the DCS. With regard to the handling of the high number of complaints recorded, it must be enquired if this has had any impact on conditions of detention. For example, in 2009/10 the Inspectorate recorded 276 636 complaints and the 220 Independent Visitors made 8 346 visits to prisons and consulted with 78 883 prisoners.³⁰⁶ The Inspectorate, does not, however, provide any further information in respect of the resolution of complaints, the monitoring of agreed-upon solutions, time duration for resolution and additional information on the handling of complaints. Other information presented by the Judicial Inspectorate in its Annual Reports since 2000, research by other organisations, and DCS Annual Reports indicate that changes in conditions of detention, the treatment of prisoners and the protection of human rights have changed very slowly, if at all, since the establishment of the Inspectorate. The types of complaints and their proportional distribution have also

³⁰⁴ The Special Rapporteur on Torture is clear on this issue: 'The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials.' (A/HRC/13/39/Add.5 para 157)

³⁰⁵ Gallinetti, J. (2004).

³⁰⁶ Office of the Inspecting Judge (2010), p. 36-37.

remained very stable,³⁰⁷ indicating that the same problems persist and are of a systemic nature. A similar conclusion, that conditions of detention and the treatment of prisoners has remained by and large unchanged, was drawn in earlier research as well.³⁰⁸ While the lodging of complaints with an Independent Visitor may benefit the individual prisoner, it is concluded that these individual complaints have not resulted in large-scale systemic changes to the treatment of prisoners and prison conditions.

Second, and possibly the underlying reason for the stagnation in prison conditions, is the relationship that the Inspectorate has with the DCS senior management and Minister of Correctional Services. The Correctional Services Act obligates the Inspecting Judge to submit an annual report as well as a report on each inspection undertaken to the Minister of Correctional Services and to Parliament.³⁰⁹ This has been done duly and the Annual Reports of the Inspectorate are distributed widely as well as made available on its website. Since the 2000 Annual Report the Inspectorate has been critical of conditions of detention, the treatment of prisoners, and systemic failures of the DCS. Yet there has been very little, if any, reaction from the DCS on these reports. The overall impression gained is that the DCS and the Minister had not given the necessary weight to the findings and recommendations of the Inspectorate as presented in its annual reports. This issue was driven to the fore in November 2010 when the Minister of Correctional Services, Nosiviwe Mapisa-Nqakula, accused the Inspecting Judge, Judge Van Zyl, of leaking the Inspectorate's Annual Report to the media and also briefing Parliament without briefing her. In response, he explained that he had tried to make an appointment with her for three weeks to brief her, but her office failed to respond.³¹⁰ Regardless of this, it was indeed the Minister's office that tabled the report in

³⁰⁷ The recorded complaints profiles for 2004/5 and 2009/10 were compared. This period was selected as the Correctional Services Act (111 of 1998) came into force in October 2004 and the 2004 White Paper was adopted by the Department of Correctional Services, in that year. Only four categories of complaints showed changes of more than 3%, being access to bail (up by 5%), access to legal representation (up by 3.4%), access to rehabilitation programmes (up by 4.4%), and other (down by 11.9%) (Office of the Inspecting Judge (2005) and Office of the Inspecting Judge (2010).

³⁰⁸ Jagwanth, S. (2004), p.53.

³⁰⁹ S 90(3-4) of the Correctional Services Act (111 of 1998). The requirement that the inspection reports should also be submitted to Parliament was added through an amendment to the Act, the Correctional Services Amendment Act, 25 of 2008.

³¹⁰ 'Minister fumes after oversight judge releases details of prisons report to press' by Carien Du Plessis, *The Sunday Independent*, 21 November 2010.

Parliament and not the Inspecting Judge. It meant the Minister had simply tabled the report in Parliament without having read it.

In the following week the DCS briefed the Portfolio Committee on its “high-level action plan” in respect of the Inspectorate’s Annual Reports.³¹¹ The proposed measures were indeed telling of what the Department’s attitude and actions have been to date. A senior official explained that “the Judicial Inspectorate for Correctional Services (JICS) Annual Report would henceforth be taken as a guide to service delivery” and that management will address the “disregard by the Department of Judicial Inspectorate reports”. Other issues to be addressed in the plan included: complaints registered with JICS Independent Visitors (IVs) would be taken more seriously; concern about Heads of Prisons reports on natural/unnatural deaths, and the reluctance of management to deal with officials implicated in prisoner deaths; research into the effect of long sentences on costs, overcrowding and gang activity; the efficiency of parole boards; lack of briefing to officials on high-risk prisoners; the persistence of solitary confinement despite it being prohibited by law; the majority of complaints by inmates remained unresolved, with transfers away from families as punishment ranking as the most common complaint; infrastructure challenges that compromised human dignity during imprisonment; improved utilisation of vocational workshops; the incremental provision of rehabilitation programmes; attention to conditions of detention for remand detainees; and the increased use of plea bargaining to avoid imprisonment for minor offences. It remains to be seen whether the DCS will deliver on this plan and if it does use the Inspectorate’s reports as a guide to service delivery. However, the plan confirmed what has long been suspected, namely that the DCS essentially ignored the recommendations made by the Inspectorate, especially when they were critical of how the Department and officials dealt with human rights issues.

6.4 Summary of issues

There is little doubt that the Inspectorate has since its establishment made an invaluable contribution to prison reform by promoting a more transparent prison system and educating the general public about imprisonment and conditions of detention. It has also been able to

³¹¹ PMG Report on meeting of the Portfolio Committee on 24 November 2010, <http://www.pmg.org.za/report/20101124-meeting-finalisation-department-public-works-department-correctional-> Accessed 22 October 2011.

mobilise a wide range of stakeholders inside and outside of government around the prison overcrowding. Despite these achievements, it also has to be acknowledged that it has not been able to exert its authority over the DCS. The attitude of the DCS and Ministry has, until very recently, been dismissive of the Inspectorate's work and recommendations.

7. Conclusion

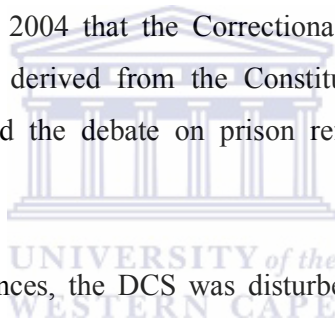
Reviewing the role of external influences on the prison system since 1994 leaves the impression that, due to a confluence of a number of factors, the DCS was by and large left to its own devices until 2001 when the Jali Commission was appointed. By that stage it had become an institution where through organisation and control, corrupt structures developed, grew and prospered over time. This is what Nötzel refers to as a “calm biope”.³¹² In this assessment of the influence of external stakeholders on prison reform, the conclusion is drawn that – in respect of not only corruption but on a broad range of issues, and due to a lack of external pressure – the Department remained undisturbed by the Constitutionally-imposed demands for reform. At national government level the lack of policy direction under the GNU on the transformation of the public service allowed the DCS essentially to continue as it had before 1994, but this did not diminish growing demands and militancy for affirmative action. Failure to develop capacity and skills in the public service, coupled with the slow response by the national government to deal with corruption and maladministration in general, enabled the DCS to become a “calm biope”. There was little guidance at national policy level for the DCS to reinvent and re-institutionalise the prison system. Lack of political leadership (especially under Mzimela), the exclusion of civil society from the discourse on prison reform, the delay in the coming into force of the full Correctional Services Act (111 of 1998), and an apathetic Portfolio Committee on Correctional Services added to the calmness. While the lack of reform and the widespread corruption that developed between 1994 and 2001 in the DCS is not the fault of the national government alone, its level of inaction created the necessary environment for perverse forces to take control of the DCS and delay fundamental reform of the prison system.

³¹² Nötzel, M. (2002) ‘Investigation Strategies and Tactics in the prosecution of corruption offences: experiences from Germany’. In Fijnaut, C. and Huberts, L. (eds) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague, p. 51.

The first substantial and visible disturbance of the calm biope in DCS took place with the appointment of the Jali Commission in 2001. In a short period of time successive scandals uncovered were reported in the media and the calm was broken. Shortly after the Jali Commission started its work, the SIU started its investigations in 2002 in the DCS. At more or less the same time, government (through the DPSA and PSC) started responding to corruption in the public service at policy level.

The Minimum Anti-Corruption Capacity requirements (MACC) were adopted and from there flowed other actions to deal with corruption in the public service. In 2004 new legislation dealing with corruption was passed. In the same year a new Portfolio Committee on Correctional Services started its term and this Committee (under Bloem) took a fundamentally different approach to previous committees in respect of its oversight mandate. Under Smith (from 2009) the Portfolio Committee would continue with perhaps even greater vigour. It was also in October 2004 that the Correctional Services Act came into force, placing very clear obligations, derived from the Constitution, on the DCS. From 2003 onwards civil society re-entered the debate on prison reform and found its platform in Parliament.

In short, due to external influences, the DCS was disturbed from a number of directions, prompting the management to take action. In less than three years (September 2001 to July 2004) the external environment of the DCS changed dramatically, placing the emphasis increasingly on transparency and accountability. After 2004 pressure on the DCS would continue, and this has been important in sustaining the re-institutionalisation of the DCS.



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Chapter 7 Conclusion

1. Introduction

The history of prison reform after 1994 was problematised and shaped by the relationship between governance and human rights standards, the requirements for both set out in the Constitution and elaborated on in the Correctional Services Act. It was shown that good governance and human rights converge in five dimensions of a constitutional democracy: legitimacy, transparency, accountability, the rule of law and resource utilisation. The new constitutional order established a set of governance and rights requirements for the prison system that demanded fundamental reform. It de-legitimised the existing prison system and thus placed it in a crisis. This required its reinvention to establish a system compatible with constitutional demands. In 1994 there were legitimate expectations that fundamental prison reform based on the Constitution would follow, but by and large these expectations have not been met.

In this concluding chapter, an overview is first provided of the main points made in the thesis. Flowing from this, it is argued that the critically missing element was a constitutional imagination to guide the reform process. It is furthermore posited that disagreement about what reform meant and the agenda to be followed would constrain reform itself. Furthermore, the 2004 White Paper redefines rehabilitation of offenders as the Department's core business, but this requires closer examination and it is argued that the decision to focus on rehabilitation was not based on the existing evidence on effective interventions, nor was it founded on a Constitutional imperative. Throughout the period under review, lack of transparency emerged as a problem area and had a material impact on the reform process. The chapter concludes with a discussion of possible implications for reform efforts in other jurisdictions.

2. Overview

In Chapter 2 it was argued that reform through crisis is an acknowledged construct in the literature and that the reform-crisis thesis fits the events that unfolded in the South African prison system after 1994. The lack of, or inadequate, response by the DCS management to the

impending democratic reforms prior to 1994 and thereafter, shaped the history of prison reform especially in the first ten years of democratic rule. The new democratic order placed radically different demands on an organisation that was highly institutionalised, preserving in nature, conservative in outlook, and unresponsive to external influences. The internal constraints of the DCS corresponded with what has been noted in the literature and would in fact aggravate the situation. It was concluded that management failed to put in place preparations for reform.

It was argued furthermore that prisons suffer from an inherent legitimacy deficit but that reform driven by, and focused on, giving tangible and sustained expression to the values and precepts of the Constitution would address such a deficit. A prison system in a constitutional democracy would consequently be based on four pillars: an underlying philosophy (and knowledge) creating the anchor points for justifying and using imprisonment; clear and full recognition of prisoners' rights which is expressed in practice; effective horizontal and vertical accountability of the executive; and maximum transparency. Weak or absent compliance with the accountability and transparency requirements leaves the recognition of rights and the underlying philosophy without substance and meaning; such oversight creates the risk that it will be "business as usual", or worse, that perverse results, enabled by a crisis situation, may ensue.

When faced with a crisis, policy-makers must not only act with haste but also develop effective policies. However, effective policy-making is a carefully managed process that is highly reliant on knowledge and information. Poorly institutionalised organisations will struggle to assimilate and use information and consequently experience difficulties in implementing reforms. Effective policy-making and the re-institutionalisation of an organisation in crisis are thus prerequisites for stability and meaningful reform.

Contrary to expectations in 1994, rapid reform of the prison system did not materialise, but rather the opposite occurred and a second crisis developed, namely the collapse of order and discipline in the Department. The period 1994 to 2004 was characterized by a series of governance failures in the prison system. Instead of reinventing the prison system, the result was rather a near-intractable mess of operational challenges such as prison overcrowding, poor skills levels, management inexperience, misdirected policy initiatives, poor financial management, lack of strategic vision, unionisation, corruption, human rights violations, resistance to reform and so forth. By mid-1996 the lack of re-institutionalisation and the

poorly planned and executed demilitarisation of the DCS had created a management void into which organised labour (POPCRU in particular) stepped, and the erstwhile rigid distinction between management and labour faded. Through purposefully designed campaigns and actions POPCRU took control of key functions in the Department to force the rapid implementation of affirmative action by all means necessary and at least in some management areas a culture of lawlessness, fear and intimidation prevailed. Although the events in DCS should be contextualised by the general state of the public service at the time, corruption and maladministration attained exceptional dimensions and it was conceded that the state had lost control of the Department by 2000.

In analysing the events after 1994, it was argued that in many regards the problems were created prior to 1994. Even though it was clear that democratic reforms were under way, little preparation was undertaken. The DCS management at the time failed to recognise that it was already in a crisis, but more importantly, it lacked strategic vision as exemplified by the hastily drafted 1994 White Paper which failed to draw a clear link with the Constitution. The prison system inherited by the Government of National Unity (GNU) was a highly institutionalised organisation characterised by a conservative, preserving, non-responsive, and inward-looking approach. These traits remained dominant at least until mid-1996 and accords with the definition of crisis by ignorance, showing “cognitive arrogance – a hermetic, chronically overoptimistic self-image that shuts out discrepant information”.¹ However, from 1996 onwards, levels of institutionalisation eroded rapidly as a consequence of the failure to implement a new management system replacing the abolished military command structure. Coordination problems emerged, basic discipline was not enforced and the Department was increasingly unable to implement reforms even if it wanted to.

At management level there was a failure to problematise the relationship between the requirements of the Constitution and the state of the prison system. The 1994 White Paper was woefully inadequate to steer the post-1994 reform task of the newly elected government to fulfil its historical mission in respect of the prison system. Following the 1996 Constitution, new prison legislation was drafted (the 1998 Correctional Services Act) and

¹ Boin, A. and T’Hart, P. (2000) Institutional crises and reforms in policy sectors. In Wagenaar, H. (ed) *Government institutions – effects, changes and normative foundations*. Dordrecht: Kluwer Academic Publishers, p. 17 citing Kouzmin, A. and Jarman, A. (1989) ‘Crisis decision making – towards a contingent decision path perspective’. In Rosenthal, U., Charles, M.T. and T’Hart, P. (eds) *Coping with crises: the management of disasters, riots and terrorism*. Springfield: Charles C. Thomas, pp. 397-435.

even though this presented an opportunity to give new direction and impetus to reform, it was concluded that its drafting was detached from the Department and that when adopted, it would not have any noticeable bearing on the operations of the Department. It would take six years for the Act to come into force, leaving the prison system during this period with patchwork legislation not aligned to the 1996 Constitution. This further diminished the chances for constitutionalism driving prison reform.

Between 1994 and 2004 the Department engaged in a number of policy initiatives that were either cosmetic or fundamentally so ill-conceived or poorly implemented, frequently with unintended consequences, that they detracted from reform efforts. Given the prevailing governance failures, including leadership instability, it is hard to see how any new policies could possibly have been implemented successfully. The new constitutional framework should have emancipated policy-makers from previous constraints and seen imaginative redesign and redevelopment of the prison system, but this did not come to pass.

It was concluded that the legitimacy crisis of the prison system deepened as corruption, poor service delivery and maladministration became increasingly prevalent. The campaigns launched by POPCRU also had unintended consequences in the sense that a general culture of lawlessness and impunity permeated the Department. A culture of lawlessness placed prisoners in a particularly vulnerable position since the wide-ranging failure to adhere to general principles of good governance made compliance with human rights standards near impossible. Several investigations were undertaken into the Department, but the Department remained unresponsive to their recommendations. It was, however, only with the appointment of the Jali Commission that full recognition was given to the crisis in discipline and order. In the eyes of the public and Parliament, the prison system had become deeply corrupted and far removed, ideologically and in practice, from an institution that could provide safe custody and enable offenders to be law-abiding and responsible citizens. In respect of prison reform in the first ten years of democratic rule, it was concluded that very little progress was made to give expression to constitutional requirements and redefine a new purpose for the prison system. In short, during this period constitutionalism did not establish the transformative basis for fundamental prison reform. Consequently, prisoners remained the victims of widespread rights violations, the Department lacked transparency and impunity prevailed at all levels.

In response to the Jali Commission, SIU, PSC and DPSA investigations as well as political pressure, the DCS commenced with a number of reforms from 2001 onwards to address specifically corruption and maladministration. Gradually gains were made as perpetrators of corruption were sanctioned, financial controls improved and the disciplinary code more effectively enforced. At policy level, the Department's approach to corruption emphasised law enforcement and paid less attention to the prevention requirements of an effective anti-corruption strategy. The DCS also developed internal capacity to investigate corruption and enforce the disciplinary code and centralised this function in the Head Office, while the prevention function remained decentralised. It is uncertain to what extent the prevention function has been successfully assimilated in the lower rungs of the Department.

The history of corruption and maladministration in the DCS should be seen against the general state of the public service by the late 1990s, as discussed in Chapter 6. By the late 1990s government incrementally appreciated the extent and seriousness of corruption in the public service and a number of policy and legislative steps were taken. It was concluded that the Department's post-2001 response to corruption may not have been possible at an earlier stage as there was simply not the political support from national government for this and nor were the necessary supportive policies, legislation and resources in place.

The Department targeted corruption cases resulting in losses to the state and thus paid less attention to corruption where prisoners were the victims. Symptomatic of this approach is that the Department has by and large ignored the influence of the prison gangs as a threat to good governance. Enforcing the disciplinary code gave the Head Office the means to reassert its control over the Department, but based on the evidence presented it appears that the Head Office has a fluctuating authority-relationship with its subordinate structures and there remain notable areas of legislative and administrative non-compliance.

Results in respect of addressing the legitimacy deficit of the prison system are varied. The legal basis for the prison system is found in the 1998 Correctional Services Act, which is firmly based on the 1996 Constitution, as it should be. The Correctional Services Act set new standards of performance, but power has not always been exercised within the bounds of the law. Philosophically, the 2004 White Paper attempts to provide the justification for the prison system, stating that rehabilitation is the core business of the Department. This construct is, however, undermined by several contradictions at the sociological level. Importantly, rehabilitation is not a constitutional imperative. The setbacks described in Chapter 5, in

addition to human rights violations, have continued to erode confidence in the 2004 White Paper. In assessing progress made towards addressing the legitimacy deficit, it is concluded that while there has been a legal and policy framework in place since 2004, successful implementation of this framework has been beleaguered by capacity constraints and deliberate, if not criminal, actions on the part of some DCS officials. Scandals and embarrassing incidents have had immediate negative consequences for reform efforts as they strongly influence public perceptions about the Department and the integrity of its leadership to deliver on the demands for prison reform. Notwithstanding these concerns, it can be concluded that concerted actions on multiple fronts, even when induced through pressure, were moderately effective in addressing corruption and maladministration in the Department.

The prognosis for further success in reform may, however, be constrained by the 2004 White Paper itself. The appropriateness of the White Paper to guide reform is questionable, as is demonstrated in its lack of alignment with the DCS budget. Developing new policies and procedures, setting up systems, creating internal structures, and so forth are all part of re-institutionalisation and is a tedious and time-consuming enterprise. It was noted that information management and reporting thereon have become more sophisticated and managerialist in nature, but this has not translated into the realignment of the Department's budget to the 2004 White Paper.

It was argued that the more overt focus by the DCS management on addressing governance resulted in neglecting compliance with human rights standards. It was therefore concluded that prisoners' rights, as a legal and ideological construct, had not attained the necessary prominence in the Department's strategy development and consequently failed to permeate the execution of policy. It was shown that, notwithstanding the rhetoric about prisoners' rights, there is little to indicate that there exists, or that systematic efforts were made to create, a pervasive awareness of prisoners' rights among the staff of the Department. Rather than dealing with risks and violations proactively, the approach had been reactive.

While the Department engaged a number of external stakeholders to address corruption and maladministration, and also developed internal capacity to investigate cases and enforce the disciplinary code, this did not happen in respect of addressing prisoners' rights concerns. Even though governance and human rights are inextricably linked, both require an explicit focus to give effect to fundamental reform. Evidently, violations of prisoners' rights were not regarded by the Department's leadership with the same reverence as allegations and findings

of corruption and mismanagement. Symptomatic of the Department's attitude and approach to prisoners' rights was that it actively resisted and attempted to undermine efforts to improve the situation in respect of prisoners' rights, for example in *EN and Others*, the *McCullum* case (and St Albans assault) and litigation on parole decisions. Reported rights violations were at best seen as individual incidents as opposed to systemic problems. The problem remains one where the proverbial basket is rotten and not just a few apples. While the Department acknowledged that in respect of governance it was in a crisis and thus required a focused and strategic response, the same conclusion was not made about the level of compliance with prisoners' rights standards.

Notwithstanding the inherent problems of the 2004 White Paper as a policy framework, it had a further adverse consequence for prisoners' rights. The White Paper assumed great prominence in the reports, communications and policies of the Department after 2004, but this was done at the cost of meticulous compliance with the standards set in the Correctional Services Act. Furthermore, it was concluded that little preparation was undertaken to implement the Correctional Services Act when it came into force in mid- 2004 and training on the Act appears to have been of a superficial nature. Evidence for the lack of knowledge and understanding of the Correctional Services Act amongst the staff corps is found in the increased litigation against the Department, failure to comply with statutory reporting obligations, and denying prisoners rights clearly articulated in the Correctional Services Act. Despite Departmental rhetoric about rehabilitation, realising the aims of rehabilitation in an environment where basic rights, especially the right to dignity, are compromised is extremely difficult. It was therefore concluded that meeting the minimum standards of humane detention is a prerequisite for the rendering of effective interventions with offenders.

Despite the transition to democracy, constitutional and legislative reform, and the requirements for transparency, the Department remained less than responsive to concerns raised by domestic and international stakeholders to human rights violations. Progress in respect of delivering on prisoners' rights has been slow since 2004, and this can by and large be attributed to the Department's lack of emphasis on compliance with the Correctional Services Act. It may have been deliberate, but it may also indicate that the Department was beguiled by populist notions of punishment and punitive attitudes in the light of the high violent crime rate. The expectation that post-1994 South Africa's prison system would indeed embody, as far as is possible, the values of a constitutional democracy has consequently not

been met and all the thematic areas reviewed in respect of prisoners' rights found that serious deficiencies remain.

The influence of external stakeholders on prison reform since 1994 has been varied. Under the GNU the lack of policy direction on the reform of the public service essentially allowed the DCS to carry on as it had before 1994, but this did not diminish growing demands and militancy for affirmative action. The failure of the national government to develop at an earlier stage a comprehensive and strategic response to corruption and maladministration enabled the DCS to become a calm biope. Lack of political leadership (especially under Mzimela), the exclusion of civil society from the discourse on prison reform, the delay in the coming into force of the full Correctional Services Act (111 of 1998) and an apathetic Portfolio Committee on Correctional Services (until 2004) added to the calmness. While the lack of reform and the widespread corruption that developed between 1994 and 2001 in the DCS is not the fault of the national government alone, its level of inaction created the necessary environment for perverse forces to take control of the DCS and delay fundamental reform of the prison system.

The Jali Commission represents a turning point in the history of the Department, for it laid bare the toxic environment that had developed in the Department. Media coverage of corruption and other scandals uncovered ensured that the calmness was broken. A number of initiatives at national government level (i.e. Public Service Anti-Corruption Policy, Minimum Anti-Corruption Capacity requirements and new legislation) supported efforts by the new leadership in the Department to develop a more coherent response to corruption.

From 2004 the Portfolio Committee on Correctional Services adopted a fundamentally different approach in respect of its oversight mandate compared to the previous committees. The Committee would grow in stature and exerted increasing pressure on the Department to address long-standing problems. In 2003 civil society re-entered the debate on prison reform and found its platform in Parliament, inserting new energy and knowledge into the discourse.

3. A constitutional imagination

The Freedom Charter saw a limited role for imprisonment as punishment and instead emphasised re-education and warned against vengeance.² In 1994 there was the opportunity to re-imagine³ the South African prison system using the Interim Constitution as guidance, but the 1994 White Paper failed to do this. What was needed was a realistic constitutional imagination that would have embraced the specific prescripts of the Constitution and imagined giving effect to them in real and practical terms in daily prison life. If “the sociological imagination”, as coined by C. Wright Mills, would require the individual to seek understanding of broader societal processes, the constitutional imagination required understanding of how the Constitution and the democratic order would have meaning in the lives of individuals, in this case prisoners. Fundamentally it would ask the question: What does the Constitution mean for the purposes of the prison system, for the prisoner and his custodian? Such an imagination would not seek goals beyond what the Constitution requires, but rather see that prisoners’ dignity, as a core value of the Constitution, is maintained in a measurable way. Consequently detention conditions consistent with human dignity must prevail and would, for example, prohibit overcrowding. As the Constitution requires, at minimum, daily exercise, three separately served meals per day, access to adequate reading material and medical treatment equal to that in free society, and contact with the outside world are not beyond the reach of available resources. The Alternative White Paper on Corrections (1995) developed by the Penal Reform Lobby Group did draw upon such a constitutional imagination, and the 74-page document describes in a fair amount of detail how the prison system should function. However, the Department failed to engage with the Alternative White Paper and the imagination presented therein was lost.

A constitutional imagination also would have developed responses that address the nexus between governance and human rights. The preceding chapters, especially Chapters 4 and 5, examined this nexus and affirmed its inextricable nature. That the South African prison system remains without an oversight structure operating at this nexus remains one of the most important post-1994 failings.

Imagining a new prison system would also have seen a critical questioning of the purpose of the prison system in the broader criminal justice system and more specifically the use of

² Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance (The Freedom Charter, as adopted at the Congress of the People, Kliptown, on 26 June 1955).

³ With acknowledgment to Van Zyl Smit, D. (2005) *Imagining the South African prison*, Valedictory lecture, University of Cape Town, 20 October 2005.

imprisonment on the continuum of punishments. However, the function of the prison system has remained by and large unchanged, namely incapacitation. There was no attempt from the DCS (through the two White Papers) to reserve imprisonment for a particular group of offenders or to redefine the modes of imprisonment. Rather the DCS worked from the assumption that it has no control over whom the courts send to prison and that this does not matter very much either. A more imaginative interpretation would have seen the Department critically examining sentencing practices and attempting at least to garner and build support for a new sentencing regime. Indeed, there was a golden opportunity for this in the South African Law Reform Commission (SALRC) project on sentencing.⁴ Instead of investing in the research and development of creative solutions (e.g. pilot projects on new interventions such as open prisons), the Department plied its time and effort into planning to build new prisons (but failing) and various other disjointed policy initiatives.

Any observer in 1994 would have agreed that reinventing and reforming the prison system would not be a short-term endeavour and have accepted that there would be setbacks. In the ensuing ten years fundamental prison reform was effectively placed on hold while the DCS disintegrated into chaos, adding to the legitimacy deficit. By 2004 the White Paper presented a new vision and attached a 20-year time-frame to its ambitious goals. From a strategic planning perspective this was a mistake on two fronts – the goals were too ambitious and the time-frame too long. “Over-ambition” in this regard refers to exceeding the requirements of the Constitution and more specifically the Correctional Services Act. A more realistic and knowledge-based approach would have seen more modest goals staggered in, for example, five-year periods, as argued with reference to the principles for effective policy-making in Chapter 2 (section 2.4).

The 1998 Correctional Services Act did apply a constitutional imagination, articulating minimum standards in respect of conditions of detention and the treatment of prisoners. However, as was described, not only was its coming into force delayed by six years, but even then little was done to prepare for and monitor its full implementation. In effect the 2004 White Paper has trumped the Correctional Services Act in the Department’s strategic approach to prison system reform, but the abstract and confusing language of the 2004 White Paper does little to guide legislative compliance at operational level.

⁴ South African Law Reform Commission (2000) *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82, Pretoria: South African Law Reform Commission.

4. Lack of consensus on reform

Prison reform after 1994 was substantially constrained by: the system inherited from the apartheid regime; the broader political context; government's response to the high violent crime rate; the state of the public service, especially under the GNU; and the ability of the DCS leadership to translate the new constitutional demands into a programme of action. These five factors placed prison reform on a particular trajectory that would see limited progress towards establishing a prison system reflective of the Constitution. Notably the GNU accepted and confirmed the institutional arrangements created in 1990 that saw the establishment of a Ministry and Department of Correctional Services. Despite the institutional arrangements, the contestation of authority in the prison system reduced the leadership's ability for flexible responses and capacity to follow through on policy reform. More importantly, it was not able to build consensus on what reform is, or should be.

In Chapter 2 reform was defined as the intended fundamental change of the policy and/or administration of a policy sector. It was said furthermore that reform efforts in the prison system are regarded as particular actions undertaken by the state and its stakeholders to change the prison system, actions necessitated by the large-scale socio-political changes taking place in South Africa from 1994 onwards. The scope of reform therefore includes but is not limited to the policies, strategic direction, legislative framework (including subordinate legislation), organisational structure, human resources, financial management, and day-to-day operations.

However, the meaning of reform in the prison sector was not agreed upon nor was it stable. In the period 1996-2001 it was in practice understood by the DCS management and organised labour to mean the racial transformation of the staff corps. Even though the 1994 White Paper articulated vague aims regarding humane custody and rehabilitation, these never had a material effect on the strategic direction and thus reform of the Department. The meaning attached to reform by civil society groups in the early 1990s, especially the PRLG, emphasised constitutional values and human rights standards, as articulated in the Alternative White Paper. Others have argued that "transformation" was required as opposed to "reform".⁵

⁵ Giffard, C. (1997) *Out of Step? The Transformation process in the South African Department of Correctional Services*. Dissertation submitted in partial fulfillment of the degree of Master of Science in Criminal Justice Studies, Scarman Centre for the Study of Public Order, University of Leicester.

It can thus be surmised that even amongst civil society organisations in the 1990s there was a lack of consensus on what reform meant and what exactly it was that needed to change.

However, a number of important reforms (e.g. demilitarisation in 1996 and privatisation) were unplanned for and were not derived from the policy framework in place at the time. The Jali Commission understood reform efforts to focus on addressing systemic weaknesses and establishing a functioning Department able to deliver on the rehabilitation mandate. The 2004 White Paper regards the rehabilitation of offenders as the reform target for the prison system, but is vague on how this should be achieved. Civil society groups and Parliament have since 2003 focused on legislative compliance, governance and human rights as areas of reform. It is thus concluded that agreement between DCS, on the one hand, and civil society and Parliament, on the other, on what prison reform constitutes, remains contested and elusive, preventing constitutionalism from driving reform.

Prison reform since 1994 has also been surrounded by mixed if not contradictory messages from government.

On the one hand, rehabilitation, restorative justice⁶ and *ubuntu*⁷ are central to DCS policies, especially since 2004, and frequently feature in media reports and public statements. These notions reflect a particular tolerance and understanding of offending behaviour, condemning the criminal acts but not the person who committed them. Restorative justice and *ubuntu* also embody notions of offender reintegration and stand diametrically opposed to retributive justice. Further reflective of this “softer” approach was the change in Departmental nomenclature: prisons became correctional centres, prisoners became inmates, and so forth. The change in nomenclature was also an attempt to sanitise the prison system from its past and legitimate it. However, it was little more than rhetoric.

On the other hand, minimum-sentences legislation, longer non-parole periods, stricter security measures, and super-maximum security prisons communicated a message that had little to do with rehabilitation, restorative justice and *ubuntu*. Moreover, reports about rights violations, overcrowding, assaults on prisoners, and corruption contradict the rhetoric espoused by the leadership of the Department. Consequently there remains a deep chasm

⁶ Department of Correctional Services (2004 b) *The White Paper on Corrections in South Africa*, Pretoria: Department of Correctional Services, para 5.2.3, p. 82.

⁷ Department of Correctional Services (2004 b) para 5.3.5, p. 87.

between the agenda for reform and claims made by the Department in this regard, not to mention the results to date. Fundamentally, there remains a lack of consensus on the substance of prison reform and what the prison system should ultimately look like in South Africa. It can furthermore be concluded that especially since 2004 there has been more penetrating questioning about the reform agenda articulated in the 2004 White Paper. Its appropriateness to guide reform is increasingly contested by Parliament and civil society groups. Past failures and other embarrassing setbacks have also instilled a deep sense of mistrust in the Department's ability to deliver on reform promises. With reference to the reform and crisis thesis it must therefore be concluded that the crisis is not over yet.

5. The rehabilitation goal

In Chapter 4 (section 5.3) an assessment was provided of the 2004 White Paper as a policy document and it was concluded that it suffers from a number of substantial shortcomings. Notwithstanding these shortcomings, the White Paper has gained great prominence in the thinking and rhetoric of DCS. Central to the White Paper is the rehabilitative goal and in view of the centrality given to the White Paper a closer assessment of the rehabilitation goal is required.

In South Africa and other parts of the world and at different times in the history of penal reform, the rehabilitation goal had been abandoned and rekindled from time to time. The rehabilitation goal, in the vague form it was articulated in the 2004 White Paper, sought to reinvent the prison as institution. From the White Paper it is evident that the conceptualization of rehabilitation was not an imaginative engagement with the principles and values of the Constitution. The vague, idealistic and aspirational language of the White Paper provides little clarity on what exactly it is that the DCS must do. On the one hand it states that rehabilitation is the core business of the Department, but then, on the other, argues that "correction is a societal responsibility".⁸

Van Zyl Smit points out that the Correctional Services Act deliberately avoids the term "rehabilitation" with all its baggage and that the "language is that of the *Sozialstaat* or, in South African terms, of the socio-economic rights that are a prominent feature of our

⁸ Department of Correctional Services (2004 b), pp. 66-72.

Constitution”.⁹ Against this background the Correctional Services Act therefore requires the Department to “provide amenities which will create an environment in which sentenced offenders will be able to live with dignity and develop the ability to lead a socially responsible and crime-free life”.¹⁰ Neither the Constitution nor the Correctional Services Act affords sentenced prisoners a right to rehabilitation. Subsequent jurisprudence has in fact questioned the rehabilitation objective of imprisonment,¹¹ and others have concluded that the possibility of rehabilitation is indeed highly speculative.¹²

The focus on rehabilitation was adopted although it had by now been well established in research that rehabilitation, on the scale that the Department wanted it to be, would not be possible. The ideal of rehabilitation articulated in the 2004 White Paper was, however, not new and scientific studies have increasingly questioned the rehabilitation ideal.¹³ The growing consensus is that there are a fairly limited number of programmes that have been able to effect substantial reductions in re-offending. However, the programmes shown to be effective require well-trained staff and implementation integrity, rely on cognitive behavioural therapy

⁹ Van Zyl Smit, D. (2005) *Imagining the South African prison*, Valedictory lecture, University of Cape Town, 20 October 2005, p. 14.

¹⁰ s 37(2).

¹¹ ‘It is a notorious fact that our prisons are overcrowded, often subjecting our prison population to undignified conditions of detention. It is optimistic in the extreme to assume that there are always effective rehabilitation programmes in place.’ *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and two others* (165/08) [2009] ZASCA 72 (1 June 2009) para 21.

¹² *S v Nkomo* 2007 (2) SACR 198 (SCA); Mujuzi, J.D. (2008) The prospect of rehabilitation as a ‘substantial and compelling’ circumstance to avoid imposing life imprisonment in South Africa: A comment on *S v Nkomo*, *South African Journal of Criminal Justice*, Vol. 1, pp. 1-21.

¹³ Since the second half of the nineteenth century there has been a claim that ‘scientific methods’, based on positivist thinking, would be used to reshape people into law-abiding citizens. (Van Zyl Smit D (2000) The Place of Criminal Law in Contemporary Crime Control Strategies, *European Journal of Crime Criminal Law and Criminal Justice*, Vol. 8 No. 4, p. 362). In *Discipline and Punish: The Birth of the Prison* Foucault cites several reports from the 1830s and 1840s that lament the miserable failure of prison as an institution of correction and rehabilitation and assert that prison in fact only contributes to worsening the situation (p. 265). In *What works? Questions and answers about Prison Reform* Robert Martinson gave a pessimistic account of the prospects for rehabilitating offenders and concluded: ‘With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.’ This conclusion was soon reduced to ‘nothing works’. (Cullen, F.T. and Gendreau, P. (2000) Assessing Correctional Rehabilitation: Policy Practice and Prospects. In J Horney (ed) *Criminal Justice 2000, Volume 3: Changes in Decision Making and Discretion in the Criminal Justice System*, US Department of Justice, Washington, p. 111.)

and must be subjected to rigorous evaluations. These are not production-line programmes operating across entire prison systems, as envisaged in the 2004 White Paper. Seven years after the 2004 White Paper was adopted, the rehabilitation ideal remains elusive. The noble and overambitious focus on rehabilitation at policy level distracted the DCS from its primary obligation, namely to ensure safe and humane custody under conditions of human dignity, as is required by the Constitution.

6. Transparency

Throughout the period (1994 to 2011) the DCS has been suspicious if not dismissive of advice, guidance and at times orders (including court orders) offered or given by external stakeholders. After 2004, facilitated by a more active Portfolio Committee on Correctional Services and increased involvement and research by civil society, the transparency of the prison system has improved. The preceding years, however, were characterised by a lost dialectic between the administrators of the prison system and the external stakeholders who had a legitimate interest in or a legal mandate in respect of the prison system. However, it remains the case that there is no forum for interaction between the DCS and its stakeholders with regard to the strategic direction of the DCS and to assessing progress made.

While civil society organisations and even prisoners have increasingly engaged with international structures and drawn on international human rights standards to advocate for prison reform, the DCS has since 1994 remained insulated and isolated from the global human rights framework. It has equally failed to engage actively with applicable human rights treaties that South Africa has ratified. A greater awareness of and engagement with international human rights law would have made a valuable contribution to human rights reform in the prison sector.

From the events of the past 17 years it is evident that prisoners had not been given a central or influential role in the prison-reform discourse. There is no available record indicating that the DCS had consulted or sought the opinion of prisoners about their needs and what they saw as the purposes of imprisonment. The entire approach of the 2004 White Paper is based on the assumption that it is the Department's task to correct offending behaviour and that it alone knows what is required. A more inclusive consultation process with prisoners, their families and their communities of origin may have made a valuable contribution to policy

development. Even though the Constitution requires transparency and public participation in the working of government, the Department has not utilised this requirement to inform and strengthen the reform of the prison system.

7. Implications and recommendations

Following from the preceding chapters, a number of implications are drawn in this section for states engaged in constitutional and prison reform. The transition to democracy in South Africa was in many ways unique, but in other jurisdictions new constitutions have been adopted in recent years in emerging democratic states. A new constitution presents the rather rare opportunity to re-think, redefine and redevelop the prison system. In autocratic states the prison system is usually part and parcel of the state's repressive apparatus and the new constitutional and democratic order requires a reversal of this. A new constitutional and democratic order following autocratic rule places the prison system per definition in crisis whilst simultaneously presenting the opportunity for reform through crisis. It is because the transition to democracy enables the critical examination of the previous order that previous constraints on policy-makers are lifted. The immediate implication is that the crisis needs to be recognised as such. Furthermore, there should be broad agreement between policy-makers, senior management and operational staff on the nature and extent of the crisis. The appreciative gap should therefore be as narrow as possible.

While time is of the essence, it follows that it is important to understand the current organisation and how its inherent traits may assist or inhibit a successful crisis management stage. Its level of institutionalisation, its sense of preservation or responsiveness, and the ability to deal with an influx of new information are issues requiring consideration at this stage. A successful approach would see the rapid de-institutionalisation of the organisation (doing away with past counter-productive policies and practices) and establishing new policies, procedures and practices that are aligned to and reflective of the new constitutional order. In developing a new strategy and subordinate policies it appears that modest plans over shorter time periods yield better results. More specifically, it should be accepted that not all reform challenges can be addressed simultaneously and that a process of prioritisation would be required.

In a democratic state it is important that the range of participants in the policy discourse be expanded to ensure representivity and the recognition of the legitimate interest and role to be played by those formerly excluded from the policy sector. Under a new and democratic order the ground rules have changed and the role of the state is redefined, but equally so are the rights and responsibilities of the individual. What may have been unacceptable under the previous order can now be considered as legitimate possibilities. This requires imagination – to rethink the role of the prison, what its needs to achieve and what its purpose is in relation to other penalties. A paradigmatic shift, as required by constitutional transition, requires the imagination to see beyond established practices and procedures. Such an imagination also requires critical analysis of how the daily prison regime will give expression to constitutional values.

In a constitutional democracy prison reform must have a clear, explicit and almost propagandistic focus on meeting the rights requirements articulated in the Constitution and subordinate legislation. Failure to do so undermines the authority of the Constitution and de facto permits the state to ignore Constitutional prescripts. It clearly implies that the Constitution does not have the same normative force when applied to prisoners.

Prison reform remains a dynamic and dialectic process highly dependent on an inclusive approach. Because the prison has such potentially negative consequences for constitutional rights and broader society, it is essential that multiple stakeholders need to be consulted extensively on policy development and provided information on performance. From the South African experience it is clear that prison reform is not an “in-house affair” – it demands that external influences set in motion a process of sustained problem-solving directed towards imaginative solutions.

Given the inherent tendency of prison systems to be closed to outsiders, the reform process demands vigilance in oversight. Ineffective or weak oversight will not be able to apply the necessary external pressure to see the reform process advancing in line with constitutional demands.

While high-level strategic planning is required, compliance with constitutional and legal prescripts must be monitored at operational level. Successful reform requires this link between macro-level strategy and micro-level implementation. This implies that transparency and accountability should also operate at this level and not only at Head Office level. Transparency therefore means transparency at all levels of the organisation: it is not

constrained by the hierarchy of the prison system. Prison reform should be knowledge-driven and aimed at meeting constitutional and legal standards. Not only does this require a process based on evidence of what works, it requires that the implementing officials are skilled and equipped with the knowledge and expertise needed to perform their redefined job functions.

In a constitutional democracy, prisoners, their families and communities of origin should be recognised not only as legitimate stakeholders but as important stakeholders. In the same way that the reform process will require a redefined employer-employee relationship, the same applies in respect of prisoners. Prisoners need to be part of the development of reform plans and understand what the aims are, how it will affect them and what the anticipated challenges are. They need to see sense and benefits emanating from reform, but moreover, it may require different standards of performance on their part. While there will always be a different and unequal distribution of power between prisoners and their custodians, it does not preclude a relationship that is moral and respectful.

New rules bring new standards of performance and this may lead to uncertainty and conflict. In order to demonstrate and sustain the validity, legitimacy and stature of the new rules, it is required that they are enforced impartially and that violations are appropriately dealt with. Not enforcing the new code will immediately communicate the message that the reforms are not being pursued by management with a sense of rigour and commitment and that it remains business as usual.

Reforming large organisations requires an effective communication structure and strategy. More specifically, the leadership must communicate the goals, results and challenges to the reform process in a sustained manner. The leadership must visibly engage with the rank and file and understand how they are experiencing the reform process.

8. Conclusion

The thesis traced prison reform in South Africa after 1994. In the post-1994 period the liberal democratic Constitution redefined the new state, necessitating a critical interrogation of the prevailing order. Constitutionalism prompted numerous reforms across the South African state and society to dismantle, formally and informally, the apartheid state that was inherited. The prison system did not embrace constitutionalism as the transformative basis for reform, at least not until the early 2000s. Contrary not only to expectations but also constitutional

requirements, the situation in DCS became chaotic, the legitimacy deficit of the prison system deepened and the state lost control of the Department by the late 1990s. As a result of external political and administrative pressure on DCS, a reform process to address governance and corruption after 2001 was initiated and yielded some results. However, constitutional obligations in respect of the rights requirements received less attention and material areas of non-compliance remain. It is therefore concluded that in the post-1994 period constitutionalism resulted in governance reforms in the prison system, but did not deliver human rights reforms of the nature and weight demanded by the Constitution. Constitutionalism requires that the obligations of good governance and human rights are pursued not only simultaneously but also in equity.



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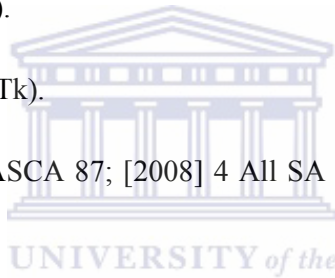
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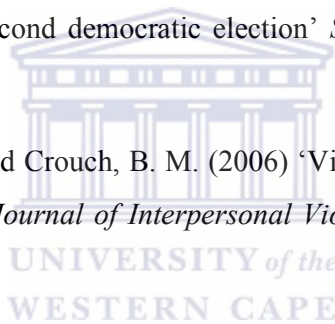
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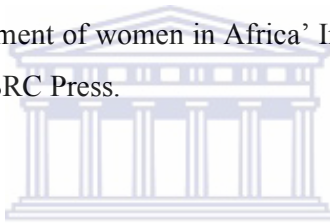
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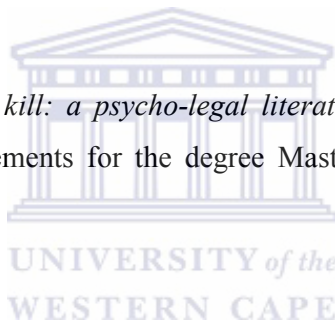
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